LEGAL MALPRACTICE IN TEXAS
THIRD EDITION

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FOREWORD

Ronald E. Mallen[†]

The third edition of LEGAL MALPRACTICE IN TEXAS brings current the developments in the relevant judicial principles. The subject of legal malpractice has been significant for only the last three decades. Before then, legal malpractice claims were rare and, generally, of concern only to those few subjected to a client's wrath. Today, however, a new lawyer entering practice is statistically at risk of being the subject of multiple claims in a career.

Although the principles governing liability and litigation of the claims have developed nationally, there is now substantial authority in many jurisdictions that warrants a more focused geographical look. David Beck has accomplished that for Texas law by this work.

Texas law has been influenced by decisions in other states, but it also has developed with independence and, sometimes, with express rejection of national trends. Thus, it is important for those lawyers practicing in Texas, doing business in Texas, and studying the law of legal malpractice to have the benefit of such a focused examination of the case law. In this work, Mr. Beck has made a significant contribution to understanding the principles concerning legal malpractice and the litigation of such claims. David Beck draws not only on the legal malpractice case law, but also on those principles of Texas law that are pertinent.

This work is essential reading for Texas lawyers, not only to understand their areas of civil exposure, but also to learn how to comply with their professional responsibilities. Mr. Beck's work examines those theories frequently asserted against lawyers and comprehensively examines Texas decisions and statutory law. His analysis and insights provide an understanding of the law in Texas, where the law is going in Texas, and how it may be influencing other jurisdictions.

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INTRODUCTION

The third edition of LEGAL MALPRACTICE IN TEXAS comes twenty years after the second edition and twenty-seven years after the first. There have been significant developments in the law of legal malpractice and attorney discipline in Texas during the intervening decades. But one thing remains constant: the public's expectations of lawyers remains high. Moreover, there are more lawyers in Texas today than ever before—in fact, Texas saw a 25% increase in the number of licensed attorneys over the past ten years.[1] In light of the ever-increasing number of claims being filed against attorneys, it is as important now as when the first edition was published that lawyers understand both the professional standards to which they are held and the legal principles by which malpractice claims are governed. Staying informed allows the lawyer to provide his or her client with the best service possible and to avoid potentially troublesome situations.

Legal malpractice claims represent significant potential exposure for law firms. Many claims now seek damages in excess of eight figures. Even the smallest of claims can have negative consequences on a firm's reputation and create distractions for its lawyers in defending against them. Advances in technology and the resultant portability of client data have also created entirely new obligations for lawyers and have given rise to new theories on which claims of professional negligence can be based.

The American Bar Association's study of malpractice claims for the period of 2012 through 2015 shows a return to the status quo in the distribution of claims by area of the law.[2] Since the ABA's study began in 1985, the practice of plaintiff's personal injury lawyers has been the top practice area generating claims (18.24% in 2015), except in 2011 when it fell to second place.[3] In 2015, real estate came in second (14.89%), followed by family law (13.51%), estate, trust and probate (12.05%), and collection and bankruptcy (10.59%).[4] The ABA study also noted an increase in the frequency of claims in the area of preparation, filing, and the

[1] State Bar of Texas, Department of Research and Analysis, *State Bar of Texas Membership: Attorney Statistical Profile (2017-18), available at* https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&Template=/CM/ContentDisplay.cfm&ContentID=38873.

[2] American Bar Association Standing Committee on Lawyers' Professional Liability, *Profile of Legal Malpractice Claims (2012-2015)* at 11.

[3] *Id.*

[4] *Id.*

transmittal of documents (up 4.20% since 2011) and in claims related to work performed during trial or hearings (up 2.01% since 2011).[5] But the most common alleged errors were failure to know or properly apply the law (15% of all errors), planning errors or procedural choices (11% of all errors), inadequate discovery or investigation, drafting errors, and failure to obtain consent or to inform a client (each representing 7% of all errors).[6]

Attorneys at solo or small firms are at significantly greater risk of being a target of a malpractice claim. According to the ABA, nearly 70% of all claims filed arise from firms with fewer than five attorneys.[7] In Texas, just 40% of attorneys practice in firms with fewer than five lawyers.[8] Although the nationwide ABA statistics do not necessarily reflect reality in Texas, these figures suggest that a disproportionate number of claims arise from firms with five or fewer lawyers.

Many of these claims may be unmeritorious. The ABA study reports that nearly 70% of all claims brought were resolved favorably for the lawyer-defendant—approximately 52% resulted in no payment or the claim being abandoned, while 18% of all suits resulted in dismissal or a judgment for the lawyer-defendant.[9] Correspondingly, nearly 73% of all claims filed resulted in an indemnity payment of $10,000 or less to the claimant.[10] Only 14.42% of all claims resulted in indemnity payments in excess of $50,000, and just 3.89% involved payments exceeding $250,000.[11]

In Texas, not only has there been a significant increase in the number of licensed attorneys in the past ten years, but they are also an older and more experienced group than licensed attorneys were ten years ago. The median age of active Texas attorneys has increased from 47 years to 49 years since

[5] *Id.* at 15–16.

[6] *Id.* at 19.

[7] *Id.* at 14.

[8] State Bar of Texas, Department of Research and Analysis, *State Bar of Texas Membership: Attorney Statistical Profile (2017-18), available at* https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&Template=/CM/ContentDisplay.cfm&ContentID=38873.

[9] American Bar Association Standing Committee on Lawyers' Professional Liability, *Profile of Legal Malpractice Claims (2012-2015)* at 17.

[10] *Id.* at 21.

[11] *Id.*

2007.[12] Moreover, today's Texas attorneys have on average been licensed for 19 years (compared to 17 years in 2007).[13]

The data suggest that, although many claims are resolved favorably for the lawyer, it is obvious that even these cases frequently create reputational injuries and are a distraction for those involved. The third edition LEGAL MALPRACTICE IN TEXAS is published with the singular goal of raising awareness among those who practice this noble profession. Remaining informed and diligent will greatly enhance each lawyer's ability to avoid potential legal malpractice claims.

[12] State Bar of Texas, Department of Research and Analysis, *State Bar of Texas Membership: Attorney Statistical Profile (2017-18)*, *available at* https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&Template=/CM/ContentDisplay.cfm&ContentID=38873.

[13] *Id.*

CHAPTER I: AGENCY

§ 1 Agency

"It is axiomatic that the relationship of attorney and client is one of principal and agent."[14] Thus, traditional rules of agency govern the relationship. Under agency law, an attorney and client can create the attorney-client relationship expressly by a written contract,[15] or it can be implied from the conduct of the parties.[16] The attorney-client relationship is a highly fiduciary one, and "require[s] absolute and perfect candor, openness and honesty, and absence of any concealment or deception" on the

[14] Duval Cty. Ranch Co. v. Alamo Lumber Co., 663 S.W.2d 627, 633 (Tex. App.—Amarillo 1984, writ refused n.r.e.); *see* Auguston v. Linea Aerea Nacional-Chile, S.A., 76 F.3d 658, 665 (5th Cir. 1996); Green v. Midland Mortg. Co., 342 S.W.3d 686, 691 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) ("The attorney-client relationship is an agency relationship. The attorney's acts and omissions within the scope of his or her employment are regarded as the client's acts; the attorney's negligence is attributed to the client." (citing Gavenda v. Strata Energy, Inc., 705 S.W.2d 690, 693 (Tex. 1986))); Adame v. Law Office of Allison & Huerta, No. 13-04-670-CV, 2008 WL 2151454, at *10 (Tex. App.—Corpus Christi May 22, 2008, pet. denied) (mem. op.); Bradt v. West, 892 S.W.2d 56, 76 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (holding that an attorney's knowledge regarding legal considerations of making worker's compensation claim as an agent of the client could be imputed to the client such that the client made an informed election).

[15] *See, e.g.*, *In re* Quintanilla, No. 14-16-00473-CV, 2016 WL 4483743, at *3 (Tex. App.—Houston [14th Dist.] Aug. 25, 2016, no pet.) (mem. op.) (citing Stephenson v. LeBouf, 16 S.W.3d 829, 836 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)); *In re* Baytown Nissan Inc., 451 S.W.3d 140, 146 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citing Sutton v. Estate of McCormick, 47 S.W.3d 179, 182 (Tex. App.—Corpus Christi 2001, no pet.)); *see also* Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198–99 (5th Cir. 1995) (stating that under Texas law, attorney-client relationship can be formed by explicit agreement of the parties or may arise by implication from the parties' actions); Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 147 (Tex. 1996) ("In Texas law, an attorney-client relationship is contractual and results from the mutual agreement of the parties as to the nature of the work to be undertaken and the compensation to be paid."); Vinson & Elkins v. Moran, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) ("The attorney-client relationship is a contractual relationship in which an attorney 'agrees' to render professional services for a client. To establish the relationship, the parties must explicitly or by their conduct manifest an intention to create it. . . . To determine if there was an agreement or meeting of the minds one must use objective standards of what the parties said and did and not look to their subjective states of mind." (citations omitted)).

[16] *See Banc One*, 67 F.3d at 1198 (stating that an attorney-client relationship may arise by implication from parties' actions); Sotelo v. Stewart, 281 S.W.3d 76, 80 (Tex. App.—El Paso 2008, pet. denied).

part of the attorney.[17] In Texas, all that is required to create an attorney-client relationship is that the parties, explicitly or implicitly by their conduct, manifest an intention to create the attorney-client relationship.[18] Therefore, the relationship of attorney and client may exist as a result of rendering services gratuitously; it does not depend on the payment of a fee.[19] Where the evidence is conflicting as to whether there was an actual acceptance or assent by the attorney or whether the conduct of the parties implies an attorney-client relationship, the issue is one for the trier of fact.[20] The determination of whether there was a meeting of the minds must be

[17] Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied); *see also In re* Legal Econometrics, Inc., 191 B.R. 331, 348 (Bankr. N.D. Tex. 1995); Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988); Judwin Properties v. Griggs & Harrison, 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, no writ).

[18] *See* Bright v. Addison, 171 S.W.3d 588, 596 (Tex.App.—Dallas 2005, pet. denied) (the attorney-client relationship may be expressly created through a contract or it may be implied from the actions of the parties); *Sutton*, 47 S.W.3d at 182 (citing Mellon Serv. Co. v. Touche Ross & Co., 17 S.W.3d 432, 437 (Tex. App.—Houston [1st Dist.] 2000, no pet.)); *see also* Randolph v. Resolution Tr. Corp., 995 F.2d 611, 615 (5th Cir. 1993) ("In Texas, an attorney-client relationship may be implied from the conduct of the parties."); *In re* Yarn Processing Patent Validity Litig., 530 F.2d 83, 90 (5th Cir. 1976) ("Such a relationship can only be formed with the consent of the attorney and his client."); Kotzur v. Kelly, 791 S.W.2d 254, 257 (Tex. App.—Corpus Christi 1990, no writ).

[19] *See* Grace v. Center for Auto Safety, 72 F.3d 1236, 1241–42 (6th Cir. 1996) ("An attorney-client relationship [under Texas law] depends on a contract, express or implied, between parties. . . . It does not depend upon the payment of a fee." (citing Simpson v. James, 903 F.2d 372, 376 (5th Cir. 1990))); Izzo v. Izzo, No. 03-09-00395, 2010 WL 1930179, at *6 (Tex. App.—Austin May 14, 2010, pet. denied) (mem. op.) ("It is our opinion that the relation of attorney and client does not depend upon the payment of a fee. Such may exist as a result of rendering services gratuitously. A contract of employment may exist merely as a result of an offer or request made by the client and an acceptance or assent thereto by the attorney." (citing Prigmore v. Hardware Mut. Ins. Co., 225 S.W.2d 897, 899 (Tex. Civ. App.—Amarillo 1949, no writ))).

[20] *See Sotelo*, 281 S.W.3d at 81 (holding that fact issue as to whether attorney-client relationship could be implied from attorney's conduct in adding plaintiff's name to documents filed in breach of contract action against plaintiff's husband precluded summary judgment on her legal malpractice claim). *But see* Wright v. Gunderson, 956 S.W.2d 43, 48 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that no fact issue existed concerning the creation of attorney-client relationship when lawyer who prepared will for deceased discussed documents prepared with beneficiary, called funeral home to give assurance that funds were available for funeral expenses, and told beneficiary to take will to bank; summary judgment proof showed there was no express, written, or implied contract for attorney's services).

based on an objective standard examining what the parties did and said and not on their alleged subjective states of mind.[21]

A fiduciary relationship can be established even when an attorney merely enters into a discussion with a *potential* client regarding his legal problems with a view toward undertaking representation.[22] All that is required is that the parties explicitly or by their conduct manifest an intention to create the attorney-client relationship.[23] However, preliminary discussions about fees and availability normally do not create an attorney-client relationship.[24]

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[21] *Addison*, 171 S.W.3d at 596; Roberts v. Healey, 991 S.W.2d 873, 880 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

[22] *See* Peters v. Thedford, No. 94-60250, 1995 WL 413016, at *3 (5th Cir. 1995) ("The fiduciary relationship between an attorney and his client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention."); Nolan v. Foreman, 665 F.2d 738, 739 n.3 (5th Cir. 1982) (stating that fiduciary relationship between attorney and client extends to preliminary consultations between client and attorney regarding possible retention); Hill v. Hunt, No. 3:07-CV-02020-O, 2008 WL 4108120, at *3 (N.D. Tex. Sept. 4, 2008) (mem. op.) ("All that is required under Texas law is that the parties, explicitly or by their conduct, manifest an intention to create the attorney-client relationship."); Cantu v. Butron, 921 S.W.2d 344, 349–50 (Tex. App.—Corpus Christi 1996, writ denied) (holding that evidence supported finding that attorney misrepresented fee arrangement to prospective clients and then later fraudulently altered fee arrangement); *see also* Vickery v. Vickery, No. 01-94-01004-CV, 1996 WL 698867, at *14 (Tex. App.—Houston [1st Dist.] Dec. 5, 1996), *opinion withdrawn and superseded by*, 1997 WL 751995 (Tex. App.—Houston [1st Dist.] 1997) (holding that husband, an attorney, owed the "high duty of an attorney" to his wife when he advised her as to legal aspects of their divorce).

[23] *See In re* Adobe Energy Inc., 82 F. App'x 106, 114 (5th Cir. 2003) (citing Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198–99 (5th Cir.1995)); First Nat'l Bank of Durant v. Trans Terra Corp. Int'l, 142 F.3d 802, 807 (5th Cir. 1998) (stating that courts will not readily find implied attorney-client relationship absent sufficient showing of intent); *Nolan*, 665 F.2d at 739 n.3; LeBlanc v. Lange, 365 S.W.3d 70, 79 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("In order to establish [an attorney-client] relationship, the parties must either explicitly or by their conduct manifest an intent to create it.").

[24] *See* Gillis v. Provost & Umphrey Law Firm, LLP, No. 05-13-00892-CV, 2015 WL 170240, at *11 (Tex. App.—Dallas Jan. 14, 2015, no pet.) ("There is no evidence of an intention on Kendall's part to undertake legal representation of Gillis or evidence that Kendall reasonably induced a belief by Gillis that he had agreed to represent him. The summary judgment evidence, in the light most favorable to the nonmovant appellants, establishes Gillis met with Kendall regarding the 'possibility' of Gillis becoming a relator in an FCA lawsuit and to determine if Provost and Kendall 'might be interested in representing' or 'would represent' Gillis in a potential FCA lawsuit or lawsuits. There is no evidence of a commitment or undertaking by Kendall to represent Gillis, and in fact, Gillis stated that Kendall made no commitment regarding 'continued'

§ 2 Duty to Inform of Non-Representation

When an attorney *knows* that a person incorrectly believes the attorney is representing him in a matter, the attorney may have an affirmative duty to inform the person that he is not.[25] Consequently, an attorney can be held liable for failing to advise a person that he is not representing him when the circumstances led the person to believe that the attorney was representing him.[26] The duty to inform generally arises if the attorney was aware or should have been aware that his conduct would have led a reasonable person to believe he or she was being represented.[27] Without such

representation of appellants."); *see also* Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 164 (Tex. 2004) (speculation is not evidence of an attorney-client relationship).

[25] *See* Clark v. Pimienta, No. 09-99-035CV, 2002 WL 31628021, at *1 (Tex. App.—Beaumont Nov. 21, 2002, no pet. h.) (not designated for publication); Dillard v. Broyles, 633 S.W.2d 636, 643 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (refusing to impose affirmative duty on attorney to deny his representative capacity when attorney had no knowledge of plaintiff's mistaken belief).

[26] *See* Randolph v. Resolution Tr. Corp., 995 F.2d 611, 615 (5th Cir. 1993) ("An attorney may be held negligent when he fails to advise a party that he is not representing that party, when circumstances lead the party to believe that the attorney is representing him."); Wadhwa v. Goldsberry, No. 01-10-00944-CV, 2012 WL 682223, at *7 n.6 (Tex. App.—Houston [1st Dist.] Mar. 1, 2012, no pet. h.) (mem. op.); Bergthold v. Winstead Sechrest & Minick, P.C., No. 2-07-325-CV, 2009 WL 226026, at *5 (Tex. App.—Fort Worth Jan. 29, 2009, no pet. h.) (mem. op.) (citing Kotzur v. Kelly, 791 S.W.2d 254, 258 (Tex. App.—Corpus Christi 1990, no writ) ("An attorney may be held negligent when he fails to advise a party that he is not representing them on a case when the circumstances lead the party to believe that the attorney is representing them.")); Burnap v. Linnartz, 914 S.W.2d 142, 148 (Tex. App.—San Antonio 1995, writ denied) ("Even in the absence of an attorney-client relationship, an attorney may be held negligent for failing to advise a party that he is not representing the party."); Anderson v. Sneed, 618 S.W.2d 388, 389 (Tex. Civ. App.—El Paso 1981, no writ) (holding that even though client talked to several other lawyers, where client did not fire his first attorney and obtain new counsel, but instead left his file with first attorney, who continued to represent client and who continued to indicate that everything was fine, evidence was sufficient to raise fact issue concerning client's reliance upon first attorney's representations to him); Rice v. Forestier, 415 S.W.2d 711, 713 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) (holding that attorney is negligent in failing to inform client that he would not represent client in new matter).

[27] *See Bergthold*, 2009 WL 226026, at *7; *Burnap*, 914 S.W.2d at 148–49; Parker v. Carnahan, 772 S.W.2d 151, 157 (Tex. App.—Texarkana 1989, writ denied) (reversing and remanding summary judgment to determine whether attorneys were negligent in failing to advise ex-wife that they were not representing her); *Kotzur*, 791 S.W.2d at 258 (holding that a fact question existed as to whether attorney-client relationship had been established).

knowledge on the attorney's part, no duty to inform exists.[28] Furthermore, representation of a client in one transaction does not give rise to an attorney-client relationship in an unrelated transaction.[29]

§ 3 Termination of Relationship

Since an attorney who violates his obligations or responsibilities to the client may be subjected to the risk of liability, it is important for an attorney to know when the attorney-client relationship terminates and when the accompanying obligations and responsibilities cease.[30] The failure to terminate the relationship in a clear and unambiguous manner will create the risk of liability for events transpiring even during the post-termination period.[31]

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[28] *See Burnap*, 914 S.W.2d at 148–49 ("[N]egligence cannot be established in the absence of evidence that the attorney knew the [client] had assumed that he was representing them in a matter."); *Dillard*, 633 S.W.2d at 643.

[29] *See* Lively v. Henderson, No. 14-05-01229-CV, 2007 WL 3342031, at *4 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing Stephenson v. LeBoeuf, 16 S.W.3d 829, 836 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)); *In re* Hutchison, 187 B.R. 533, 536 (Bankr. S.D. Tex. 1995) ("Moreover, '[g]enerally . . . an attorney's representation of a party in one action does not make the attorney an agent for the party in an unrelated case between the same parties.'"); Maldonado v. Ramirez, 757 F.2d 48, 51 (3d Cir. 1985) (same); *see also* Simpson v. James, 903 F.2d 372, 376 (5th Cir. 1990) ("When an attorney-client relationship is established, the relation generally terminates once the purpose of the employment is completed, absent contrary agreement."); Donahue v. Shughart, Thompson & Kilroy, P.C., 900 S.W.2d 624, 626 (Mo. 1995) (en banc) (stating that representation of client in one matter does not create attorney-client relationship in unrelated matters); Ginsberg v. Chastain, 501 So.2d 27, 29 (Fla. Dist. Ct. App. 1986) (stating that attorney's representation of woman in real estate matter did not entitle plaintiff to believe that her attorney was representing woman in dispute over loan).

[30] *See generally Rice*, 415 S.W.2d at 714 (stating that the jury was justified in finding that an attorney had been negligent in failing to inform client that he would not represent client in new matter).

[31] *See* Medrano v. Reyes, 902 S.W.2d 176, 178 (Tex. App.—Eastland 1995, no writ) (holding that a law firm that withdrew from wrongful death case was not negligent for failing to file suit prior to running of the statute of limitations, where the firm sent a letter to its clients notifying them of firm's withdrawal, client secured new counsel after receiving the letter, and the letter was sent twenty-one months before statute of limitation ran); Blake v. Lewis, 886 S.W.2d 404, 407–08 (Tex. App.—Houston [1st Dist.] 1994, no writ) (stating that law firm's withdrawal from suit did not constitute legal malpractice, and client's inability to secure new counsel after withdrawal was no evidence of causation linking the firm to alleged malpractice and client's alleged damages); *see also* Hanlin v. Mitchelson, 794 F.2d 834, 842 (2d Cir. 1986) (stating that fact issues existed as to whether attorney-client relationship terminated and whether attorney's withdrawal was proper); Aziz v. U.S. Dep't of Homeland Filed Sec., 2004 U.S. Dist. LEXIS 31941, at *8–9 (E.D.N.Y.

The attorney-client relationship generally terminates once "the purpose of that representation ends."[32] An attorney who is retained to conduct a legal proceeding presumably agrees to conduct the proceeding to its conclusion.[33] Accordingly, when an attorney decides to withdraw from representing a client, he must comply with the appropriate rules regarding withdrawal.[34]

The Texas Disciplinary Rules of Professional Conduct expressly provide that if the rules of a court require permission for withdrawal from employment, an attorney may not withdraw until the court gives permission.[35] In addition, an attorney can withdraw only after taking steps, to the extent reasonably practicable, to protect the client's interest.[36]

Apr. 29, 2004); Hansel, Post, Brandon & Dorsey v. Fowler, 288 S.E.2d 227, 228 (Ga. Ct. App. 1981) (holding that a letter declining representation and advising individual to obtain legal counsel protected firm from liability).

[32] JuxtaComm-Tex. Software, LLC v. Axway, Inc., No. 6:10CV11, 2010 WL 4920909, at *2 (E.D. Tex. Nov. 29, 2010); Simpson v. James, 903 F.2d 372, 376 (5th Cir. 1990).

[33] *See* Staples v. McKnight, 763 S.W.2d 914, 916 (Tex. App.—Dallas 1988, writ denied); *see also* Gonzalez v. Barney, No. 03-13-00679-CV, 2014 WL 7463871, at *2 (Tex. App.—Austin Dec. 30, 2014, no pet.) (mem. op.) ("When an attorney abandons the contract before completion without good cause, the attorney forfeits his right to compensation under the contract.").

[34] *See* Augustson v. Linea Area Nacional-Chile, S.A., 76 F.3d 658, 661 n.3 (5th Cir. 1996); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (West & Supp. 2017) (TEX. STATE BAR R. art. X, § 9); TEX. R. CIV. P. 10 (providing the bases and criteria for withdrawal, including that "[a]n attorney may withdraw from representing a party only upon written motion for good cause shown"); *In re* Matthews, 154 B.R. 673, 680, 681 (Bankr. W.D. Tex. 1993) (discussing debtor attorney's options, including withdrawal under Rule 1.15, where clients refused to cooperate in filing honest schedules).

[35] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(c); *see also* Bullard v. Chrysler Corp., 925 F. Supp. 1180, 1186–88 (E.D. Tex. 1996) (sanctioning attorney for failing to comply with Fed. R. Civ. P. 11 in motion to withdraw); Stephens v. Hale, No. 06-98-00101-CV, 1999 WL 1217878, at *5 (Tex. App.—Texarkana Dec. 21, 1999, pet. denied) (not designated for publication) ("We hold that such attorneys, being officers of the court, and once having appeared as attorneys of record for [the client] . . . continue[d] to constitute the attorneys of record for such party until the trial court gave them permission to withdraw." (citing Curtis v. Carey, 393 S.W.2d 185, 188 (Tex. Civ. App.—Corpus Christi 1965, no writ))); *In re* D.A.S., 951 S.W.2d 528, 530 (Tex. App.—Dallas 1997, no writ) (disallowing attorney ad litem to withdraw from appeal); Ditto v. State, 898 S.W.2d 383, 386 n.4 (Tex. App.—San Antonio 1995, no writ) (stating that attorney is still on case until his motion to withdraw is granted); Coleman v. State, 246 S.W.3d 76, 85 (Tex. Crim. App. 2008) (citing Wenzy v. State, 855 S.W.2d 47, 49 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (stating that attorney may not withdraw without permission of trial court)).

[36] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(d); *see generally* Hoeffner, Bilek & Eidman, L.L.P. v. Guerra, No. 13-01-503-CV, 2004 WL 1171044, at *7, *8 (Tex. App.—Corpus Christi May 27, 2004, pet. denied) (mem. op.); Royden v. Ardoin, 331 S.W.2d 206, 209

Even if he is entitled to withdraw, the attorney should protect the interests of the client by giving reasonable notice of withdrawal, allowing time for employment of other counsel, and surrendering papers and property to which the client is entitled.[37] Of course, the attorney should promptly refund the unearned portion of any fee paid in advance.[38] The attorney may retain papers relating to the client to the extent permitted only if such retention will not prejudice the client in the subject matter of the representation.[39] An attorney's withdrawal is mandatory in certain situations[40] and optional in others.[41] However, an attorney's effort to

(Tex. 1960) ("If an attorney, without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, . . . he thereby forfeits all right to compensation." (quoting Baeumont v. J. H. Hamlen & Son, 81 S.W.2d 24, 25 (Ark. 1935))); Blake v. Lewis, 886 S.W.2d 404, 408 (Tex. App.—Houston [1st Dist.] 1994, no writ) (stating that if a competent attorney agreed to represent client and he was not hampered by anything the prior firm had done, or had not done, then the firm, which had withdrawn from client's case, did not cause harm to client).

[37] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(d); *see also* Fed. Trade Comm'n v. Intellipay, Inc., 828 F. Supp. 33, 34 (S.D. Tex. 1993) (denying motion to withdraw in light of attorney's conclusory assertions offered to support motion and hardship that would be imposed on trial court, plaintiff, and defendants if attorney were permitted to withdraw approximately one month before trial); Medrano v. Reyes, 902 S.W.2d 176, 178 (Tex. App.—Eastland 1995, no writ) (holding that law firm was not liable for failing to file suit before expiration of the statute of limitations where firm notified plaintiffs of withdrawal approximately twenty-one months before running of statute of limitations and suggested that plaintiffs employ new counsel, and plaintiffs employed new counsel as suggested); Moss v. Malone, 880 S.W.2d 45, 50 (Tex. App.—Tyler 1994, writ denied) (holding that trial court erred under Tex. R. Civ. P. 10 by allowing attorney to withdraw from representation of client pursuant to deficient motion to withdraw and without taking steps to protect litigant's rights when only two days remained before trial); Byrd v. Woodruff, 891 S.W.2d 689, 701 (Tex. App.—Dallas 1994, writ dism'd by agr.) (stating that duties of an attorney representing a minor client in a personal injury action did not end when court entered a judgment approving settlement; attorney had duty to see that settlements were properly managed and protected for the minor until she reached majority); Vander Voort v. State Bar of Tex., 802 S.W.2d 332, 334 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (affirming the public reprimand of two lawyers when they ceased representing client for nonpayment of fee but failed to tell client they had ceased representation and failed to return file until after trial date at which they failed to appear).

[38] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(d).

[39] *See id.*

[40] *See id.* R. 1.15(a)(1)–(3) (stating that withdrawal is mandatory if (1) the representation violates a rule of professional conduct; (2) the lawyer's physical, mental or psychological condition materially impairs lawyer's fitness; or (3) the lawyer, with or without cause, is discharged by his client); Augustson v. Linea Avea Nacional-Chile, S.A., 76 F.3d 658, 661 n.3 (5th Cir. 1996). Moreover, a lawyer may not accept or continue employment if the representation

withdraw is subordinate to the orders of the court even in those situations where withdrawal is mandatory.[42]

Many considerations affect an attorney's decision to withdraw from a representation and the consequences of that withdrawal.[43] Rule 1.16(a)(1) of the American Bar Association Model Rules of Professional Conduct requires lawyers to withdraw from representation when necessary to prevent their services from being used by the client to materially further a course of criminal conduct.[44] Rule 1.16(d) explains that, after withdrawal, the lawyer must take steps as reasonably necessary to protect the client's interest, which may include refraining from disclosing the confidences of the client (except as provided otherwise by Model Rule 1.6).[45] However, the

would result in violation of law or "other applicable rules of professional conduct." TEX. DISCIPLINARY RULES PROF'L CONDUCT 1.15(a)(1); *see also* Plunkett v. State, 883 S.W.2d 349, 352, 355 (Tex. App.—Waco 1994, pet. ref'd) (stating that withdrawal of lawyer was necessary when he learned that client had paid jurors to obtain hung jury); Haley v. Boles, 824 S.W.2d 796, 798 (Tex. App.—Tyler 1992, orig. proceeding).

[41] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(b)(1)–(7) & cmt. 7 & 8 (stating that withdrawal is optional if (1) the lawyer's withdrawal will not have a material adverse effect on the interests of the client; (2) the client has used the lawyer's services in what the lawyer reasonably believes is criminal or fraudulent conduct; (3) "the client has used the lawyer's services to perpetuate a crime or fraud"; (4) the client's objective is repugnant or imprudent to the lawyer or the lawyer has a fundamental disagreement with the client on the objective; (5) the client, after a reasonable warning, "fails substantially" to pay or comply with his agreement with the lawyer; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) there is any good cause not contemplated by the rules); *see also Augustson*, 76 F.3d at 661, n.3; Blake v. Lewis, 886 S.W.2d 404, 406–08 (Tex. App.—Houston [1st Dist.] 1994, no writ) (stating that firm's withdrawal from a medical malpractice and product liability action was justified in light of client's attempted interference with medical diagnosis and lack of connection between drug and client's condition).

[42] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(c). This rule provides as follows: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." *Id.*; *see also* Lopez v. State, 462 S.W.3d 180, 185 (Tex. App.—Houston [1st Dist.] 2015, no pet.); Wenzy v. State, 855 S.W.2d 47, 50 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (holding that trial counsel was ineffective for failing to represent defendant to the extent of his ability after his motions to withdraw were denied, and, thereby, abrogated his duty under Rule 1.15(c)).

[43] *See* discussion of Exceptions to Nondisclosure of Confidential Information, *infra* Chapter VI, § 6.

[44] *See* MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2015).

[45] *See id.* R. 1.16(d). Rule 1.6 allows an attorney to reveal confidential information if doing so would "prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." *Id.* R. 1.6(b)(2). Having been dubbed the "noisy

rules (a) do not prohibit the lawyer from giving notice of the fact of withdrawal and (b) affirmatively permit the lawyer to withdraw or disaffirm any opinions expressed during the representation.[46] Both of these features further the ethical consideration of protecting the public from the client's intended criminal conduct.

A client has the absolute right to discharge an attorney at any time,[47] with or without cause.[48] As a matter of law, the attorney's discharge by the client terminates the attorney-client relationship.[49] However, the client's ability to discharge the attorney may be limited if the client is mentally incompetent or the attorney is serving as appointed counsel.[50] The client's power to discharge the attorney is subject to liability for payment for the attorney's services.[51]

withdrawal" provision, this paragraph has been reviewed extensively by the ABA Ethics and Professional Responsibility Committee in attempts to reconcile the apparent conflicts regarding disclosure. *Id.*

[46] *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.6, 1.16, and 1.8 (2015); *see also* Scholes v. Stone, McGuire & Benjamin, 786 F. Supp. 1385, 1393 (N.D. Ill. 1992) (addressing case where lawyers withdrew from representation of client (Douglas) who, after being told he could not solicit or trade investor funds, created investment vehicles through which he controlled over $30 million in investors' funds; even though lawyers did not attempt to contact investors, court held that investors were essentially clients of the lawyers who could have fulfilled their duty to the investors only by informing them of Douglas' fraudulent activities).

[47] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(a)(3); Heard v. Liberty Mut. Fire Ins. Co., 828 S.W.2d 457, 459 (Tex. App.—El Paso 1992, writ denied) (stating that trial court erred in finding that lawyer still represented client after client had discharged lawyer and after trial court had signed order substituting new counsel).

[48] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(a)(3); *see also* Parsons v. Turley, 50 S.W.3d 519, 526 (Tex. App.—Dallas 2000, pet. denied); Hume v. Zuehl, 119 S.W.2d 905, 907 (Tex. Civ. App.—San Antonio 1938, writ ref'd) ("Either party may dissolve the relation for cause; and the client has the absolute right to discharge the attorney and terminate the relation at any time even without cause, no matter how arbitrary his action may seem, although the question of whether the revocation or termination was with or without cause may have a material bearing on the client's liability for fees or damages." (quoting 7 C.J.S. ATTORNEY AND CLIENT, § 109 (1980))).

[49] *See Parsons*, 50 S.W.3d at 526; *Hume*, 119 S.W.2d at 907.

[50] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15 & cmt. 5 & 6.

[51] *See id.* R. 1.15 & cmt. 4; *see also* Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969). The court in *Mandell & Wright* held that if an attorney hired on a contingency fee basis is discharged without good cause before the representation is completed, the attorney may seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages the client subsequently recovers. 441 S.W.2d at 847. Both remedies are subject to the prohibition against charging and collecting an unconscionable fee. Slovacek LLP v. Walton, 206

Regardless of whether the lawyer or the client is the instigator, courts have recognized three primary ways of terminating the attorney-client relationship: (1) an express statement; (2) an act inconsistent with a continued relationship; and (3) the passage of time.[52] Since the last two are less explicit, the surest way to avoid malpractice claims or disciplinary proceedings is to memorialize the termination of the relationship.[53]

§ 4 No Attorney-Client Relationship

The fact that a person is involved in a business transaction with an attorney does not create an attorney-client relationship.[54] For example, in

S.W.3d 557, 561 (Tex. 2006). Whether a particular fee or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation is an issue for the fact finder. *Id.*

[52] SWS Fin. Fund A. v. Salomon Bros., 790 F. Supp. 1392, 1398–99 (N.D. Ill. 1992).

[53] The current rule in Texas states that representation of a new client is barred if it "involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(b)(1). Consequently, an ambiguity over the termination of the attorney-client relationship can become relevant to the future representation of other clients. *See* Bd. of Managers v. Wabash Loftominium, L.L.C., 876 N.E.2d 65, 74 (Ill. App. Ct. 1st Dist. 2007) (citing *SWS Fin. Fund A.*, 790 F. Supp. at 1398–99 (holding that when firm took on adverse representation two months after completion of last project for client, but no express termination, ongoing relationship existed but confidentiality concerns did not apply and the firm was not disqualified)); JuxtaComm-Tex. Software, LLC v. Axway, Inc., No. 6:10CV11, 2010 WL 4920909, at *3 (E.D. Tex. Nov. 29, 2010) (citing Artromick Intern., Inc. v. Drustar, Inc., 134 F.R.D. 226, 230 (S.D. Ohio 1991) (stating that mailing newsletter to client for whom services had not been performed for over a year and casually characterizing that party as client were equally as indicative of attempt to revive terminated relationship as of belief of existing one; thus, attorney-client relationship had terminated)).

[54] In *McGary v. Campbell*, an attorney participated in a business transaction with other business partners. 245 S.W. 106, 116 (Tex. Civ. App.—Beaumont 1922, writ dism'd, w.o.j.). One of those partners subsequently sued the attorney, alleging that he had breached a fiduciary duty because he once advised the plaintiff that the time to repay a loan was "within a reasonable time." *Id.* at 115. The court of civil appeals concluded this statement was only "the expression of an opinion as to [the attorney's] view of the law on a state of facts equally known to both . . . ." *Id.* Because their venture was solely a business one, no attorney-client relationship existed as a matter of law, and no fiduciary relationship existed. *Id.* at 116; *see also* Century Res. Land LLC v. Adobe Energy Inc. (*In re* Adobe Energy Inc.), 82 F. App'x 106, 114 (5th Cir. 2003) (holding that creditor seeking to impose constructive trust on debtor could not succeed on a claim for malpractice against debtor's attorney when attorney only negotiated with creditor on debtor's behalf); Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198–99 (5th Cir. 1995) (stating that seller of securities and law firm representing seller did not create attorney-client relationship with

Banc One Capital Partners Corp. v. Kneipper, a Dallas-based movie production company sent potential investors an opinion letter written by a law firm it retained regarding its initial offering of securities.[55] The chairman of the board of the production company was also a partner in the law firm that issued the opinion letter.[56] After the venture failed to raise enough capital, disgruntled investors sued the production company and the law firm for securities fraud, civil conspiracy, professional negligence, and legal malpractice.[57] In holding no attorney-client relationship existed between the disgruntled investors and the law firm, the court reasoned that the investors failed to show the law firm intended to form an attorney-client relationship with them because the firm included a disclaimer in the opinion letter to that effect.[58]

Nor does the appearance by an attorney in a case on behalf of a party necessarily mean that he is that party's attorney. In *Arnold v. Fort Worth & D.S.P. Ry. Co.*, an attorney appeared at a hearing on behalf of all of the defendants, including one who was not present.[59] The attorney admitted that he had never actually been employed by the defendant, who was not present at the hearing.[60] The court of civil appeals observed that the attorney's assumption that he represented the absent defendant did not mean an actual attorney-client relationship existed between them.[61] Although the question

investors by issuing copies of law firm's opinion letter regarding securities to investors); *In re* Hutchison, 187 B.R. 533, 536 (Bankr. S.D. Tex. 1995) (stating that an attorney's representation of a party in one action does not make attorney an agent for the party in unrelated case between same parties); Rea v. Cofer, 879 S.W.2d 224, 228–29 (Tex. App.—Houston [14th Dist.] 1994, no writ) (holding that defendants had no business relationship with defendant and thus no legal duty, as required to support attorney malpractice claim); Thomason v. Thomas, 641 S.W.2d 685, 687 (Tex. App.—Waco 1982, no writ) (holding that evidence sustained finding that there was no attorney-client relationship between vendor and vendee, even though vendee was attorney). *But see* Yaklin v. Glusing, Sharpe & Krueger, 875 S.W.2d 380, 384 (Tex. App.—Corpus Christi 1994, no writ) (reversing summary judgment because fact issue existed as to whether an attorney-client relationship existed between client and attorney who handled refinancing of the client's business).

[55] *Banc One*, 67 F.3d at 1191–92.

[56] *Id.* at 1190.

[57] *See id.* at 1187 (in synopsis).

[58] *See id.* at 1199.

[59] Arnold v. Fort Worth & D.S.P. Ry. Co., 8 S.W.2d 298, 300 (Tex. Civ. App.—Amarillo 1928, no writ).

[60] *See id.* at 299–300.

[61] *See id.* at 301 ("The fact that [the attorney is] assumed to conduct the case for all the defendants on the trial does not alter the fact that Tom Arnold had no attorney of his own selection

of whether an attorney-client relationship exists is generally for the trier of fact, to raise such an issue there must be evidence of "an offer or request made by the client and an acceptance or assent thereto by the attorney."[62] Because in *Arnold* there was no evidence of such an offer or request by the client, the court held no attorney-client relationship existed.[63]

When an attorney represents legal entities such as corporations or limited partnerships, the directors or limited partners of those entities cannot legitimately claim that they personally have attorney-client relationships with the attorney. The former Code of Professional Responsibility provided that in such a situation the attorney's obligations are owed solely to the entity, not to the individual directors or limited partners.[64] Following that principle, courts have held that corporate directors or officers may not recover against the corporation's attorney for

to represent him. [The attorney] had no authority to bind Tom C. Arnold by his conduct of the case for all parties.").

[62] Vaughn v. Vaughn (*In re* Legal Econometrics), 191 B.R. 331, 346 (Bankr. N.D. Tex. 1995, no pet. h.) (citing State v. Lemon, 603 S.W.2d 313, 318 (Tex. Civ. App.—Amarillo 1980, no writ)); Hill v. Bartlette, 181 S.W.3d 541, 547 (Tex. App.—Texarkana 2005, no pet.) (citing Parker v. Carnahan, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied)); Mellon Serv. Co. v. Touche Ross & Co., 17 S.W.3d 432, 437 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (citing Honeycutt v. Billingsley, 992 S.W.2d 570, 581 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); State v. Lemon, 603 S.W.2d 313, 318 (Tex. Civ. App.—Amarillo 1980, no pet.) (citing Prigmore v. Hardware Mut. Ins. Co. of Minn., 225 S.W.2d 897, 899 (Tex. Civ. App.—Amarillo 1949, no writ)).

[63] *See Arnold*, 8 S.W.2d at 301; *see also* Rhodes v. Batilla, 848 S.W.2d. 833, 840 (Tex. App.—Houston [14th Dist.] 1993, writ denied (writ dism'd)).

[64] At the time, State Bar of Texas Ethical Consideration 5-18 expressly provided that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not a stockholder, director, officer, employee, representative, or other person connected with the entity." Tex. State Bar R. art. XII, § 8, EC 5-18 (TEX. CODE OF PROF'L RESP.) (1972, superseded 1990). EC-5 was replaced, effective January 1, 1990, by Texas Disciplinary Rule 1.12(a), which states as follows:

> A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.12(a).

malpractice.[65] Rendering legal services to a corporation *generally* does not, by itself, create a duty for the attorney to the corporation's investors,[66] its officers and directors,[67] or its shareholders.[68] Thus, in *Gamboa v. Shaw*, it

[65] *See, e.g.*, Lane v. Chowning, 610 F.2d 1385, 1389 (8th Cir. 1979); *In re* Sunrise Sec. Litig., 793 F. Supp. 1306, 1323 (E.D. Pa. 1992); Stratton Group, Ltd. v. Sprayregen, 466 F. Supp. 1180, 1184 (S.D.N.Y. 1979); Swank v. Cunningham, 258 S.W.3d 647, 662 (Tex. App.—Eastland 2008, pet. denied).

[66] *See generally* Schatz v. Rosenberg, 943 F.2d 485, 491 (4th Cir. 1991) (stating that "the law, as a general rule, only rarely allows third parties to maintain a cause of action against lawyers for the insufficiency of their legal opinions" (citing Abell v. Potomac Ins. Co., 858 F.2d 1104 (5th Cir. 1988))); Fromhart v. Tucker, No. 5:11CV97, 2013 WL 3364451, at *3 (N.D. W. Va. July 3, 2013) (mem. op.) (holding that attorney representing company in bankruptcy proceeding did not represent company's employee individually); Ackerman v. Schwartz, 733 F. Supp. 1231, 1243 (N.D. Ind. 1989) (stating that attorney who issued tax opinion letter could not be liable for fraudulent investment venture to investors); Bush v. Rewald, 619 F. Supp. 585, 590 (D. Haw. 1985) ("[P]erforming corporate legal work does not, by itself create . . . a duty [to disclose all material facts] to investors in the corporation."); Goeth v. Craig, Terrill & Hale, L.L.P., No. 03-03-00125-CV, 2005 WL 850349, at *6 (Tex. App.—Austin Apr. 14, 2005, no pet.) (mem. op.). When a lawyer represents a financial entity, the lawyer owes his allegiance to the entity, and not to the stockholder, director, officer, or representative connected to the entity. *See* Jim Arnold Corp. v. Bishop, 928 S.W.2d 761, 767 (Tex. App.—Beaumont 1996, no writ) (holding that corporation failed to establish that attorney was ever retained as attorney in litigation in which alleged malpractice occurred, and so could not maintain legal malpractice action against attorney); Hamlin v. Gutermuth, 909 S.W.2d 114, 116 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (holding that evidence was insufficient as a matter of law to establish causal connection between attorney's representation of corporation and its shareholders in sale of corporation and shareholder's damages resulting from dispersal of funds from escrow account to another shareholder).

[67] *See Lane*, 610 F.2d at 1389; Clair v. Clair, 982 N.E.2d 32, 41 (Mass. 2013); Robertson v. Gaston Snow & Ely Bartlett, 536 N.E.2d 344, 349 n.5 (Mass. 1989); Egan v. McNamara, 467 A.2d 733, 738 (D.C. 1983); Stratton Group Ltd. v. Sprayregen, 466 F. Supp. 1180, 1184 n.3 (S.D.N.Y. 1979); Pan Am Rys., Inc. v. Sheppard Mullin Richter & Hampton LLP, 2012 D.C. Super. LEXIS 2 (D.C. Super. Ct. 2012); *Goeth*, 2005 WL 850349, at *6.

[68] *See Goeth*, 2005 WL 850349, at *6. Under Texas law, a shareholder has no separate cause of action for injury to the property of a corporation, or for impairment or destruction of its business, even though the shareholder may be injured by that wrong. *See* Wingate v. Hajdik, 795 S.W.2d 717, 719 (Tex. 1990); Richardson v. Newman, 439 S.W.3d 538, 542 (Tex. App.—Houston [1st Dist.] 2014, no pet.). In other words, individual shareholders have no separate and independent right of action for injuries suffered by the corporation even if the injury to the corporation results in the depreciation of the value of their stock. *Wingate*, 795 S.W.2d at 719 (citing Massachusetts v. Davis, 168 S.W.2d 216, 221 (Tex. 1942)); *see also* White v. Indep. Bank, N.A., 794 S.W.2d 895, 898 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (concluding that "[e]ven though stockholders may sustain indirect losses, they have no independent right to bring an action for injuries suffered by the corporation"). However, this rule does not prohibit a

was held that a shareholder of a corporation was not in privity with the attorney for the corporation and therefore could not maintain a legal malpractice action against him.[69] The court determined that:

> [s]uch a deviation would result in attorneys owing a duty to each shareholder of any corporation they represent. With no privity requirement, corporate attorneys would be subject to almost unlimited liability . . . . Even more bothersome is the fact that attorneys representing corporations would owe a duty to both sides of the litigation in any type of derivative suit brought against the corporation by a shareholder. . . . This situation would place an unacceptable burden on the legal profession and would result in a degeneration in the quality of legal services received by corporate clients.[70]

Nevertheless, in certain unique situations, some courts have not followed the general rule that an attorney representing a legal entity is the attorney for that entity only and does not owe a professional duty to the shareholders, directors, officers, or partners.[71]

In dealing with a corporation's directors, officers, employees, and shareholders, under the current Texas disciplinary rules, an attorney must explain the identity of the client to avoid any misunderstanding when it is apparent that the corporation's interests are adverse to such persons or when such explanation appears "reasonably necessary to avoid misunderstanding

shareholder from recovering for wrongs done to him individually "where the wrongdoer violates a duty arising from contract or otherwise, and owing directly by him to the stockholder." *Wingate*, 795 S.W.2d at 719 (quoting *Davis*, 168 S.W.2d at 222).

[69] 956 S.W.2d 662, 664–65 (Tex. App.—San Antonio 1997, no writ); *see also Goeth*, 2005 WL 850349, at *6.

[70] *Gamboa*, 956 S.W.2d at 665; *see also Goeth*, 2005 WL 850349, at *6.

[71] At least one court has allowed a shareholder in a closely-held corporation to sue the lawyer that set up the corporation. *See* Meyer v. Mulligan, 889 P.2d 509, 513–18 (Wyo. 1995) (distinguishing a closely-held corporation from large publicly held corporations and finding that because attorney had previously represented the shareholder, shareholder hired attorney to set up the corporation, attorney offered shareholder continuing advice throughout the transaction at issue, and attorney did not disclaim representation of shareholder, a fact issue existed as to whether there was an attorney-client relationship between attorney and shareholder); *see also* Swank v. Cunningham, 258 S.W.3d 647, 662, 666 (Tex. App.—Eastland 2008, pet. denied).

on their part."[72] An attorney representing a corporation or other organization:

> must take reasonable remedial actions whenever the lawyer learns or knows that:
>
> (1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;
>
> (2) the violation is likely to result in substantial injury to the organization; and
>
> (3) the violation is related to a matter within the scope of the lawyer's representation of the organization.[73]

Malpractice actions by limited partners against attorneys representing limited partnerships have been unsuccessful, usually because of the lack of any duty to the limited partners personally.[74] In *Kastner v. Jenkens & Gilcrist, P.C.*, for example, the court held that the attorney for the limited partnership did not owe a duty to a limited partner as a client because "he did not represent" the limited partners.[75] Similarly, in *Quintel Corp., N.V. v. Citibank, N.A.* the court reached the same result but for a slightly different reason:

> To hold that a limited partner is automatically a foreseeable client of the attorney representing the general partner or even the limited partnership, in the absence of any affirmative assumption of duty by the attorney, would ignore Ethical Consideration 5-18, which specifically defines the attorney's allegiance to the entity that retained him rather than to any person connected with the entity.[76]

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[72] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.12(e).

[73] *Id.* R. 1.12(b)(1)–(3).

[74] *See* Kastner v. Jenkens & Gilchrist, P.C., 231 S.W.3d 571, 577–78 (Tex. App.—Dallas 2007, no pet.).

[75] *Id.* at 579.

[76] 589 F. Supp. 1235, 1241–42 (S.D.N.Y. 1984).

Relying heavily on the privity requirement, the court reasoned that the attorney owed no duty to the limited partner in the absence of an attorney-client relationship and dismissed the limited partner's breach of fiduciary duty claim against the attorney.[77]

§ 5 Involuntary Representation

An appointed attorney representing a defendant in a criminal case has a duty to become familiar with the applicable rules of procedure and to follow these rules.[78] If an attorney fails to comply with such rules, the court may find that the attorney was negligent or that he interfered with the orderly administration of justice.[79]

Likewise, a court-appointed attorney, such as an attorney ad litem, has the duty to "defend the rights of his involuntary client with the same vigor and astuteness he would employ in the defense of clients who had expressly employed him for such purpose."[80] In representing the client, the court-

[77] *See id.* at 1242.

[78] *See* Rivera v. State, 123 S.W.3d 21, 31 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding that attorney appointed at presentence investigation hearing "has a duty to familiarize himself sufficiently with the totality of the legal and factual circumstances to be capable of making an informed and rational decision regarding whether or not to advance rights accorded the defendant by law, such as the right to seek a continuance; to seek a correction, amendment, or supplementation of the PSI report; to seek withdrawal of a plea of guilty or reduction of the charges; or to put on mitigating evidence"); Harmon v. State, 649 S.W.2d 93, 95 (Tex. App.—Corpus Christi 1982, no writ) (holding that after attorney representing criminal defendant on appeal filed brief sixty-four days late after several extensions of time, the court should impose strict sanctions when it appears that the attorney is negligent or interfering with orderly administration of justice by noncompliance with rules of criminal procedure).

[79] *See Harmon*, 649 S.W.2d at 95.

[80] *In re* Estate of Velvin, No. 06-13-00028-CV, 2013 WL 5459946, at *3 (Tex. App.—Texarkana Oct. 1, 2013, no pet. h.) (mem. op.); *In re* Estate of Stanton, 202 S.W.3d 205, 208 (Tex. App.—Tyler 2005, pet. dism'd); Executors of Estate of Tartt v. Harpold, 531 S.W.2d 696, 698 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (citing Madero v. Calzado, 281 S.W. 328, 330 (Tex. Civ. App.—San Antonio 1926, writ dism'd w.o.j.)); *see also* Sims v. Sims, 589 S.W.2d 865, 866 (Tex. Civ. App.—Fort Worth 1979, no writ) ("An attorney appointed or assigned to represent an indigent . . . has a duty to act and to diligently protect all the rights of such person."); *Estate of Tartt*, 531 S.W.2d at 698 ("The attorney ad litem should exhaust all remedies available to his client. The attorney ad litem may be called upon to represent his client on appeal and should do so when it is in the interest of his client."); Duncan v. Adams, 210 S.W.2d 180, 182 (Tex. Civ. App.—Beaumont 1948) ("We have concluded that the attorney who was appointed by the trial court had the duty and responsibility of determining after judgment whether an appeal should be taken in behalf of his client."), *aff'd*, 215 S.W.2d 599 (Tex. 1948).

appointed attorney therefore should exhaust all available remedies.[81] An attorney ad litem may also be required to represent the client on appeal.[82]

CHAPTER II: FEES & BILLING

§ 1 Generally

Litigation concerning attorneys' fees and billing practices arise in two contexts: (1) billing disputes, and (2) the recovery of attorneys' fees by prevailing litigants.[83] Billing disputes may cause or increase client dissatisfactions, and they frequently serve to "trigger" legal malpractice claims. Questionable billing practices also increase serious public perception problems for the profession. "One major contributing factor to the discouraging public opinion of the legal profession appears to be the

[81] *See Estate of Tartt*, 531 S.W.2d at 698; *see generally* Lopez v. Calzado, 281 S.W. 324 (Tex. Civ. App.—San Antonio 1926, writ dism'd w.o.j.).

[82] *See* Cahill v. Lyda, 826 S.W.2d 932, 933 (Tex. 1992); *In re* Guardianship of Wehe, No. 13-12-00263-CV, 2012 WL 5292893, at *3 (Tex. App.—Corpus Christi Oct. 25, 2012, no pet. h.) (mem. op.); *see also* Hernandez v. United States, Nos. 3:12-CV-0921-B-BK, 3:08-CR-268-B(03), 2013 WL 632107, at *1 (N.D. Tex. Feb. 20, 2013) (citing United States v. James, 990 F.2d 804, 805 (5th Cir. 1993) (stating that under a plan adopted by Fifth Circuit pursuant to Criminal Justice Act, appointed counsel must file petition for certiorari with Supreme Court when requested to do so in writing by client)); United States v. McIntosh, 808 F. Supp. 760, 762 (D. Colo. 1992) (stating that appointed counsel's responsibilities continue through every stage of the proceedings, including post trial procedures and processes); *Madero*, 281 S.W. at 330.

[83] As a general rule, a prevailing litigant is only entitled to an award of attorneys' fees where such an award is specifically provided by agreement or by statute. *See* New Amsterdam Cas. Co. v. Tex. Indus., Inc., 414 S.W.2d 914, 915–16 (Tex. 1967). However, in *Turner v. Turner*, the Texas Supreme Court discussed, without expressly adopting, an exception to the general rule that attorneys' fees are not available as actual damages. 385 S.W.2d 230, 233–34 (Tex.1965) (discussing an exception to the general rule which allows a party's damages to include attorneys' fees incurred as a result of tortious conduct of a third party); *see also* Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 119 (Tex. 2009) (explaining that Texas had not yet adopted the "tort of another" exception). While some Texas appellate courts have adopted the "tort of another" exception, others have declined to do so. *See* Toka Gen. Contractors v. Wm. Rigg Co., No. 04–12–00474–CV, 2014 WL 1390448, at *5–6 (Tex. App.—San Antonio Apr. 9, 2014, no pet.) (mem. op.) (listing Texas appellate courts that have adopted "tort of another" exception to general rule as well as those that have not). As mentioned above, some statutes also permit recovery of attorneys' fees. TEX. BUS. & COM. CODE ANN. § 17.50(d) (West 2011) ("Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees."); TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2014) (involving contract disputes, *inter alia*); TEX. TAX CODE ANN. § 42.29 (West Supp. 2015) (involving tax disputes over land designation).

billing practices of some of its members."[84] But regardless of the precise fees charged by attorneys, the overriding issue continues to be client satisfaction.

In 2015, one survey of 700 in-house counsel concluded that what in-house counsel expects from outside lawyers is: "responsiveness," "communication," "specialized expertise," and value for their money.[85] According to a recent report published by the State Bar of Texas, the median hourly rate charged by lawyers in 2015 was $260.[86] New entrants to private practice reported a median hourly rate of $200, while private practitioners with twenty-one years of experience or more charged a median hourly rate of $300.[87]

Because clients are more inclined to question and even litigate over supposedly inflated or questionable bills, legal audits and client surveys are growing in frequency, with their published results telling other clients what to look for in legal bills. For example, in one survey of over 340 in-house and outside counsel, only 53% percent of in-house counsel said that law firms in the "top 2 box"—law firms who received a four- or five-star rating—provided legal invoices in accordance with litigation guidelines/procedures and only 8% of in-house counsel agreed that "bottom 2 box" firms—law firms that received a one- or two-star rating—did so.[88] Although the ABA had developed guidelines two years earlier that condemned billing more than one client for the same work and adding large surcharges to routine services like photocopying and telephone calls, the survey reflected that only 7% of law firm lawyers had actually read the new rules.[89]

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[84] ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 93–379 (1993).

[85] INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, INSIDE/OUTSIDE COUNSEL RELATIONSHIP SURVEY—FINAL REPORT, page 9, 21 (2015), *available at* https://www.iadclaw.org/securedocument.aspx?file=1/7/2015_IADC_Inside_Outside_Counsel_Relationship_Survey_-_Report.pdf.

[86] STATE BAR OF TEX. DEPT. OF RESEARCH & ANALYSIS, 2015 HOURLY FACT SHEET (2015), *available at* https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=34182.

[87] *See id.*

[88] INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, INSIDE/OUTSIDE COUNSEL RELATIONSHIP SURVEY—FINAL REPORT, page 12 (2016), *available at* https://www.iadclaw.org/securedocument.aspx?file=1/7/2016_IADC_Inside_Outside_Counsel_Relationship_Survey.pdf.

[89] *See id.*

While overbilling schemes will almost certainly result in the loss of clients, they also may lead to civil damage awards and even prison sentences. In 2013, one large law firm settled a counterclaim for an undisclosed amount after it sued a former client for failing to pay his attorney's bills and provoked a claim for $22.5 million in punitive damages from the client for alleged overbilling.[90] In 2007, the District of Columbia Bar Counsel recommended a six-month suspension for a lawyer who padded the hours he and his associates billed his clients; however, the court assessed just a 30-day suspension.[91] In a more recent case, a former client has requested $5 million in punitive damages for alleged overbilling.[92]

§ 2 Unconscionable Fees

Fee relationships are not only matters of contract, but they also present ethical issues. An attorney must not charge or collect an "illegal fee or unconscionable fee."[93] Ethically, a fee is unconscionable if, after reviewing the facts, a "competent lawyer could not form a reasonable belief that the fee is reasonable."[94]

In *Arthur Andersen & Co. v. Perry Equipment Corp.*, the Texas Supreme Court set out eight factors for determining the reasonableness of an attorney's fee.[95] These factors are the same as those used in determining whether the fee is ethical and are drawn directly from the Texas Disciplinary Rules. The finder of fact should consider:

[90] Sharon D. Nelson & John W. Simek, *Hot Buttons: Churn That Bill, Baby! Overbilling in Law Firms*, 39 LAW PRAC. MAGAZINE 24, 24 (2013), *available at* http://www.americanbar.org/publications/law_practice_magazine/2013/september-october/hot-buttons.html.

[91] Ronald D. Rotunda, *The Problem of Inflating Billable Hours*, VERDICT (Nov. 17, 2014), *available at* https://verdict.justia.com/2014/11/17/problem-inflating-billable-hours; *In re* Romansky, 938 A.2d 733, 743 (D.C. Cir. 2007).

[92] Roy Strom, *How a Big Law Fee Dispute Turned Into a Bitter, Cross-Country Litigation*, THE AM. LAWYER (Jan. 13, 2017), *available at* http://www.americanlawyer.com/id=1202776824329/How-a-Big-Law-Fee-Dispute-Turned-Into-a-Bitter-CrossCountry-Litigation?slreturn=20170021144908.

[93] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.04(a); *see also* Braselton v. Nicolas & Morris, 557 S.W.2d 187, 188 (Tex. Civ. App.—Corpus Christi 1977, no writ) ("There exists, therefore, a lawfully imposed duty not to charge excessive fees.").

[94] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.04(a).

[95] Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997).

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
>
> (2) the likelihood, [if apparent to the client,] that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount [of the controversy] involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent . . . .[96]

Federal courts apply similar factors.[97]

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[96] *Id.* (quoting TEX. DISCIPLINARY RULES PROF'L CONDUCT 1.04(b)); *see also* Ellis v. Renaissance on Turtle Creek Condo. Ass'n, Inc., 426 S.W.3d 843, 856 (Tex. App.—Dallas 2014, pet. denied) (noting that evidence of each of the *Arthur Andersen* factors is not required to support an award of attorney's fees); Sharifi v. Steen Auto., LLC, 370 S.W.3d 126, 153 (Tex. App.—Dallas 2012, no pet.); Herring v. Bocquet, 21 S.W.3d 367, 368–70 (Tex. App.—San Antonio 2000, no pet.). Further, the trier of fact may also "look at the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties in determining the reasonableness of the attorneys' fees." *In re* Estate of Vrana, 335 S.W.3d 322, 330 (Tex. App.—San Antonio 2010, pet. denied).

[97] Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974), *abrogated on other grounds*, Blanchard v. Bergeron, 489 U.S. 87 (1989). In *Johnson*, the Fifth Circuit established a twelve-point test for determining reasonable attorneys' fees, when such fees are allowed by federal law:

> (1) The time and labor required;
>
> (2) The novelty and difficulty of the questions;
>
> (3) The skill requisite to perform the legal service properly;

Thus, under both prior and current law, in the litigation context, an attorney's fee must be reasonable under the particular circumstances of the case and also must bear some reasonable relationship to the amount in controversy.[98] Courts have not been reluctant to reduce fee awards based on these factors.[99]

For example, in *Thomas v. Bobby D. Associates*, the jury awarded significantly less in damages (about $7,000) than the amount of attorney's

(4) The preclusion of other employment by the attorney due to acceptance of the case;

(5) The customary fee;

(6) Whether the fee is fixed or contingent;

(7) Time limitations imposed by the client or the circumstances;

(8) The amount involved and the results obtained;

(9) The experience, reputation, and ability of the attorneys;

(10) The "undesirability" of the case;

(11) The nature and length of the professional relationship with the client; and

(12) Awards in similar cases.

Id. Although the Texas Supreme Court did not adopt the Johnson factors for use in Texas state courts, the factors listed in the Texas Disciplinary Rules are strikingly similar. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.04(b). Texas state courts have also employed these factors when deciding fees associated with federal question cases. *See, e.g.*, City of Houston v. Levingston, 221 S.W.3d 204, 237 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (involving an alleged wrongful termination under the Whistleblower Act); *City of Amarillo*, 651 S.W.2d at 916 (involving 42 U.S.C. § 1983 violation); Martin v. Body, 533 S.W.2d 461, 465–66 (Tex. Civ. App.—Corpus Christi 1976, no writ) (involving claim made under Federal Truth in Lending Act).

[98] *See* USAA Cty. Mut. Ins. Co. v. Cook, 241 S.W.3d 93, 103 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("Attorney's fees must bear some reasonable relationship to the amount in controversy."); Cordova v. Sw. Bell Yellow Pages, Inc., 148 S.W.3d 441, 448 (Tex. App.—El Paso 2004, no pet.); Allied Fin. Co. v. Garza, 626 S.W.2d 120, 127 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.) (holding an award of $14,768 for attorney's fees excessive where damages totaled $682; according to the court, if 173 hours were expended by the attorneys, "then they overprepared, overtried and overbriefed" the matter); Argonaut Ins. Co. v. A.B.C. Steel Prods. Co., 582 S.W.2d 883, 889 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); Republic Nat'l Life Ins. Co. v. Heyward, 568 S.W.2d 879, 887 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

[99] *See* Ridge Oil Co. v. Guinn Invs., Inc., 148 S.W.3d 143, 161 (Tex. 2004) (affirming a trial court's decision to reduce jury awarded attorney's fees of $200,895.82 in preparing the case for trial and an additional $45,000 for an appeal to $175,000 in attorney's fees through trial and $20,000 in attorney's fees for an appeal).

fees ($49,000).[100] The court did not question whether the firm's fee was excessive considering the amount of hours worked on the case but held that "the case has been overworked" and reduced the amount of attorney's fees by $24,000.00.[101] Similarly, in *Cole Chemical & Distributing v. Gowing*, the trial court awarded $2,500 in attorney's fees although the experts in the case stated that appropriate attorney's fees would be between $10,000 and $27,100.[102] After the appellate court reversed the trial court's remittitur of damages, the appellate court remanded for consideration of how the (now increased) damages award would affect the attorney's fee award.[103]

In *Hoover Slovacek LLP v. Walton*, John Walton hired the firm of Hoover Slovacek L.L.P. to assist in "recover[ing] unpaid royalties from several oil and gas companies operating on his 32,500 acre ranch."[104] The parties operated under a contingent fee contract granting the firm 30% of the recovery, and included a termination provision which stated:

> You may terminate the Firm's legal representation at any time . . . . Upon termination by You, You agree to immediately pay the Firm the then present value of the Contingent Fee described [herein], plus all Costs then owed to the Firm, plus subsequent legal fees [incurred to transfer the representation to another firm and withdraw from litigation].[105]

Walton later discharged the firm, alleging that the assigned attorney was not making headway in settling his claims, and had, in fact, damaged his credibility by making unauthorized, outrageous demands.[106] Hoover attempted to collect what it claimed was its percentage of the then-current value of the claim, which Walton refused to pay.[107] Hoover brought suit against Walton; the trial court held for Hoover, but was reversed by the court of appeals, which ruled that "Hoover's fee agreement was

[100] Thomas v. Bobby D. Assocs., No. 12-08-00007-CV, 2008 WL 3020339, at *4–5 (Tex. App.—Tyler Aug. 6, 2008, no pet.) (mem. op.).

[101] *Id.* at *5.

[102] Cole Chem. & Distrib., Inc. v. Gowing, 228 S.W.3d 684, 689–90 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

[103] *Id.*

[104] 206 S.W.3d 557, 559 (Tex. 2006).

[105] *Id.*

[106] *Id.* at 560.

[107] *Id.*

unconscionable as a matter of law."[108] The Texas Supreme Court agreed with this point, reasoning that "[b]ecause [the agreement] imposes an undue burden on the client's ability to change counsel, Hoover's termination fee provision violates public policy and is unconscionable as a matter of law."[109] The Hoover court identified three bases for striking down the termination fee in question: (1) the termination fee provision imposed a penalty for changing counsel; (2) the provision granted the law firm "an impermissible proprietary interest" in the client's claims; and (3) the provision "subverted several policies underlying the use of contingent fees."[110]

Nor is it necessarily prudent for a lawyer to seek a fee that exceeds the client's recovery. In *Levine v. Bayne, Snell & Krause, Ltd.*, the plaintiffs sued under the Deceptive Trade Practices Act for failure to disclose defects in a residential home sold by the defendant to the plaintiffs.[111] The plaintiffs succeeded at trial on their DTPA claim, but the trial court offset the plaintiff's recovery by the amount awarded to the defendant on his counterclaim for the unpaid balance due under the mortgage.[112] The plaintiffs and their attorney had entered into a contingent fee agreement that provided for the attorney's fee to be calculated based on "any amount received by settlement or recovery."[113] The law firm insisted that the attorney's fee should be based on the amount of damages awarded under the DTPA claim before taking the counterclaim into account.[114] The clients claimed that the attorney's fee should be based only on the actual recovery—after offset of the counterclaim.[115] Instead of attempting to evaluate the clients' reasonable expectations or holding that the direct financial benefit received by the clients was an "amount received" under the contract, the majority opinion of the court expressly adopted the rule provided in Section 35 of the Restatement (Third) of the Law Governing

[108] *Id.*

[109] *Id.* at 563.

[110] *Id.* at 566.

[111] Levine v. Bayne, Snell, & Krause, Ltd., 40 S.W.3d 92, 93 (Tex. 2001); *see* Levine v. Bayne, Snell, & Krause, Ltd., 92 S.W.3d 1, 3–4 (Tex. App.—San Antonio 1999), *rev'd*, 40 S.W.3d 92 (Tex. 2001).

[112] *Levine*, 40 S.W.3d at 93; *Levine*, 92 S.W.3d at 4.

[113] *Levine*, 40 S.W.3d at 94.

[114] *Id.* at 93; *Levine*, 92 S.W.3d at 6.

[115] *Levine*, 40 S.W.3d at 93.

Lawyers.[116] The court ruled that for the purposes of calculating attorney's fees, in the absence of a specific provision to the contrary, the client's recovery is to be reduced by any counterclaim or offset.[117] The majority opinion created a bright line rule that attorneys must either include a specific provision within the contingent fee agreement regarding offsets of counterclaims, or run the risk of a fee forfeiture, regardless of the circumstances.[118]

Forfeiture of fees may be a particularly appropriate way to deter fee abuses. According to the Restatement of the Law Governing Lawyers, "a lawyer engaging in clear serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter."[119] A "clear and serious" violation occurs when a reasonable attorney would have known the conduct was wrongful.[120] However, before a trial court may order fee forfeiture, there must be a finding of a breach of fiduciary duty.[121]

The Texas Supreme Court held, in *Burrow v. Arce*, that "whether an attorney must forfeit any or all of his fee for a breach of fiduciary duty to his client must be determined by applying the rule as stated in Section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* and the factors we have identified to the individual circumstances of each case."[122] The Restatement rejected a "rigid approach to attorney fee forfeiture."[123] Accordingly, a court may find that an attorney is required to forfeit fees by considering "the gravity and timing of the violation, its wilfulness, its effect on the value of the lawyer's work for the client, any other threatened or

[116] *Id.* at 95.

[117] *Id.* at 95–96; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 (AM. LAW INST. 2000).

[118] *Levine*, 40 S.W.3d at 96.

[119] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (AM. LAW INST. 2000); *see also* Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron & Blue, 843 F. Supp. 2d 673, 685 (N.D. Tex. 2011); Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 121 (Tex. 2009) ("If an attorney has breached his or her fiduciary duty to a client, then part or all of the fees the client paid may be recovered through disgorgement and forfeiture."); Burrow v. Arce, 997 S.W.2d 229, 241–42 (Tex. 1999).

[120] *See Campbell Harrison & Dagley L.L.P.*, 843 F. Supp. 2d at 685; *Burrow*, 997 S.W.2d at 241.

[121] *See Burrow*, 997 S.W.2d at 234; McGuire, Craddock, Strother & Hale, P.C. v. Transcon. Realty Investors, Inc., 251 S.W.3d 890, 897 (Tex. App.—Dallas 2008, pet. denied).

[122] *Burrow*, 997 S.W.2d at 245.

[123] *Id.* at 241.

actual harm to the client, and the adequacy of other remedies."[124] Forfeiture is only required for "clear and serious violations of duty," that is, "if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful."[125] Forfeiture is required "for services rendered in violation of the lawyer's duty to a client, or for services needed to alleviate the consequences of the lawyer's misconduct."[126]

Courts have refused to order fee forfeiture under varying circumstances. For example, in one case a client claimed that his attorney "acquired information about the claim during his representation of [the client] in the litigation with the mortgage holder, then used that information to his own advantage by suggesting representation on a contingent-fee basis."[127] But the attorney had disclosed that relationship with the client and the court.[128] Additionally, the attorney failed to withdraw as counsel before asserting his attorney fee claim, although he withdrew a few weeks after filing his petition in intervention.[129] The court held no abuse of discretion occurred when the trial court refused to order the fee forfeited because there was no showing that forfeiture was necessary to satisfy the public's interest in protecting the attorney-client relationship.[130] In another case, the client claimed that the attorney, who represented the client in two matters, violated his duty of loyalty in the second matter.[131] However, any alleged breach that occurred in the second matter did not entitle the client to forfeiture for fees charged in the first matter.[132]

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] Wythe II Corp. v. Stone, 342 S.W.3d 96, 104–05 (Tex. App.—Beaumont 2011, pet. denied).

[128] *Id.* at 105.

[129] *Id.*

[130] *Id.*

[131] Gregory v. Porter & Hedges, LLP, 398 S.W.3d 881, 886–87 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); *see also* Celmer v. McGarry, 412 S.W.3d 691, 707 (Tex. App.—Dallas 2013, pet. denied).

[132] *Gregory*, 398 S.W.3d at 886–87.

§ 3 Question of Fact

Whether a particular attorney's fee is reasonable is ordinarily a question of fact and depends upon the particular circumstances of each case.[133] Accordingly, without an agreement to try the issue of the reasonableness of the attorney's fees to the court, a jury will determine the reasonable value of the attorney's services.[134] In an action to recover attorney's fees, expert testimony is ordinarily necessary,[135] but an attorney can testify as his own expert witness.[136] Such opinion testimony usually only creates a fact issue

[133] *See* Smith v. Patrick W.Y. Tam Tr., 296 S.W.3d 545, 547 (Tex. 2009) ("The reasonableness of attorney's fees is ordinarily left to the factfinder, and a reviewing court may not substitute its judgment for the jury's."); *In re* Estate of Vrana, 335 S.W.3d 322, 329 (Tex. App.—San Antonio 2010, pet. denied) ("A determination of reasonable attorneys' fees is a question for the trier of fact."); Hous. Lighting & Power Co. v. Russo Props., Inc., 710 S.W.2d 711, 715 (Tex. App.—Houston [1st Dist.] 1986, no writ); Kosberg v. Brown, 601 S.W.2d 414, 418 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (finding that determination of what constitutes reasonable attorney's fees is within province of jury and will not ordinarily be disturbed on appeal); *see also* LeRoy v. City of Hous., 906 F.2d 1068, 1083 (5th Cir. 1990) (holding that hours awarded were grossly excessive and determined reasonable fee based on common sense and years of experience).

[134] *See* Gulf Paving Co. v. Lofstedt, 188 S.W.2d 155, 160 (Tex. 1945) (holding that trial court erred in refusing to submit to jury the issue of reasonable attorney's fees); *Hous. Lighting & Power Co.*, 710 S.W.2d at 716 (holding no abuse of discretion by trial court in its factual determination that attorney's fees awarded were not excessive).

[135] *See* Great Am. Reserve Ins. Co. v. Britton, 406 S.W.2d 901, 907 (Tex. 1996) (stating that reasonableness of attorney's fees must be proven by "competent evidence"); Twin City Fire Ins. Co. v. Vega–Garcia, 223 S.W.3d 762, 770 (Tex. App.—Dallas 2007, pet. denied) (stating that generally the amount of attorneys' fees sought in a case must be proved by expert testimony); Cantu v. Moore, 90 S.W.3d 821, 826 (Tex. App.—San Antonio 2002, pet. denied) ("Expert testimony is required to support an award of attorneys' fees."); Lesikar v. Rappeport, 33 S.W.3d 282, 308 (Tex. App.—Texarkana 2000, pet. denied) (same); Woollett v. Matyastik, 23 S.W.3d 48, 52 (Tex. App.—Austin 2000, pet. denied) (same); Travelers Ins. Co. v. Brown, 750 S.W.2d 916, 918 (Tex. App.—Amarillo 1988, writ denied) ("In Texas jurisprudence, the accepted method of proving that fact [reasonableness of fees] is by an expert witness . . . .").

[136] *See* McMahon v. Zimmerman, 433 S.W.3d 680, 690 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (attorney testified to reasonableness of his fee); Kroll v. Scott, 155 S.W.2d 985, 989 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.) (permitting attorney who had given extended testimony in his own behalf to argue his cause and to remark upon its importance to himself, as well as to comment upon his own testimony as if it had been that of some other witness, was not error in action for attorneys' fees); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08(a)(3) *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R., art. X, § 9) (creating exception to the general prohibition against a lawyer acting simultaneously as an attorney and a witness for testimony relating "to the nature and value of legal services rendered in the case").

as to whether a fee is reasonable; it is not conclusive.[137] The trier of fact may reject the expert's testimony.[138] However, where the undisputed evidence is positive and direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted, a directed verdict or a summary judgment on that issue may be proper.[139]

When a court awards attorneys' fees, competent evidence must support the "reasonableness" of the fees.[140] Thus, even if the record on appeal reveals the attorneys performed substantial work, the trial court's judgment on attorney's fees will nevertheless be reversed if there is no evidence as to the reasonableness of the fees.[141]

Moreover, after a jury trial, a judgment awarding attorney's fees may be fatally defective if the jury question did not submit the proper legal standard authorizing the recovery of attorneys' fees.[142] However, proof of the necessity of the fees, other than testimony as to their reasonableness, may

[137] *See* City of Dall. v. Arnett, 762 S.W.2d 942, 958 (Tex. App.—Dallas 1988, writ denied); Tex. Gen. Indem. Co. v. Speakman, 736 S.W.2d 874, 886 (Tex. App.—Dallas 1987, no writ); Tuthill v. Sw. Pub. Serv. Co., 614 S.W.2d 205, 213–14 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.). "Block billing," referring to daily time entries consisting of two or more task descriptions, also has been disallowed by many courts. *See, e.g.*, City of Laredo v. Montano, 414 S.W.3d 731, 733–34 (Tex. 2013) (holding that insufficient evidence existed to support attorney's fee award to attorney who block billed a certain number of hours per week).

[138] *See Arnett*, 762 S.W.2d at 958.

[139] *See* TEX. R. CIV. P. 166a(c); Bastida v. Aznaran, 444 S.W.3d 98, 105 (Tex. App.—Dallas 2014, no pet.).

[140] *See Great Am. Reserve Ins. Co.*, 406 S.W.2d at 907 ("The plaintiff offered no proof of any kind of the reasonableness of the attorney fees sought and recovered. We have held that 'the reasonableness of attorney's fees in an insurance case is a question of fact to be determined and must be supported by competent evidence and may be submitted to a jury.'" (quoting Johnson v. Universal Life & Accident Ins. Co., 94 S.W.2d 1145, 1146 (Tex. 1936))); *see also* ASAI v. Vance Insulation Abatement, Inc., 932 S.W.2d 118, 123 (Tex. App.—El Paso 1996, no writ) ("[R]easonableness of attorney's fees is a fact question and as such is required to be supported by competent evidence.").

[141] *See Great Am. Reserve Ins. Co.*, 406 S.W.2d at 907; Gipson-Jelks v. Gipson, 468 S.W.3d 600, 606 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *ASAI*, 932 S.W.2d at 123; Huntley v. Huntley, 512 S.W.2d 767, 771 (Tex. Civ. App.—Austin 1974, no writ).

[142] *See* Jackson v. Fontaine's Clinics, Inc., 499 S.W.2d 87, 90 (Tex. 1973) (holding that jury submission on damages is totally defective if it fails to guide jury "to a finding on any proper legal measure of damages"); TeleResource Corp. v. Accor N. Am., Inc., 427 S.W.3d 511, 523 (Tex. App.—Fort Worth 2014, pet. denied); Hogue v. Blue Bell Creameries, L.P., 922 S.W.2d 566, 571 (Tex. App.—Texarkana 1996) ("An issue that fails to guide the jury to a proper finding is defective."), *writ denied*, 930 S.W.2d 88 (Tex. 1996) (per curiam).

not be required.[143] Nor is proof required that the fee is reasonable and customary in the particular county in which the case is tried.[144] Rather, "[t]estimony concerning the amount charged by attorneys in the general locality or area is sufficient,"[145] as is testimony concerning "the amount charged by other attorneys in the locality doing similar work."[146]

§ 4 Employment Contracts

If the contract for compensation between an attorney and client was made before or at the inception of the attorney-client relationship, the parties are presumed to have dealt with each other at arm's length.[147] Such a contract is not tainted with the presumed unfairness that attaches to agreements made during the attorney-client relationship.[148] *Archer v.*

[143] *See* State & Cty. Mut. Fire Ins. Co. *ex rel.* S. United Gen. Agency of Tex. v. Walker, 228 S.W.3d 404, 410 n.11 (Tex. App.—Fort Worth 2007, no pet.); Farley v. Farley, 731 S.W.2d 733, 737 (Tex. App.—Dallas 1987, no writ).

[144] *See Walker*, 228 S.W.3d at 410 n.11; *Farley*, 731 S.W.2d at 737.

[145] *Farley*, 731 S.W.2d at 737. The geographic size of this "general locality or area" is unclear. However, in *Brazos Cty. Water Control & Improvement Dist. No. 1 v. Salvaggio*, the court held that, when receiving testimony on amounts charged in the locality, to require an attorney to "know the usual and customarily reasonable fees in every individual county or city within the area of a trial court would be unduly restrictive." 698 S.W.2d 173, 178 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *see also In re* Estate of Vrana, 335 S.W.3d 322, 329 n.9 (Tex. App.—San Antonio 2010, pet. denied) (acknowlegding that the factor concerning attorney's fees customarily charged in the locality for similar legal services usually refers to the amount charged by other attorneys in the locality doing similar work, as explained in *Brazos*).

[146] Terminex Int'l, Inc. v. Lucci, 670 S.W.2d 657, 666 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); *see also In re Vrana*, 335 S.W.3d at 330; *Salvaggio*, 698 S.W.2d at 178; Ortiz v. O.J. Beck & Sons, Inc., 611 S.W.2d 860, 867 (Tex. Civ. App.—Corpus Christi 1980, no writ). However, a showing of what is reasonable within the attorney's locality was not required in *Gulf Paving Co. v. Lofstedt*, which is frequently cited as establishing the criteria to be considered: "There is a great latitude in fixing attorney's fees, and several elements must be considered in determining what is a reasonable fee, as the amount involved, the actual services to be performed, the time required for trial, the situation of the parties, and the results obtained." 188 S.W.2d 155, 160 (Tex. 1945).

[147] *See* Flores v. Gonzalez & Assocs. Law Firm, Ltd., No. 13-15-00205-CV, 2016 WL 5845922, at *7 n.5 (Tex. App.—Corpus Christi Oct. 6, 2016, no pet.) (mem. op.); *see also* Nguyen Ngoc Giao v. Smith & Lamm, P.C., 714 S.W.2d 144, 147 (Tex. App.—Houston [1st Dist.] 1986, no writ).

[148] *See* Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964); Keck, Mahin & Cate, Grant Cook v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 20 S.W.3d 692, 699 (Tex. 2000); *Nguyen*, 714 S.W.2d at 147; Cole v. McCanlies, 620 S.W.2d 713, 715 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); Plummer v. Bradford, 395 S.W.2d 856, 859–61 (Tex. Civ. App.—Houston 1965, no

Griffith sets forth the rule governing contracts or other transactions relating to compensation entered during the attorney-client relationship:

> Although an attorney is not incapacitated from contracting with his client for compensation during the existence of the relation of attorney and client, and a fair and reasonable settlement of the compensation to be paid is valid and enforceable, if executed freely, voluntarily, and with full understanding by the client, the courts, because of the confidential relationship, scrutinize with jealousy all contracts between them for compensation which are made while the relation exists.[149]

If a fee arrangement is made *during* the attorney-client relationship, the transaction is presumptively fraudulent and the burden of proving the reasonableness of the fee is on the attorney.[150] This is because an attorney, upon entering into a professional relationship, assumes a common-law fiduciary obligation to the client.[151] During that relationship, it is presumed

writ) (stating that prior to the execution of the contingent fee contract, the attorney-client relationship did not exist); Johnson v. Stickney, 152 S.W.2d 921, 924 (Tex. Civ. App.—San Antonio 1941, no writ).

[149] 390 S.W.2d at 739 (Tex. 1964) (quoting POMEROY, EQUITY JURISPRUDENCE, § 960d (5th ed. 1941)).

[150] *See* Lee v. Daniels & Daniels, 264 S.W.3d 273, 279 (Tex. App.—San Antonio 2008, pet. denied) (citing Robinson v. Garcia, 804 S.W.2d 238, 248 (Tex. App.—Corpus Christi 1991, writ denied)); Gum v. Schaefer, 683 S.W.2d 803, 805–06 (Tex. App.—Corpus Christi 1984, no writ); *Cole*, 620 S.W.2d at 715; *see also Archer*, 390 S.W.2d at 739 ("The burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney, upon the general rule, that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other."). *Cf.* Cole v. Plummer, 559 S.W.2d 87, 89–90 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.) (reversing judgment for attorney because court did not submit issues inquiring whether his contract with the client was fair and whether he made full disclosure regarding underlying lawsuit).

[151] *See* Nolan v. Foreman, 665 F.2d 738, 741 (5th Cir. 1982); *Archer*, 390 S.W.2d at 739; *Robinson*, 804 S.W.2d at 248 ("There is a presumption of unfairness attaching to a fee contract entered into during the existence of the attorney-client relationship, and the burden of showing the fairness of the contract is on the attorney. . . . Furthermore, effect is generally not given to a contract that obligates the client to pay to the attorney a sum of money in excess of that which has been agreed on by them in their original negotiations."); *Cole*, 559 S.W.2d at 89; Holland v. Brown, 66 S.W.2d 1095, 1102 (Tex. Civ. App.—Beaumont 1933, writ ref'd). *Cf.* Jampole v. Matthews, 857 S.W.2d 57, 63–64 (Tex. App.—Houston [1st Dist.] 1993, writ denied)

negotiations between the attorney and client were not at arm's length, and that the client relied upon the attorney as an advisor in a position of trust to consider the client's interests and to refrain from turning these interests to the attorney's advantage.[152] The fiduciary nature of the relationship thus requires the attorney to bear the burden of proving the reasonableness of the fee.[153]

For example, in *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, the Texas Supreme Court construed ambiguities in a contingent fee contract against the lawyer and in favor of the client.[154] The case involved a dispute between lawyer and client over the potential recoverability of a contingent fee. Specifically, the question was whether a fee agreement on firm letterhead, but that referred to the lawyer providing services only individually, constituted an agreement with the firm or with the individual lawyer.[155] Both the trial court and the appeals court had concluded the agreement was ambiguous, and the jury had made factual findings that the fee agreement was only with the individual attorney. The Texas Supreme Court concluded that the agreement was unambiguous, and that it was with the law firm.[156] In support of its reasoning, the court noted:

> Construing client-lawyer agreements from the perspective of a reasonable client in the circumstances imposes a responsibility of clarity on the lawyer that should preclude a determination that an agreement is ambiguous in most instances. Lawyers appreciate the importance of words and 'are more able than most clients to detect and repair omissions in client-lawyer contracts.' A client's best interests, which its lawyer is obligated to pursue, do not include having a jury construe their agreements.[157]

(renegotiating and collecting a higher contingent fee but failing to inform clients that attorneys not entitled to fee increases).

[152] *See Archer*, 390 S.W.2d at 739.

[153] *See Cole*, 559 S.W.2d at 89.

[154] 352 S.W.3d 445, 446 (Tex. 2011).

[155] *Id.* at 449.

[156] *Id.* at 453.

[157] *Id.*

Moreover, "because a lawyer's fiduciary duty to a client covers contract negotiations between them, such contracts are closely scrutinized."[158] "Placing the burden on the lawyers to be 'clear' in fee agreements is warranted, given a lawyer's sophistication, the trusting relationship between a lawyer and his client, and lawyer's responsibility to notify the client of the fee's basis or rate at the outset."[159]

Attorney contingent fee contracts serve two main purposes. First, they allow plaintiffs who cannot afford to pay a lawyer to compensate the lawyer out of any future recovery.[160] Second, such contracts, because they offer the potential of a greater fee than might be earned under an hourly billing method, compensate the attorney for the risk that the attorney will receive no fee if the case is lost.[161] Contingent fee arrangements are examined for reasonableness under the factors set out in Texas Disciplinary Rule 1.04(b).[162]

For example, in *Arthur Andersen v. Perry Equipment Corporation*, the Texas Supreme Court held that a contingent fee agreement alone could not support an award of attorney's fees under the DTPA.[163] The court held that the evidence must be specific as to the amount of attorney's fees requested:

> To recover attorney's fees under the DTPA, the plaintiff must prove that the amount of fees was both reasonably incurred and necessary to the prosecution of the case at bar,

[158] *In re* Davenport, 522 S.W.3d 452, 458 (Tex. 2017) (citing Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 450 (Tex. 2011)).

[159] *Id.* (holding that contingent fee agreement calling for fee to be calculated based on "the total sums recovered" unambiguously only permits recovery from monetary awards and **not** from non-cash benefits such as the ownership interest in any business recovered) (citing *Greenberg Peden*, 352 S.W.3d at 450, 453; Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 95–96 (Tex. 2001)).

[160] *See* Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997).

[161] *See id.*; Wythe II Corp. v. Stone, 342 S.W.3d 96, 103 (Tex. App.—Beaumont 2011, pet. denied) ("A contingent-fee contract is permissible in Texas in part because the potential for a greater fee compensates the attorney for assuming the risk that the attorney will receive no fee if the case is lost, while the client is largely protected from incurring a net financial loss in the event of an unfavorable outcome.").

[162] *See Arthur Anderson*, 945 S.W.2d at 818; *see also* Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 561 n.7, 563–64 (Tex. 2006) (analyzing a contingent fee contract under Texas Disciplinary Rules of Professional Conduct 1.04(b) and 1.04(d)); Celmer v. McGarry, 412 S.W.3d 691, 720 (Tex. App.—Dallas 2013, pet. denied) (discussing the requirements of a contingent fee contract as provided by Rule 1.04(b)).

[163] 945 S.W.2d at 819. *Cf. Stone*, 342 S.W.3d at 103.

> and must ask the jury to award the fees in a specific dollar amount, not as a percentage of the judgment.[164]

Accordingly, there must be additional evidence so that the trier of fact has a "meaningful way to determine if the fees were in fact reasonable and necessary."[165] The agreement between the attorney and client may be taken into account by the factfinder, but the factfinder must consider the agreement in light of the factors set out in the Disciplinary Rules.[166]

Where contingent fee agreements are unenforceable, the lawyer may nonetheless be entitled to recover the reasonable value of his or her fees and expenses under a quantum meruit theory of recovery.[167] In *Hill*, the lawyer attempted to enforce an oral contingent-fee agreement or, alternatively, to recover in quantum meruit the reasonable value of his services. After it was determined that the oral agreement violated Texas Government Code § 82.065(a)'s requirement that such agreements be in writing and signed by the attorney and client, the Texas Supreme Court nevertheless held that the lawyer presented legally sufficient evidence to support his entitlement to a $7.25 million fee in quantum meruit.[168]

§ 5 Arbitration Agreements

In *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, the Texas Supreme Court held an engagement agreement that requires clients to arbitrate malpractice claims, but gives lawyers the option to litigate any claim over unpaid fees is not so one-sided as to make an arbitration agreement unconscionable and therefore unenforceable.[169] The law firm accepted the representation of the client in a divorce proceeding, subject to the terms of this agreement.[170] The underlying matters were resolved at

[164] *See Arthur Andersen*, 945 S.W.2d at 819.

[165] *Id.*; *see also Walton*, 206 S.W.3d at 561; Gen. Motors Corp. v. Bloyed, 916 S.W.2d 949, 960–61 (Tex. 1996) (discussing relative strengths and weaknesses of contingent fee and lodestar methods of awarding attorneys' fees in context of court-approved class action settlement).

[166] *See Walton*, 206 S.W.3d at 561 n.7; *Arthur Andersen*, 945 S.W.2d at 819.

[167] Hill v. Shamoun & Norman, LLP, No. 16-0107, 2018 WL 1770527, at *6 (Tex. Apr. 13, 2018) (citing Celmer v. McGarry, 412 S.W.3d 691 (Tex. App.—Dallas 2013, pet. denied); In re Webber, 350 B.R. 344, 381–82 (Bankr. S.D. Tex. 2006) (mem. op.)).

[168] *Id.* at *8–11.

[169] 467 S.W.3d 494, 502 (Tex. 2015).

[170] *Id.* at 498.

mediation.[171] The client thereafter sued the law firm, claiming it had induced him to accept an inadequate settlement.[172] In response to this lawsuit, the law firm moved to compel arbitration.[173]

The client challenged the enforceability of the arbitration clause on several fronts:

> (1) the provision was so one-sided as to be unconscionable;
>
> (2) the provision violated public policy because of the kind of agreement it was (an introductory agreement to become the client of an attorney);
>
> (3) the burden of proof should have been borne by the law firm, because of the client's status as a prospective client, to demonstrate that the firm had met its ethical obligation to explain the effects of the arbitration clause to the prospective client; and
>
> (4) the arbitration clause was illusory because it did not universally require the law firm to arbitrate all of its potential claims congruently with the client's obligation to arbitrate all of his.

The court of appeals refused to grant mandamus relief to overturn the trial court's ruling that the arbitration provision was unenforceable, concluding that the one-sidedness of the agreement made it unconscionable.[174]

With respect to the client's unconscionability argument, the Texas Supreme Court stated that an arbitration agreement between an attorney and a client is presumed enforceable *if* a valid agreement exists, and *if* the claim in question is within its scope.[175] These two criteria were satisfied by the law firm. Since arbitration agreements between a lawyer and a client are not presumptively unconscionable,[176] unless there is proof of a defense to such a clause, it is enforceable. The court then concluded there was no such defense, reasoning that unless there is fraud, misrepresentation or deceit in

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* at 499–500.

[176] *Id.* at 500.

the signing of such an agreement, "one who signs a contract is deemed to know and understand its contents and is bound by its terms."[177]

Of additional significance, the court further held that challenges to arbitration provisions must be based on the arbitration provision alone, rather than potential bases for challenging other aspects of the parties' agreement.[178] Consequently, excluding certain disputes from the arbitration requirement does not render the provision "so one-sided as to be unconscionable," even if the provision excludes all potential claims by just one of the parties.[179]

With respect to the public policy argument, the court acknowledged two competing policies regarding arbitration agreements between an attorney and his or her client: "the policy of holding attorneys to the highest level of ethical conduct and the policy of encouraging and enforcing arbitration agreements."[180] However, the court was unwilling to recognize that the State Bar Disciplinary Rules established a "public policy" against arbitration clauses in engagement agreements with clients.[181] Also, it was unwilling to place on the law firm the burden of proving it had explained the import of the arbitration clause to the client, opting instead for placing the burden upon the client to prove that the clause's importance had been *insufficiently* explained.[182]

Finally, the court held that the arbitration provision was not illusory because it excluded potential claims by the law firm against its client.[183] Under the agreement, the law firm could not avoid its promise to arbitrate all claims within the scope of the arbitration clause, such as by unilateral amendment or termination of the clause.[184] Therefore, the court reasoned, because the law firm did not have a choice on whether to arbitrate claims that were within the scope of the arbitration clause in question, the clause was not illusory.[185] In light of the client's failure to prove any defense to the arbitration clause, it was held to be valid and enforceable.[186]

[177] *Id.*

[178] *Id.* at 501.

[179] *Id.*

[180] *Id.* at 502–03.

[181] *Id.* at 504–05.

[182] *Id.* at 503.

[183] *Id.* at 505–06.

[184] *Id.*

[185] *Id.*

[186] *Id.* at 506.

§ 6 Billing Guidelines

Billing guidelines abound. For example, the ABA Committee on Ethics and Professional Responsibility weaves ethical rationale with its practical guidance in three major areas: (1) disclosure of the bases of the amounts to be charged; (2) professional obligations regarding the reasonableness of fees; and (3) charges other than professional fees.[187] Others have addressed the topics of communication and reasonableness.[188] The Restatement of the Law Governing Lawyers provides that a lawyer "may not charge a fee larger than is reasonable in the circumstances or that is prohibited by law"[189] and that "[i]n seeking compensation claimed from a client or former client, a lawyer may not employ collection methods forbidden by law, use confidential information (as defined in Chapter 5) when not permitted under § 65, or harass the client."[190]

The Association of Corporate Counsel suggests its own list of billing guidelines, including instructions such as (a) billing in 6-minute increments; (b) providing for detailed, itemized statements; (c) obtaining prior approval before adding each new attorney working on the matter; and (d) estimating the cost of work before it is completed.[191] In any event, one simple prudent rule to follow is this: treat your client as you would wish to be treated.

Whichever guidelines an attorney chooses to follow, he or she should remain aware of: (1) the requirements set out in the Disciplinary Rules; and (2) the applicable case law as it develops. Keeping track of developments in both of these areas will prevent misfortune down the road.

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[187] *See* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993); *see also* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 15-472 (2015).

[188] Todd C. Scott, Am. Bar Ass'n, *Nine Rules for Billing Ethically and Getting Paid on Time*, 1 GPSOLO EREPORT 4 (Nov. 2011), *available at* https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2011/november_2011/billing_ethically_getting_paid.html.

[189] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 34 (AM. LAW INST. 2000); *see also id.* §§ 38–39.

[190] *Id.* § 41.

[191] Association of Corporate Counsel, *Sample Billing Guidelines—Outside Counsel*, *available at* http://www.acc.com/_cs_upload/vl/membersonly/SampleFormPolicy/1362010_1.pdf.

CHAPTER III: DUTIES TO THIRD PARTIES

§ 1 Privity of Contract

Texas law follows the bright-line rule that an attorney owes no duty to non-clients and therefore is not ordinarily liable to third parties for damages resulting from the performance of professional services.[192]

> Under Texas law, an attorney owes a duty only to those parties in privity of contract with him. Because an attorney has no duty of care to non-clients, a non-client can have no claim for negligence against an attorney. Third parties in Texas have no standing to sue attorneys on causes of action arising out of their representation of others.[193]

This bright-line rule reflects the traditional view,[194] but is contrary to the current majority rule that an attorney may be liable to a non-client under certain circumstances.[195] Jurisdictions adopting this latter view have relaxed the privity requirement and extended the attorney's liability to third party non-clients based on a balancing of factors theory,[196] a third-party

[192] *See* Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015); Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996); *see also* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 792 (Tex. 1999) (explaining that lack of privity precludes attorneys' liability to non-clients for legal malpractice); Bossin v. Towber, 894 S.W.2d 25, 33 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (stating that "[u]nder Texas law, an attorney owes a duty only to those parties in privity of contract with him").

[193] *Bossin*, 894 S.W.2d at 33 (citations omitted).

[194] *See* Savings Bank v. Ward, 100 U.S. 195, 200 (1879) ("Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party . . . .").

[195] *See, e.g.*, Borissoff v. Taylor & Faust, 93 P.3d 337, 338 (Cal. 2004); Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961) (en banc). The California Supreme Court's decision in *Lucas* is often cited in the estate planning context for its holding that a lawyer who drafts a will owes a duty of care to the testator's intended beneficiaries. *See also* 1 R. MALLEN, LEGAL MALPRACTICE § 7.9 (2018 ed.).

[196] *See Lucas*, 364 P.2d at 687–88; Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 633 (Cal. Ct. App. 1991) ("Determination of whether in a specific case an attorney will be held liable to a third person not in privity 'is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the [attorney's] conduct and the injury, and the policy of preventing future harm.'" (citation omitted)); Donahue v. Shughart, Thompson & Kilroy, P.C., 900 S.W.2d 624, 628–29 (Mo. 1995) (en banc) (adopting "modified balancing" test to determine attorney's liability to non-clients, which evaluates the following: (1) the existence of a specific

beneficiary theory,[197] a fiduciary or agency theory,[198] or a foreseeability of harm theory.[199]

intent by the client that the purpose of the attorney's services were to benefit the plaintiffs; (2) the forseeability of the harm to the plaintiffs as a result of the attorney's negligence; (3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct; (4) the closeness of the connection between the attorney's conduct and the injury; (5) the policy of preventing future harm; and (6) the burden on the profession of recognizing liability under the circumstances); Minor v. Terry, 475 S.W.3d 124, 132 (Mo. Ct. App. 2014) (listing factors); Redies v. Attorneys Liab. Prot. Soc., 150 P.3d 930, 942 (Mont. 2007) (listing factors); Leyba v. Whitley, 907 P.2d 172, 182 (N.M. 1995) (adopting combination of multi-factor balancing test and third party beneficiary test for analyzing duty owed to statutory beneficiaries by attorney for personal representative prosecuting a wrongful death action); Bohn v. Cody, 832 P.2d 71, 76–77 (Wash. 1992) (en banc) (stating that once lawyers disclose information to unrepresented party, they must take care to be completely forthcoming and should advise unrepresented party to retain counsel before even discussing transaction).

[197] *See* Dingle v. Dellinger, 134 So. 3d 484, 487–88 (Fla. Dist. Ct. App. 5th Dist. 2014); Hamilton v. Needham, 519 A.2d 172, 173 (D.C. 1986); Hodge v. Cichon, 78 So. 3d 719, 722 (Fla. Dist. Ct. App. 5th Dist. 2012) (citing Greenberg v. Mohoney, Adams & Criser, P.A., 614 So. 2d 604, 605 (Fla. Dist. Ct. App. 1993) (stating that third-party-intended-beneficiary exception to privity rule is not limited to will drafting cases)); York v. Stiefel, 458 N.E.2d 488, 492 (Ill. 1983) (stating that attorney's duty of care to non-client plaintiff may be established by showing that primary purpose of actual attorney-client relationship was to benefit plaintiff); Reddick v. Suits, 960 N.E.2d 1182, 1191 (Ill. App. Ct. 2d Dist. 2011) (holding that in representing a corporation the "incidental benefit [to the officers and directors of the corporation] does not transform the primary purpose and intent of [the attorney's] representation into protecting [the corporate] directors and officers"); Jewish Hosp. of St. Louis, Mo. v. Boatmen's Nat'l Bank of Belleville, 633 N.E.2d 1267, 1275–76 (Ill. App. Ct. 1994) (ruling that attorney who drafted will owed duty in contract or tort to remainder beneficiaries of testamentary trusts); Holsapple v. McGrath, 521 N.W.2d 711, 714 (Iowa 1994) (approving of third-party legal malpractice actions arising out of preparation of nontestamentary instruments if third-party plaintiffs establish that plaintiff was specifically identified, by the grantor, as an object of grantor's intent); McIntosh Cty. Bank v. Dorsey & Whitney, LLP, 745 N.W.2d 538, 547 (Minn. 2008) (stating that in order for a third party to sue for malpractice, it must be a direct and intended beneficiary); *Leyba*, 907 P.2d at 179; Onita Pacific Corp. v. Trs. of Bronson, 843 P.2d 890, 896 (Or. 1992) (en banc) (ruling that attorney owes a duty not only to the client but also to intended beneficiaries of work done for client).

[198] *See* Cohen v. Goodfriend, 665 F. Supp. 152, 158–59 (E.D.N.Y. 1987).

[199] *See* Ackerman v. Schwartz, 947 F.2d 841, 846 (7th Cir. 1991) ("In order to recover from a professional for a report rendered to his client, the third party must establish that the professional was aware that the report would be used for a particular purpose, in furtherance of which a known person would rely, and the professional must show an understanding of this impending reliance."); Schick v. Bach, 238 Cal. Rptr. 902, 909 (Cal. Ct. App. 1987) (stating that attorney may have foreseen the adverse consequences of his advice on plaintiff is only one of "innumerable policy considerations" and is insufficient because it would inhibit an attorney's devotion to his client); Great Am. E&S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A., 100 So. 3d 420, 424–25 (Miss. 2012) (noting that state statute abolished privity requirement in all causes of action for

The requirement of privity is based on the unique relationship between the attorney and the client.[200] An attorney must exercise judgment "within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties."[201] The ethical foundation for the privity requirement was previously found in the Texas Code of Professional Responsibility: "Neither his personal interests, the interests of other clients, nor the desires of third parties should be permitted to dilute [the attorney's] loyalty to his client."[202] Although the Code was replaced by the Texas Disciplinary Rules of Professional Conduct, effective January l, 1990, the current Rules continue to provide that "in all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law."[203]

"economic loss brought on account of negligence," and holding that attorney was liable to reasonably foreseeable persons who detrimentally relied on attorney's title work); Mega Grp., Inc. v. Pechenik & Curro, P.C., 819 N.Y.S.2d 796, 799 (N.Y. App. Div. 3d Dep't 2006) (citing Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318, 322 (N.Y. 1992) (stating that where purpose of opinion letter is to provide third party with information, where attorney expects third party to, and third party does, rely on opinion letter, and where attorney sends opinion letter directly to third party, attorney owes third party duty of care)).

[200] *See* Smith v. O'Donnell, 288 S.W.3d 417, 421 (Tex. 2009) ("We refused to join the majority of states that relax the common-law privity barrier for intended beneficiaries, and held that third parties lack privity with a deceased's attorney and cannot sue for malpractice."); Chu v. Hong, 249 S.W.3d 441, 446 & n.18 (Tex. 2008) ("As an attorney, Chu had a fiduciary duty to further the best interests of his clients, the buyers; imposing a second duty to the sellers would inevitably conflict with the first." (footnotes omitted)); JJJJ Walker, LLC v. Yollick, 447 S.W.3d 453, 468–69 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ("[A]n attorney generally does not independently owe a non-client a duty of care in the provision of legal services. For this reason, an attorney ordinarily is not liable to a non-client for legal malpractice."); Swank v. Cunningham, 258 S.W.3d 647, 666 (Tex. App.—Eastland 2008, pet. denied) ("AMPS's lack of privity with Beck Redden and Smyser Kaplan precludes it from asserting breach of fiduciary duty claims against them. Fiduciary duties arise when an attorney-client relationship is created.").

[201] Bell v. Manning, 613 S.W.2d 335, 338 (Tex. Civ. App.—Tyler 1981, writ refused n.r.e.) (citing State Bar of Texas, Ethical Considerations on Code of Professional Responsibility, EC 5–1 (1972)), *abrogated on other grounds*, McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 795 (Tex. 1999) (permitting negligent misrepresentation claim against attorney by nonclient); *see also* Emp'rs Cas. Co. v. Tilley, 496 S.W.2d 552, 563 (Tex. 1973) (same); Authorlee v. Tuboscope Vetco Int'l, Inc., 274 S.W.3d 111, 120 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (stating that "attorney must zealously represent his clients within the bounds of the law").

[202] TEX. STATE BAR R. art X, § 9, DR 5–105(A) (TEX. CODE OF PROF'L RESP.) (1982, superseded 1990).

[203] TEX. DISCIPLINARY RULES PROF'L CONDUCT Preamble ¶ 3. The "Preamble: A Lawyer's Responsibilities," points out that the lawyer has many roles. As the "representative of clients," the

The privity rule for attorneys is firmly grounded in public policy. Holding an attorney liable to a third party would inject undesirable self-protective reservations into the attorney's counseling role. The attorney's preoccupation with the risk of a claim asserted by anyone with whom his client might deal would prevent him or her from devoting energies solely to the client's interest. The result would both burden the profession and diminish the quality of the legal services received by the client. It would also encourage parties to contractual negotiations to forego personal legal representation and then sue counsel representing the other party when the resulting contract later proves disfavorable in some respect.[204] Accordingly, if an attorney must be concerned about potential liability to third parties, the resulting self-protective tendencies may deter vigorous representation of the client. This rationale also precludes an attorney from suing an opposing attorney in connection with the representation of his client.[205] The risk of liability to nonclients might cause the attorney improperly to consider the interests of third parties above the client's interests, thereby contravening the attorney's uncompromising duty of loyalty to the client.[206]

Even third-party beneficiaries of the attorney's services had no cause of action in Texas against an attorney with whom they were not in privity. In

interests of clients should be "zealously" pursued. *Id.* ¶¶ 2–3. The Rules recognize that in "the nature of law practice, conflicting responsibilities are encountered." *Id*. ¶ 7. "The Texas Disciplinary Rules of Professional Conduct . . . stat[e] minimum standards" for dealing with those encounters in an ethical manner. *Id*. In the end, "[e]ach lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards . . . ." *Id*. ¶ 9. Thus, it is within each lawyer's discretion to decide whether sound professional judgment will be impaired by a representation. In certain circumstances, the lawyer may still be held accountable for allowing his judgment to be impaired by agreeing to a particular representation, although the disciplinary rules themselves do not expressly cover the matter.

[204] *Bell*, 613 S.W.2d at 339.

[205] An attorney does not ordinarily have a cause of action against opposing counsel arising from conduct the second attorney engaged in as part of the discharge of his duties in a lawsuit. Plainly, such a policy would encourage "*tentative* representation, not the *zealous* representation that our profession rightly regards as an ideal and that the public has a right to expect. That policy would dilute the vigor with which Texas attorneys represent their clients, which would not be in the best interests of justice." Bradt v. West, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *see also* Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481–82 (Tex. 2015) (general rule of non-liability); Guzder v. Haynes & Boone, LLP, No. 01-13-00985-CV, 2015 WL 3423731, at *3–4 (Tex. App.—Houston [1st Dist.] May 28, 2015, no pet.) (same); Ross v. Arkwright Mut. Ins. Co., 933 S.W.2d 302, 305 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

[206] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 & cmt. 1 (Am. Bar Ass'n 2011).

the seminal case of *Barcelo v. Elliott*, an attorney prepared a will and an *inter vivos* trust agreement for his client; upon her death, the trust was to terminate, and certain assets would be distributed to her children, with the remainder to her grandchildren.[207] After her death, two of the children contested the validity of the trust and the probate court found it invalid and unenforceable.[208] Settling for an allegedly smaller share than they said they would have received under the trust, the grandchildren sued the lawyer, alleging that his negligence caused the trust to be invalid.[209]

Recognizing the common-law privity barrier that an attorney owes a duty of care only to his or her client, the plaintiffs advocated a limited exception to this barrier for lawyers who negligently draft a will or trust because such an exception would not "thwart the rule's underlying rationales" as "to persons who were specific, intended beneficiaries of the estate plan."[210] The Texas Supreme Court acknowledged that most other states have relaxed the privity barrier in the context of estate planning,[211] but concluded that:

> 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. . . .
>
> We therefore hold that an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust.[212]

However, in *Barcelo*, the court carefully explained that it expressed "no opinion as to whether the beneficiary of a trust has standing to sue an attorney representing the trustee for malpractice."[213] The Texas Supreme Court's pronouncement in *Barcelo* followed a long series of similar lower court decisions, and spawned numerous law review commentary.[214]

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[207] 923 S.W.2d 575, 576 (Tex. 1996).

[208] *See id.*

[209] *See id.*

[210] *Id*. at 577.

[211] *See id.*

[212] *Id*. at 578–79.

[213] *Id*. at 579 n.2.

[214] *See generally* Sam Johnson, *The Litigation Privilege in Texas*, 3 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 164 (2013) (discussing general rule that one party's attorney is not liable to the opposing party); David J. Beck & Geoff A. Gannaway, *The Vitality of* Barcelo *After Ten*

In *Berry v. Dodson, Nunley & Taylor*, the first reported Texas case to deal with the issue of privity in an estate planning context, the attorney allegedly failed to complete the preparation and execution of a will that would have included the testator's second wife's children as beneficiaries.[215] The court of appeals refused to find that the attorney owed a duty to the intended beneficiaries of the new will.[216] Instead, the court "follow[ed] the Texas decisions holding an attorney owes no duty to a third party in the absence of privity of contract."[217] For many years, Texas courts steadfastly refused to deviate from the strict privity rule for attorneys, and *Donaldson v. Mincey* is illustrative.[218] There, an attorney represented a father as he planned his estate.[219] After discussions with the father about increasing trust distributions to his children, the attorney drafted a trust amendment but failed to get the father to execute it.[220] After their father died, the children sued the attorney for negligence and breach of fiduciary duty, asking the court to relax the privity requirement.[221] The court declined to "disregard existing Texas law," holding that though "an attorney always

Years: When Can an Attorney Be Sued for Negligence by Someone Other than His Client?, 58 BAYLOR L. REV. 371 (2006) (discussing developments in Texas law regarding general privity rule and limited exceptions to it); Helen B. Jenkins, *Privity—A Texas-Size Barrier to Third Parties for Negligent Will Drafting—An Assessment and Proposal*, 42 BAYLOR L. REV. 687 (1990) (exploring theories underlying case law that supports the dissolution of privity barrier in will context); C. John Muller Iv, Comment, *"Assault Upon the Citadel of Privity": The Coexistence of Strict Privity and* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 39 ST. MARY'S L.J. 911 (2008) (discussing privity requirement in light of Texas Supreme Court decision allowing executor of estate to sue decedent's attorneys for malpractice); Jason D. Pinkall, Comment, *From* Barcelo *to* McCamish*: A Call to Relax the Privity Barrier in the Estate-Planning Context in Texas*, 37 HOUS. L. REV. 1275 (2000) (reviewing the privity requirement and arguing that it should be relaxed in estate-planning context).

[215] 717 S.W.2d 716, 717 (Tex. App.—San Antonio 1986), *judgment set aside*, 729 S.W.2d 690 (Tex. 1987).

[216] *See id.* at 719.

[217] *Id.*; *see also* Thomas v. Pryor, 847 S.W.2d 303, 305 (Tex. App.—Dallas 1992) (refusing to recognize malpractice action by will beneficiaries not in privity with attorney), *vacated pursuant to settlement*, 863 S.W.2d 462 (Tex. 1993).

[218] No. 05-13-00271-CV, 2014 WL 7399263, at *3 (Tex. App.—Dallas Dec. 17, 2014, pet. denied) (mem. op).

[219] *See id.* at *1.

[220] *See id.*

[221] *See id.* at *1, 3.

owes a duty of care to a client, no such duty is owed to non-client beneficiaries, even if they are harmed by the attorney's malpractice."[222]

Similarly, in *Dickey v. Jansen*, which concerned a suit by the beneficiaries of a testamentary trust against the testator's attorney, the court declined to overrule "long-standing precedent" that barred claims by those not in privity with the attorney.[223] In yet another will beneficiary's attempt to hold the attorney drafter liable through a request that the court reconsider the "well-established Texas rule," the court refused to address the point, explaining as follows: "Because opening attorney-client contracts to third party challenges would create a vast range of liability, we believe a change of this magnitude, if warranted, *should be made by the Texas Supreme Court or the Texas Legislature*."[224]

The Texas Supreme Court relaxed to a limited extent its "bright line" privity rule in *Belt v. Oppenheimer, Blend, Harrison, and Tate, Inc*.[225] In *Belt*, the court ruled that the independent executors of the decedent's estate could bring a malpractice claim on behalf of the estate as personal representatives.[226] The court reasoned that since executors have a duty to

[222] *Id*. at *2–3; *see also* Rogers v. Walker, No. 13-12-00048-CV, 2013 WL 2298449, at *6 (Tex. App.—Corpus Christi May 23, 2013, pet. denied) (mem. op.) (affirming summary judgment in attorney's favor on legal malpractice and breach of fiduciary duty claims where there was no evidence of attorney-client relationship or privity); Parsons v. Baron, No. 02-09-00380-CV, 2011 WL 3546617, at *2–5 (Tex. App.—Fort Worth Aug. 11, 2011, no pet.) (mem. op.) (holding that negligence claims against attorneys failed for lack of privity where there was no evidence of an attorney-client relationship); Haddy v. Caldwell, 355 S.W.3d 247, 251 (Tex. App.—El Paso 2011, no pet.) (stating that husband had privity with attorney who handled his former wife's medical malpractice claim because husband was also a client of the attorney and a party to the medical claims); Jurek v. Kivell, No. 01-10-00040-CV, 2011 WL 1587375, at *4–6 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.) (mem. op.) (stating that fraudulent inducement claims against opposing lawyer failed because there was no privity or duty to disclose information); Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 402, 405–08 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (affirming privity requirement and trial court's dismissal of lawsuit by a client against the law firm representing his former attorney); Vinson & Elkins v. Moran, 946 S.W.2d 381, 401–02 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) (citing Parker v. Carnahan, 772 S.W.2d 151, 156–57 (Tex. App.—Texarkana 1989, writ denied) (refusing to allow former wife to sue attorney hired by husband for malpractice, even though attorney prepared joint income tax return that benefited former wife)).

[223] 731 S.W.2d 581, 582–83 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

[224] Wright v. Gundersen, 956 S.W.2d 43, 49 (Tex. App.—Houston [14th Dist.] 1996, no writ) (emphasis added).

[225] *See* 192 S.W.3d 780, 782 (Tex. 2006).

[226] *Id*. at 782.

act on behalf of the best interests of the estate, they "stand in the shoes" of the deceased client in bringing a malpractice claim.[227]

Subsequently, in *Smith v. O'Donnell*, the Texas Supreme Court expanded its ruling in *Belt* to allow malpractice claims for legal services performed beyond estate planning.[228] In *Smith*, the court ruled that representatives of an estate could bring a malpractice claim against the decedent's attorney for failing to properly classify stock as community property regardless of whether that representation was for estate planning.[229]

Nevertheless, it is clear that an attorney is generally not liable to the *opposing party*.[230] A lawyer is authorized to practice his profession, advise his clients, and interpose any defense or supposed defense, without making himself liable for damages to a third party.[231] For some time, Texas courts

[227] *Id*. at 787.

[228] *See* 288 S.W.3d 417, 421–23 (Tex. 2009).

[229] *Id*. at 422–23.

[230] *See* Youngkin v. Hines, -- S.W.3d --, No. 16-0935, 2018 WL 1973661, at *5 (Tex. Apr. 27, 2018); Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015); Cunningham v. Tarski, 365 S.W.3d 179, 188–89 (Tex. App.—Dallas 2012, pet. denied) (holding that merely sending a cover letter accompanied by corporate documents was not a representation that the documents accurately reflected corporate affairs); Valls v. Johanson & Fairless, L.L.P., 314 S.W.3d 624, 635–36 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that "a party may not justifiably rely on statements made by opposing counsel during settlement negotiations"); Kastner v. Jenkens & Gilchrist P.C., 231 S.W.3d 571, 578 (Tex. App.—Dallas 2007, no pet.) (holding that when attorney mailed transactional document or partnership agreement, there was no reason for him to expect the non-client recipient would rely on the document); Ortiz v. Collins, 203 S.W.3d 414, 422 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (holding that attorney was not liable for alleged negligent misrepresentation made during negotiations in the context of adversarial litigation); Chapman Children's Tr. v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 443 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that nonclients would not be justified in relying on counsel's warning that they were tortiously interfering with an agreement involving the counsel's client).

[231] *See Youngkin*, 2018 WL 1973661, at *5; *Cantey Hanger*, 467 S.W.3d at 481; Guzder v. Haynes & Boone, LLP, No. 01-13-00985-CV, 2015 WL 3423731, at *3 (Tex. App.—Houston [1st Dist.] May 28, 2015, no pet.) (mem. op.); Gaia Envtl., Inc. v. Galbraith, 451 S.W.3d 398, 406 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *Cunningham*, 365 S.W.3d at 186; Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C., No. 01-06-00696-CV, 2008 WL 746548, at *7 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, pet. denied) (mem. op. on reh'g); White v. Bayless, 32 S.W.3d 271, 275 (Tex. App.—San Antonio 2000, pet. denied); Ross v. Arkwright Mut. Ins. Co., 933 S.W.2d 302, 305 (Tex. App.—Houston [14th Dist.] 1996, writ denied); Bradt v. West, 892 S.W.2d 56, 72–73 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st

remained resolute in enforcing this principle.[232] As explained in *FDIC v. Howse*, Texas follows the traditional view that an "attorney owes no duty to third party non-clients."[233]Although Texas courts have begun to relax slightly privity requirements in recent years, they generally have refused to hold attorneys liable to third persons because "an attorney owes no duty to a third party in the absence of privity of contract."[234]

In *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, the Texas Supreme Court did, however, allow non-clients to maintain a negligent misrepresentation claim against attorneys despite a lack of privity.[235] There, the non-clients sued a law firm, claiming the firm negligently misrepresented that a financial institution's board of directors had approved a settlement agreement.[236] The firm filed a motion for summary judgment, alleging that it did not owe a duty to third parties because there was no privity.[237] The trial court granted the motion, but the court of appeals reversed, holding that even absent privity, an attorney may owe a duty to avoid negligent misrepresentation to a third party.[238] The Texas Supreme Court then examined whether privity was required under Section 552 of the Restatement (Second) of Torts in order for a non-client to sue an attorney.

First, the court decided that Section 552 applies to attorneys.[239] It then explained that Section 552 imposes a duty to avoid negligent misrepresentation absent privity because the claim is not equivalent to a legal malpractice claim.[240]

Dist.] 1985, no writ); Morris v. Bailey, 398 S.W.2d 946, 947–48 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.); Kruegel v. Murphy, 126 S.W. 343, 345 (Tex. Civ. App. 1910, writ ref'd).

[232] *See* Randolph v. Resolution Tr. Corp., 995 F.2d 611, 616 (5th Cir. 1993) (rejecting argument that third party should be allowed to sue for legal malpractice because law firm knew that third party would be supplied with information based upon firm's advice); Oliver v. West, 908 S.W.2d 629, 631 (Tex. App.—Eastland 1995, writ denied) (rejecting argument that plaintiffs could assert cause of action against attorney as third-party beneficiaries).

[233] 802 F. Supp. 1554, 1563 (S.D. Tex. 1992).

[234] *Id*.

[235] 991 S.W.2d 787, 788 (Tex. 1999).

[236] *Id.* at 790.

[237] *Id.*

[238] *Id.*

[239] *Id.* at 791.

[240] *Id.* at 792.

> Under the tort of negligent misrepresentation, liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the nonclient based on the professional's manifest awareness of the nonclient's reliance on the misrepresentation and the professional's intention that the nonclient so rely.[241]

Although an attorney may be subject to liability for negligent misrepresentation under Section 552(1), liability is limited by Section 552(2) to those:

> situations in which the attorney who provides the information is aware of the nonclient and intends that the nonclient rely on the information. In other words, a section 552 cause of action is available only when information is transferred by an attorney to a known party for a known purpose.[242]

Texas courts have softened the "bright line" requirement of privity in another context as well. In *American Centennial Insurance Co. v. Canal Insurance Co.*, the court held that an excess insurance carrier has the right to bring an equitable subrogation action against the insured's defense counsel:

> If the asserted malpractice has resulted in payment of a judgment or settlement within the excess carrier's policy limits, the insured has little incentive to enforce its right to competent representation. Refusal to permit the excess carrier to vindicate that right would burden the insurer with a loss caused by the attorney's negligence while relieving the attorney from the consequences of legal malpractice. Such an inequitable result should not arise simply because the insured has contracted for excess coverage.[243]

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[241] *Id.*

[242] *Id.* at 794.

[243] 843 S.W.2d 480, 485 (Tex. 1992); *see also* Royal Ins. Co. of Am. v. Caliber One Indem. Co., 465 F.3d 614, 617 (5th Cir. 2006); Phillips v. Bramlett, 288 S.W.3d 876, 882 (Tex. 2009) (discussing excess insurer's right to subrogate against primary insurer for wrongful refusal to settle the insured's claim). For a discussion of Texas law on the duties of insurers to their insureds and the doctrine of equitable subrogation, *see* Douglas C. Monsour, Note, *How Long Will Privity*

Similarly, in *Keck, Mahin & Cate v. National Union Fire Ins. Co.*, where the excess insurer contended that it was equitably subrogated to the insureds' rights because the attorney's negligence caused it to pay more money in settlement, the Texas Supreme Court allowed the insurer to proceed in its action against the law firm.[244] The court held that, although nonclients may not sue an attorney for malpractice, "permitting an excess carrier to stand in the shoes of its insured and assert the insured's claims would not burden the existing attorney-client relationship with additional duties or create potential conflicts of interest for the attorney."[245] The court distinguished the right of equitable subrogation from an assignment of a malpractice claim, which is generally prohibited in Texas.[246] The critical distinction is that, unlike an assignment, equitable subrogation applies where "one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity should have been paid by the latter."[247] Stated another way, equitable subrogation is an equitable remedy where the payment of the loss operates as an equitable transfer of the claim.[248]

Although Texas courts have historically protected attorneys from suits brought by non-clients because of the attorney's ethical obligations to their clients and the lack of any attorney-client relationship, our courts will continue to decide whether the benefits of allowing non-clients a recovery—as they do in situations where the attorney knew that the non-client would reasonably rely on the attorney's conduct and the harm to that party was clearly foreseeable—outweigh the harm of exposing attorneys to claims from persons with whom they had little or no contact.[249]

of Contract Remain a Defense to Legal Malpractice?: American Centennial Insurance Co. v. Canal Insurance Co.*, 843 S.W.2d 480 (Tex. 1992)*, 24 TEX. TECH L. REV. 961 (1993).

[244] 20 S.W.3d 692, 695–96, 703 (Tex. 2000); *see also* Stonewall Surplus Lines Ins. Co. v. Drabek, 835 S.W.2d 708, 711 (Tex. App.—Corpus Christi 1992, writ denied).

[245] *See Keck, Mahin & Cate*, 20 S.W.3d at 700; *Stonewall*, 835 S.W.2d at 710.

[246] *See supra* Chapter III.

[247] *See* Frymire Eng'g Co. v. Jomar Int'l, Ltd., 259 S.W.3d 140, 142 (Tex. 2008) (explaining equitable subrogation) (quoting Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765, 774 (Tex. 2007)); Concierge Nursing Ctrs., Inc. v. Antex Roofing, Inc., 433 S.W.3d 37, 45 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) ("[T]he insurer as subrogee does not own the entire claim as if the claim were wholly transferred by an assignment . . . .").

[248] *See Frymire*, 259 S.W.3d at 142–43; *Stonewall*, 835 S.W.2d at 711.

[249] While not an overt attack on the privity doctrine, this tension is demonstrated in the line of cases holding that an attorney may be negligent for failing to advise a party that he does not represent her. *See, e.g.*, Wadhwa v. Goldsberry, No. 01-10-00944-CV, 2012 WL 682223, at *7 n.6

§ 2 Obligations to Third Parties Concerning Client's Funds

Mere reliance by a third party on an attorney does not establish an attorney-client relationship.[250] Thus, an attorney is not liable to a third party for failing to pay the client's debt out of settlement proceeds or insurance distributions, notwithstanding the attorney's assurance to the client's creditor to do so.[251] This is usually because the attorney is acting as an agent

(Tex. App.—Houston [1st Dist.] Mar. 1, 2012, no pet.) (mem. op.); Burnap v. Linnartz, 914 S.W.2d 142, 148–49 (Tex. App.—San Antonio 1995, writ denied) ("If circumstances lead a party to believe that they are represented by an attorney, however, the attorney may be held negligent for failing to advise the party of the attorney's non-representation."); Kotzur v. Kelly, 791 S.W.2d 254, 258 (Tex. App.—Corpus Christi 1990, no writ); Parker v. Carnahan, 772 S.W.2d 151, 157 (Tex. App.—Texarkana 1989, writ denied).

[250] *See* Nolan v. Foreman, 665 F.2d 738, 739 n.3 (5th Cir. 1982) ("All that is required under Texas law is that the parties, explicity or by their conduct, manifest an intention to create the attorney-client relationship."); Izzo v. Izzo, No. 03-09-00395-CV, 2010 WL 1930179, at *6 (Tex. App.—Austin May 14, 2010, pet. denied) (mem. op.) (stating that attorney-client relationship "may be implied from the actions of the *parties*" (emphasis added)); Bergthold v. Winstead Sechrest & Minick, P.C., No. 2-07-325-CV, 2009 WL 226026, at *7 (Tex. App.—Fort Worth 2009, no pet.) (mem. op.) ("[A]n attorney-client relationship cannot be implied based on the conduct of only one party."); Span Enters. v. Wood, 274 S.W.3d 854, 858 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (holding that there was no attorney-client relationship where attorney had no reason to know that would-be client "relied on him to provide legal services"); Dillard v. Broyles, 633 S.W.2d 636, 643 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

[251] The Texas court of appeals' decision in *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, is instructive. 32 S.W.3d 429 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). In that case, two trusts agreed to settle their lawsuit with Barry Atkins in exchange for certain "net proceeds" from a different lawsuit that Atkins was prosecuting against Motorola. *Id.* at 433. When Atkins settled the Motorola dispute, his attorneys did not comply with the trusts' requests for documentation regarding the settlement proceeds. *Id.* The court ordered Atkins and the trusts to mediate the proper allocation of the settlement funds, and the trusts agreed to settle the dispute at a lesser amount than they originally claimed. *Id.* After the mediated settlement, the trusts then sued Atkins' attorneys on multiple theories, claiming they prevented the trusts from receiving their full share of the Motorola settlement. *Id.* at 433–34. The court of appeals affirmed summary judgment in favor of Atkins' attorneys, *id.* at 432–33, reasoning that the attorneys were neither escrow agents nor trustees, and owed duties only to their clients. *Id.* at 438. The court "decline[d] to find that a client's deposit of funds into his attorneys' trust account creates a trustee/beneficiary relationship between his lawyers and an opposing party." *Id.* at 438 n.6; *see also* U.S. Bank Nat'l Ass'n v. Sheena, 479 S.W.3d 475, 476 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (affirming summary judgment in attorney's favor after attorney disbursed insurance proceeds per client's directions, despite warning from creditor that it had rights to some of the funds); Bradshaw v. Bonilla, No. 13-08-00595-CV, 2010 WL 335676, at *4–7 (Tex. App.—Corpus Christi Jan. 28, 2010, pet. denied) (mem. op.) (holding that non-client could not sue her granddaughter's attorney

on behalf of his client and is not making a "personal promise" to the third party. Nor is a law firm under any obligation to protect or care for a former client's property in enforcing its judgment for attorney's fees.[252]

However, at least with regard to a workers' compensation carrier, an attorney who settles a personal injury case on behalf of a client may be liable for conversion if he fails to withhold part of the settlement proceeds to satisfy the insurer's subrogation rights.[253] In other words, an attorney may be liable for paying funds to a client when the funds are "earmarked" for and "belong to" a third party. When a compensation carrier has paid an injured employee, the "first money" recovered in a subsequent suit against a third-party tortfeasor belongs to the compensation carrier until it has been repaid in full.[254] When an attorney accepts a settlement check from the third-party tortfeasor on behalf of his client and benefits from at least a part of it, without first recognizing the compensation carrier's subrogation rights, that attorney may be liable to the carrier for conversion.[255] This

for breach of fiduciary duty when non-client paid attorney $700,000 but attorney used the funds for more than just representing the granddaughter; there was evidence, however, of fraud).

[252] *See* Merrell v. Fanning & Harper, 597 S.W.2d 945, 950 (Tex. Civ. App.—Tyler 1980, no writ).

[253] Specifically, "[w]hen an injured worker settles a case without reimbursing a compensation carrier, everyone involved is liable to the carrier for conversion—the plaintiffs, the plaintiffs' attorney, and the defendants." Tex. Mut. Ins. Co. v. Ledbetter, 251 S.W.3d 31, 38 (Tex. 2008). At least one court has applied this rule outside of the workers' compensation context. *See* AIG Life Ins. Co. v. Federated Mut. Ins. Co., 200 S.W.3d 280, 286 (Tex. App.—Dallas 2006, pet. denied) (holding attorney was not entitled to summary judgment on insurer's conversion claim). But it is not clear whether other Texas courts would allow a conversion claim outside of the workers' compensation context. Workers' compensation carriers have a statutory—rather than equitable—right to subrogation, and are entitled to "the first money a worker receives from a tortfeasor." *Ledbetter*, 251 S.W.3d at 35–36. In contrast, under normal equitable subrogation claims, "the insurer's right of subrogation may not be exercised until the insured is made whole." Ysasaga v. Nationwide Mut. Ins. Co., 279 S.W.3d 858, 866 (Tex. App.—Dallas 2009, pet. denied); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 45(1) (AM. LAW INST. 2000) (stating that a lawyer "must promptly deliver, to the client or nonclient so entitled, funds or other property in the lawyer's possession belonging to a client or nonclient").

[254] *See Ledbetter*, 251 S.W.3d at 38 (citing Prewitt & Sampson v. City of Dallas, 713 S.W.2d 720, 722 (Tex. App.—Dallas 1986, writ ref'd n.r.e.)).

[255] *See id.*; *see also* Autry v. Dearman, 933 S.W.2d 182, 189 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (reaching same conclusion); Piland v. Harris County, No. 14-12-00087-CV, 2013 WL 151626, at *3 (Tex. App. Houston [14th Dist.] Jan. 15, 2013, no pet.) (mem. op.) (holding that a claim for conversion in such context does not bar claims for breach of contract). *But see* Home Indem. Co. v. Pate, 866 S.W.2d 277, 280–81 (Tex. App.—Houston [1st Dist.]

exception applies in another context, as well. When an attorney receives fees as part of a judgment, he becomes a party to the litigation and is bound by the judgment.[256] Thus, where the award orders an attorney to pay part of his fee to a guardian ad litem, and the attorney refuses to do so, he may be liable for conversion of those funds.[257]

When receiving funds pursuant to a settlement or judgment, prudent counsel would be wise to keep the Texas Disciplinary Rules of Professional Conduct in mind, which state that:

> Third parties, such as client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.[258]

§ 3 Conduct Foreign to the Duties of an Attorney; Immunity from Suit

Despite Texas courts' strict adherence to the privity rule in malpractice cases, an attorney may be liable for injuries to third parties when his conduct is *foreign to the duties of an attorney*.[259] As a general rule,

1993, no writ) (refusing to extend *Prewitt* to hold attorney for tortfeasor, rather than attorney for employee, liable).

[256] *See* Newman v. Link, 889 S.W.2d 288, 289 (Tex. 1994); *see also* Kabbani v. Papadopolous, No. 01-07-00191-CV, 2009 WL 469546, at *9–10 (Tex. App.—Houston [1st Dist.] Feb. 26, 2009, pet. denied) (mem. op.) (holding attorney was party to judgment awarding fees and could invoke res judicata in post-judgment dispute regarding whether the fees were excessive or unconscionable); *In re* Saad, No. 05-15-00104-CV, 2015 WL 1544795, at *1 (Tex. App.—Dallas Apr. 3, 2015, orig. proceeding [mand. denied]) (mem. op.) (holding that attorney's new trial motion extended court's plenary power because attorney was party to divorce judgment awarding attorney's fees).

[257] *See* Newman v. Link, 866 S.W.2d 721, 726 (Tex. App.—Houston [14th Dist.] 1993), *writ denied per curiam*, 889 S.W.2d 288 (Tex. 1994); *see also* Schwager v. Telecheck Servs., No. 14-01-00099-CV, 2002 WL 31995012, at *5 n.13 (Tex. App.—Houston [14th Dist.] Dec. 19, 2002, no pet.) (not designated for publication) (citing *Newman*, 866 S.W.2d at 726).

[258] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.14 cmt. 3. At least one court has held a third party cannot base a breach of fiduciary duty claim against an attorney on Rule 1.14. Jones v. Blume, 196 S.W.3d 440, 450 (Tex. App.—Dallas 2006, pet. denied).

[259] *See, e.g.*, Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 482 (Tex. 2015); Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C., No. 05-15-00055-CV, 2016 WL 164528, at *4 (Tex.

attorneys are immune from civil liability to non-clients "for actions taken in connection with representing a client in litigation."[260] Significantly, in *Cantey Hanger*, the Texas Supreme Court went further and held that "[f]raud is not an exception to attorney immunity; rather, the defense does not extend to fraudulent conduct that is outside the scope of an attorney's legal representation of his client, just as it does not extend to other wrongful conduct outside the scope of representation."[261] The court reasoned that

App.—Dallas Jan. 14, 2016, pet. denied) (mem. op.); U.S. Bank Nat'l Assoc. v. Sheena, 479 S.W.3d 475, 478–80 (Tex. App.—Houston [14th Dist.] 2015, no pet.); Essex Crane Rental Corp. v. Carter, 371 S.W.3d 366, 381–82 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); McKnight v. Riddle & Brown, P.C., 877 S.W.2d 59, 61 (Tex. App.—Tyler 1994, writ denied) ("Texas has long held that while an attorney is authorized to practice his profession without making himself liable for damages, where an attorney acting for his client participates in fraudulent activities, his action is 'foreign to the duties of an attorney.'" (citation omitted)); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ); *see also infra* Chapter VIII (discussing causes of action against attorneys on grounds other than negligence, fraud, or breach of fiduciary duty).

[260] *Cantey Hanger*, 467 S.W.3d at 481 (quoting Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 405 (Tex. App. —Houston [1st Dist.] 2005, pet. denied)); *see also* Youngkin v. Hines, No. 16-0935, 2018 WL 1973661 (Tex. Apr. 27, 2018) (affirming dismissal of claims against opposing lawyers pursuant to Texas Anti-SLAPP statute on basis of attorney immunity because attorney's negotiating settlement agreement, preparing deed to facilitate property transfer, and instituting lawsuit regarding property ownership was within scope of attorney's representation of clients).

[261] *Id.* at 484. *Wyles v. Cenlar FSB* and *Williamson v. Wells Fargo Bank, N.A.* addressed the scope of attorney immunity as it applies to attorneys acting as counsel for mortgage servicing companies in nonjudicial foreclosure sales. *See Wyles v. Cenlar FSB*, No. 7-15-CV-155-DAE, 2016 WL 1600245 (W.D. Tex. Apr. 20, 2016); *Williamson v. Wells Fargo Bank, N.A.*, No. 6:16-CV-200-MHS-JOL, 2016 WL 3265699 (E.D. Tex. Apr. 28, 2016). In *Wyles*, the lawyers were alleged to have assisted their client in a nonjudicial foreclosure sale by sending a letter to plaintiffs notifying them of the sale, posting notice of the sale, and representing the lender at the sale. *Wyles*, 2016 WL 1600245, at *2. Plaintiffs alleged that the foreclosure was wrongful and that the lawyers conspired with their client. *Id.* The court held that "providing a homeowner with notification that the mortgage is being accelerated falls within the scope of a law firm's legal representation of the mortgage servicer" and thus fell under the protection of the attorney immunity doctrine. *Id.* at *3–4.

Similarly, in *Williamson*, the plaintiff, a borrower on a mortgage loan, complained that when he attempted to reinstate his loan, he was instructed by his bank to contact its counsel to "obtain the amount of their fees and expenses so that those could be added . . . to the past due balance to arrive at the reinstatement amount." 2016 WL 3265699, at *1. Plaintiff alleged that the bank's counsel refused "to provide the reinstatement amount" and Plaintiff was therefore unable to reinstate the mortgage. *Id.* The court held that the lawyers were improperly joined in the lawsuit because attorney immunity applied, the lawyers were asked to assist in a "non-judicial foreclosure," and that refusing to provide their fees and expense information "cannot be divorced

"[a]n attorney is given latitude to 'pursue legal rights that he deems necessary and proper' precisely to avoid the inevitable conflict that would arise if he were 'forced constantly to balance his own potential exposure against his client's best interest.'"[262]

On the other hand, "attorneys are not protected from liability to non-clients for their actions when they do not qualify as the kind of conduct in which an attorney engages when discharging . . . duties to [a] client."[263] For example, an attorney cannot avoid liability for 'the damages caused by [the attorney's] participation in a fraudulent business scheme with [the] client, as such acts are entirely foreign to the duties of an attorney.'"[264]

U.S. Bank National Assoc. v. Sheena addressed the attorney immunity doctrine in the context of an attorney who allegedly wrongfully disbursed settlement funds.[265] The attorney in that case represented an apartment complex that had sustained damage from Hurricane Ike. The attorney negotiated with the insurer (but did not file a lawsuit) and obtained over $900,000 in insurance proceeds.[266] The attorney deposited the insurance proceeds in his trust account and disbursed them pursuant to his client's instructions, including making payment to himself for his attorney's fees.[267] The bank's foreclosure on the complex did not satisfy the outstanding amounts due under the mortgage and the bank filed suit against the complex and the lawyer for misappropriation of the insurance proceeds.[268]

The trial court granted summary judgment on the basis of attorney immunity, and the bank appealed.[269] The court of appeals determined that the lawyer's conduct at issue consisted of placing "settlement funds into his trust account and then disburs[ing] the funds at his client's direction, but

from attorney representation because a large part of an attorney's role is to honor the confidential billing agreement between attorney and client." *Id.* at *2–3; *see also* Rogers v. Walker, No. 09-15-00489-CV, 2017 WL 3298228, at *6 (Tex. App.—Beaumont Aug. 3, 2017, pet. filed) (mem. op.) (affirming dismissal on attorney immunity grounds in case involving attorney's role as executor of estate); Santiago v. Mackie Wolf Zientz & Mann, P.C., No. 05-16-00394, 2017 WL 944027, at *4 (Tex. App.—Dallas March 10, 2017, no pet. h.) (mem. op.) (affirming summary judgment on attorney immunity based on attorney's conduct in foreclosure proceedings before suit).

[262] *Cantey Hanger*, 467 S.W.3d at 483 (quoting *Alpert*, 178 S.W.3d at 405).

[263] *Id.* at 482.

[264] *Id.* (quoting Poole v. Houston & T.C. Ry. Co., 58 Tex. 134, 137 (1882)).

[265] 479 S.W.3d 475 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

[266] *Id.* at 476.

[267] *Id.*

[268] *Id.*

[269] *Id.* at 476–77.

without considering a third party's alleged interest in the funds."[270] Following *Cantey Hanger*, the court of appeals held that the lawyer's "allegedly actionable conduct was part of [the] discharge of his duties to his client in the litigation context"and not "foreign to the duties of an attorney," and therefore he was not liable.[271]

Although the Texas Supreme Court in *Cantey Hanger* embraced attorney immunity in the litigation context, the court made clear that it was not deciding whether attorney immunity applied *outside* the litigation context.[272] It did note, however, that other Texas courts of appeals had applied attorney immunity outside the litigation context.[273] Moreover, post-*Cantey Hanger*, courts have refused to adopt a bright-line limitation of attorney immunity.[274] The Northern District of Texas, for example, has concluded that under Texas law, the attorney immunity doctrine is not limited to the litigation context.[275] For its part, the Fifth Circuit has thus far

[270] *Id.* at 480.

[271] *Id.*

[272] 467 S.W.3d at 482 n.6 ("Because we conclude that [the defendant law firm's] alleged conduct falls within the scope of its duties in representing its client in litigation, we need not consider the attorney-immunity doctrine's application to an attorney's conduct that is unrelated to litigation . . . .").

[273] *Id.* (noting that although "[t]he majority of Texas cases addressing attorney immunity arise in the litigation context, . . . that is not universally the case" (citing Campbell v. Mortgage Elec. Registration Sys., Inc., No. 03-11-00429-CV, 2012 WL 1839357, at *6 (Tex. App.—Austin May 18, 2012, pet. denied) (mem. op.); Reagan Nat'l Advert. of Austin, Inc. v. Hazen, No. 03-05-00699-CV, 2008 WL 2938823, at *3 (Tex. App.—Austin July 29, 2008, no pet.) (mem. op.))).

[274] *See, e.g.*, Santiago v. Mackie Wolf Zientz & Mann, P.C., No. 05-16-00394, 2017 WL 944027, at *4 (Tex. App.—Dallas March 10, 2017, no pet. h.) (mem. op.); Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C., No. 05-15-00055-CV, 2016 WL 164528, at *6 n.3 (Tex. App.—Dallas Jan. 14, 2016, pet. denied) (mem. op.); Farkas v. Wells Fargo Bank, N.A., No. 03-14-00716-CV, 2016 WL 7187476, at *8 (Tex. App.—Austin Dec. 8, 2016, no pet.) (mem. op.); LJH, Ltd. v. Jaffe, No. 4:15-CV-00639, 2017 WL 447572, at *3 (E.D. Tex. Feb. 2, 2017) (mem. op.); Rogers v. Walker, No. 09-15-00489-CV, 2017 WL 3298228, at *4 (Tex. App.—Beaumont Aug. 3, 2017, pet. filed) (mem. op.) (holding that an attorney who represented a client outside the formal litigation in a probate proceeding was entitled to attorney immunity and stating that it is aware of no authority that the nonlitigation context "of the present case falls outside the purview of *Cantey Hanger*").

[275] Dorrell, et al. v. Proskauer Rose LLP, et al., No. 3:16-cv-1152-N, 7–10 (N.D. Tex. Nov. 2, 2017); *see also* Morse v. Codilis & Stawiarski, P.C., No. 4:16-CV-279, 2017 WL 2416332, at *2 (E.D. Tex. June 5, 2017) ("To the extent Plaintiff argues . . . that attorney immunity applies only to counsel involved in litigation, and not to counsel pursuing foreclosure proceedings, Plaintiff's assertion is incorrect. . . . Numerous opinions in other cases have found attorney immunity

declined to weigh in on whether attorney immunity applies outside of the litigation context. For example, in *Kelly v. Nichamoff*, the Fifth Circuit determined that the defendant-attorney had not satisfied his burden at the motion to dismiss stage of proving his entitlement to attorney immunity.[276] The court therefore expressly declined to reach the question of whether an attorney is "entitled immunity under Texas law if the alleged conduct was unrelated to litigation or a 'litigation-like' setting."[277]

The Texas Disciplinary Rules prohibit a lawyer from making knowingly false statements of material fact or law to "a third person," a term that presumably includes non-clients.[278] Thus, an attorney may violate this

applicable outside of the litigation context, including specifically in foreclosure proceedings." (internal citations omitted)).

[276] 868 F.3d 371, 376 (5th Cir. 2017).

[277] *Id.* Texas courts have also rejected the application of a "crime exception" to the attorney immunity doctrine. *See Dorrell*, No. 3:16-cv-1152-N, 11–13 (N.D. Tex. Nov. 2, 2017) (citing cases). That is, attorney immunity considers the kind of conduct in which the attorney engages. If the conduct is "within the scope of client representation," the attorney immunity doctrine immunizes attorney conduct no matter if it is "wrongful or fraudulent." *Santiago*, 2017 WL 944027, at *3. Notably, the conduct at issue in *Cantey Hanger* was itself alleged to be evading tax liability, a criminal act. 467 S.W.3d at 480. And in *Highland*, the law firm was entitled to immunity despite its allegedly "criminal, tortious, and malicious" conduct. 2016 WL 164528, at *6.

[278] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.01; Davis v. White, No. 02-13-00191-CV, 2014 WL 7387045, at *7–8, *12–13 (Tex. App.—Fort Worth Feb. 5, 2015) (mem. op.) (reporting potential violation of Rule 4.01, among other rules, to State Bar where evidence showed attorney made various misrepresentations to his partner), *rev'd on other grounds*, 475 S.W.3d 783 (Tex. 2015) (per curiam); Prize Energy Res., L.P. v. Cliff Hoskins, Inc., 345 S.W.3d 537, 573–77 (Tex. App.—San Antonio 2011, no pet.) (holding attorney violated Rule 4.01, among other rules, when he used false letterhead and claimed to be a businessman while attempting to contact potential witnesses); Flume v. State Bar of Tex., 974 S.W.2d 55, 60–61 (Tex. App.—San Antonio 1998, no pet.) (affirming sanctions in disciplinary proceeding against attorney because she mislead "opposing counsel or another party"); *see also* Tex. Ethics Comm'n Op. No. 630 (2013) (stating that lawyer would violate Rule 4.01 by giving the client "signed letters on the lawyer's letterhead making demands to third parties purportedly on behalf of persons who are customers of the client when the lawyer does not represent such persons"); Tex. Ethics Comm'n Op. No. 499 (1995) (stating that Rule 4.01 would be violated if in-house attorney represented to opposing party and administrative judge that factual basis for jurisdiction existed when attorney knew that such basis did not exist). *But see* Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993) (ruling that placing material in affidavit that has not previously been discussed with witness and then attempting to persuade witness that it is accurate version of events is not making false statement in violation of Rule 4.01, if not made in bad faith or with lack of factual basis); Blankinship v. Brown, 399 S.W.3d 303, 311 (Tex. App.—Dallas 2013, pet. denied) (holding that Rule 4.01 does not create a private cause of action); Jurek v. Kivell, No. 01-10-00040-CV, 2011

prohibition by making a false statement or by affirming such a statement made by another.[279] This obligation extends to legal opinions or other evaluations provided to a client.[280]

§ 4 Negligent Misrepresentation

As discussed in Section 1 of this Chapter, the tort of negligent misrepresentation is based on Section 552 of the Restatement (Second) of Torts, which provides, that to recover on such theory, a plaintiff must establish the following: a duty to act with care; a negligent representation upon which third parties are expected to, and do, rely to their damage; and knowledge by or notice to the professional that the representation will be relied upon.[281]

Until the late 1980s, Texas courts had refused to apply Section 552 to attorneys,[282] even while sometimes applying it to other professionals. For example, in *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, where creditors sued an accounting firm hired by its debtor to audit its financial records before going bankrupt, the court of appeals applied Section 552 of the Restatement and held that privity was not a bar to recovery against the accounting firm.[283] The *Blue Bell* court also considered the apparent conflict between this conclusion and its earlier decision in *First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart*.[284] In *First Municipal*, the court did not apply Section 552 of the Restatement to an attorney who had issued an opinion letter to a client knowing a third party

WL 1587375, at *6–7 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.) (mem. op.) (same); Joyner v. DeFriend, 255 S.W.3d 281, 282 (Tex. App.—Waco 2008, no pet.) (same).

[279] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.01, cmt. 2.

[280] *See id.*

[281] RESTATEMENT (SECOND) OF TORTS § 552 (1977).

[282] *See* Marshall v. Quinn-L Equities, Inc., 704 F. Supp. 1384, 1394–95 (N.D. Tex. 1988) (applying Texas law); Thompson v. Vinson & Elkins, 859 S.W.2d 617, 623 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (holding that Section 552 of the Restatement (Second) of Torts does not apply to attorneys); First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410, 413–14 (Tex. App.—Dallas 1983, writ ref'd n.r.e.); Bell v. Manning, 613 S.W.2d 335, 338–39 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (holding that Section 552 did not apply to attorney because of absence of privity between attorney and plaintiff).

[283] 715 S.W.2d 408 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

[284] 648 S.W.2d at 413.

would rely on it.[285] But in *Blue Bell*, the court distinguished *First Municipal* as follows:

> We doubt the wisdom of continuing to apply different standards for determining the liability of different professionals to third parties, but conclude that we need not eliminate these distinctions in this case. We limit, therefore, our holding to apply section 552 of the Restatement to accountant liability to third parties whom the accountant intends to receive the information, or whom the accountant knows, or should know, will receive the information, or parties who are members of such a class of persons.[286]

Other jurisdictions have not been reluctant to hold attorneys liable to third parties for negligent misrepresentations made in the course of representing a client. However, in those instances, there was usually a determination that the attorney intended the representation to influence the third party's actions, and the third party's reliance on the representation was justified.[287]

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[285] *Id.*

[286] *Blue Bell*, 715 S.W.2d at 413.

[287] *See, e.g.*, *In re* Allstate Life Ins. Co. Litig., 971 F. Supp. 2d 930, 948–51 (D. Ariz. 2013) (holding that under Arizona law, bondholders who gave incorrect reasons for purchasing bonds were not precluded from bringing negligent misrepresentation claims against underwriters for the bonds, attorneys for the underwriters, and entities that received the proceeds from the bonds, where the bondholders also stated that they relied on alleged misstatements in bond's preliminary official statement, the official statement, and the rating of investment rating agency in deciding to purchase the bonds); Sciaretta v. Lincoln Nat'l Life Ins. Co., 899 F. Supp. 2d 1318, 1330 (S.D. Fla. 2012) (holding that under Florida law, life insurance applicant's attorney possessed requisite pecuniary interest to subject him to liability for negligent misrepresentation in application, even if attorney was not compensated specifically for policy's issuance, where attorney served as applicant's attorney for thirty years, signed as witness exclusive rights agreement for financing arrangement for payment of initial premiums under policy, and signed trust agreement as trustee); Eaves v. Designs for Finance, Inc., 785 F. Supp. 2d 229, 255–56 (S.D.N.Y. 2011) (holding that under New York law, where actual contractual privity is lacking, a plaintiff asserting a negligent misrepresentation claim against an attorney must allege the following: (1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance); Remediation Capital Funding LLC v. Noto, 147 A.D.3d 469, 471 (N.Y. 1st Dept. 2017) (holding that allegations that borrower's attorney prepared an opinion letter at lender's request, provided letter to lender, and did so understanding that lender would rely upon letter in making loan were

Texas law now allows negligent misrepresentation suits against attorneys, but the courts typically refuse to find liability if the attorney did not intend his representation to influence the third party's actions.[288] An attorney is also less likely to be found liable when the third party's reliance is without reasonable justification.[289] Stated differently, the duty imposed on an attorney to a non-client is limited to situations where the attorney

sufficient to allege a privity-like relationship, as required for lender to state a cause of action against attorney for negligent misrepresentation).

[288] *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 793–94 (Tex. 1999); *see also* Grant Thornton LLP v. Prospect High Income Fund, 314 S.W.3d 913, 920 (Tex. 2010) (confirming that defendant—in this case, an auditor—must intend the nonclient to rely on the provided information); Bank of Texas, N.A. v. Ravkind, No. 05-11-01123-CV, 2013 WL 1281860, at *3 (Tex. App.—Dallas Mar. 12, 2013, no pet.) (mem. op.) (holding there was no evidence that attorney intended for verification of deposit form to reach the specific bank that relied on it); Cunningham v. Tarski, 365 S.W.3d 179, 188–89 (Tex. App.—Dallas 2012, pet. denied) (holding that merely sending a cover letter accompanied by corporate documents was not a representation that the documents accurately reflected corporate affairs); Kastner v. Jenkens & Gilchrist P.C., 231 S.W.3d 571, 578 (Tex. App.—Dallas 2007, no pet.) (holding that when attorney mailed transactional document or partnership agreement, there was no reason for him to expect the non-client recipient would rely on the document); Wright v. Sydow, 173 S.W.3d 534, 554 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (stating that "non-client cannot rely on attorney's misrepresentations unless the attorney invites that reliance"); Daniels v. Walters, No. 03-03-00375-CV, 2004 WL 741672, at *5 (Tex. App.—Austin Apr. 8, 2004, pet. denied) (mem. op.) (holding that when attorneys warned non-client that they did not represent him, it indicated they "did not intend for him to rely on their statements").

[289] *See* Valls v. Johanson & Fairless, L.L.P., 314 S.W.3d 624, 635 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that "a party may not justifiably rely on statements made by opposing counsel during settlement negotiations"); Alexander v. Malek, No. 01-06-01156-CV, 2008 WL 597652, at *1, *3 (Tex. App.—Houston [1st Dist.] Mar. 6, 2008, no pet.) (mem. op.) (stating that pro se plaintiff was not justified in relying on opposing counsel's promise that if plaintiff waived her right to a jury trial, she could later change her mind); Ortiz v. Collins, 203 S.W.3d 414, 422 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (holding that reliance on representations made in a business transaction is not justified if the context is adversarial, and that the alleged existence of an oral agreement to sell property did not align the parties and remove the adversarial nature of the negotiations); Lesikar v. Rappeport, 33 S.W.3d 282, 319 (Tex. App.—Texarakana 2000, pet. denied) (stating that party was not justified in relying on opposing counsel's assertions where the parties had been involved in numerous suits, even if the attorney intended that his misrepresentations be relied on); Chapman Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 443 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that nonclients would not be justified in relying on counsel's warning that they were tortiously interfering with an agreement involving the counsel's client). *But see* McMahan v. Greenwood, 108 S.W.3d 467, 497 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (holding that reliance on attorney's statements was justified when parties "were ostensibly working toward the same goal of a successful business venture").

intends for the non-client to rely on the representation and the non-client justifiably does so.[290]

In the leading case of *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, the Texas Supreme Court concluded that Texas law allows a cause of action against an attorney based on a theory of negligent misrepresentation.[291] In *McCamish*, the plaintiff (Appling) was a general partnership comprised of four family trusts and the managing partner of Boca Chica, a joint venture created to develop properties.[292] In 1985, Boca Chica obtained a line of credit from VSA in order to complete a real estate project.[293] Boca Chica accepted the loan agreement on the condition that VSA would expand their line of credit if certain conditions were met in the future.[294] When VSA failed to perform under the contract, Boca Chica filed a lender liability suit. Fearing that the Federal Savings & Loan Insurance Corporation ("FSLIC") would declare VSA insolvent and take it over before a judgment could be obtained, Boca Chica was eager to reach a settlement.[295] During settlement discussions, Appling *relied* on VSA's attorney's misrepresentations that the settlement would be enforceable against the FSLIC.[296]

The court held that a party who entered into a settlement agreement with its lender, which could not be enforced after the lender was declared

[290] Blankinship v. Brown, 399 S.W.3d 303, 309–10 (Tex. App.—Dallas 2013, pet. denied). In *Blankinship*, golf professional Timothy Brown entered into a business relationship with plaintiffs that violated Brown's non-compete agreement with a third party, of which the plaintiffs were unaware. *Id.* at 305. A lawyer for plaintiffs subsequently drafted an independent contract agreement and presented it to Brown, who gave it to his attorney for review. *Id.* After the attorney revised the agreement and the plaintiffs signed it, Brown disclosed the non-compete agreement to the plaintiffs. *Id.* The plaintiffs terminated their contract with Brown and sued Brown and his attorney for common law fraud, fraud by nondisclosure, and negligent misrepresentation. *Id.* In affirming the summary judgment for the attorney, the Dallas Court of Appeals stated that an attorney may only be liable to a non-client for negligent misrepresentation "when (1) the attorney is aware of the non-client and intends that the non-client rely on the misrepresentation; and (2) the non-client justifiably relies on the attorney's representation of a material fact." *Id.* at 309–10. A non-client's reliance is generally not justified when the representation takes place in an adversarial context, nor can a non-client justifiably rely on an attorney's representation if the attorney does not invite that reliance. *Id.* at 310.

[291] 991 S.W.2d 787, 793–94 (Tex. 1999).

[292] *Id.* at 788.

[293] *Id.*

[294] *Id.*

[295] *Id.* at 789.

[296] *Id.* at 789–90.

insolvent, could bring suit against the lender's attorneys for representing that the agreement would be enforceable.[297] The *McCamish* decision carefully points out that, although there can be a duty between attorneys and non-clients, that duty is a limited one.[298] Accordingly, the duty therefore arises only "when (1) the attorney is aware of the non-client and intends that the non-client rely on the representation; and (2) the non-client justifiably relies on the attorney's representation of a material fact."[299]

To be clear, however, in Texas a non-client usually cannot maintain a negligent misrepresentation action against an attorney who merely issues a legal opinion regarding the interpretation of a contract.[300] Nor does an

[297] *See id.* at 788.

[298] *Id.* at 793–94; *see also* Blankinship v. Brown, 399 S.W.3d 303, 309–11 (Tex. App.—Dallas 2013, pet. denied) (affirming that attorney's duty to non-client is limited, and declining to expand liability such that lawyer is on the hook for misrepresentations when preparing documents—based on information provided by a client—that ends up in a non-client's hands); Kastner v. Jenkens & Gilchrist, P.C., 231 S.W.3d 571, 577 (Tex. App.—Dallas 2007, no pet.) (stating limited circumstances in which an attorney has a duty to a non-client); Wright v. Sydow, 173 S.W.3d 534, 554 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (noting the limited "scope of the duty imposed on an attorney to a non-client"); McMahan v. Greenwood, 108 S.W.3d 467, 496–97 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (stating that an attorney's liability for negligent misrepresentation is limited to specific situations).

[299] *Blankinship*, 399 S.W.3d at 309–10.

[300] *See* Ponder v. Mankoff, 889 S.W.2d 637, 643–44 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (drafting of tax opinion letter did not occur while providing legal services because no attorney-client relationship between investor and attorney); *see also* Cunningham v. Tarski, 365 S.W.3d 179, 188–89 (Tex. App.—Dallas 2012, pet. denied) (sending a cover letter accompanied by corporate documents, but without any legal opinions or evaluations, was not a representation that the documents accurately reflected corporate affairs); *Kastner*, 231 S.W.3d at 578 (sending a partnership letter and cover letter discussing the mechanics of an upcoming transaction was not enough to induce reliance when the letter contained no legal opinions or evaluations); Daniels v. Walters, No. 03-03-00375-CV, 2004 WL 741672, at *4–5 (Tex. App.—Austin Apr. 8, 2004, pet. denied) (mem. op.) (holding that legal argument regarding ownership of property under deed records was not a statement of fact intended to be relied on); Fina Supply, Inc. v. Abilene Nat'l Bank, 726 S.W.2d 537, 540 (Tex. 1987) (holding that a bank officer's representations that coverage of letter of credit could be expanded by amending expiration date were representations concerning legal effect of a document, which is "a statement of opinion rather than of fact and will not ordinarily support an action for fraud"); Martin v. Boyd, 203 S.W.2d 266, 268 (Tex. Civ. App.—Texarkana 1947, no writ) (stating that where an attorney was alleged to have represented falsely and fraudulently that in his opinion other parties had secured title to appellees' land that could not be defeated by them and that they would lose any legal contest, such representations "would not constitute fraud"). *Cf.* N.Y. Life Ins. Co. v. Miller, 114 S.W.3d 114, 124–25 (Tex. App.—Austin 2003, no pet.) (stating that "a clear contract-interpretation dispute" between the contracting parties should not be converted "into a negligent-misrepresentation claim").

opinion letter, if it merely expresses a law firm's opinion as to the application of the law to specified facts (without misrepresenting the facts themselves or knowingly misrepresenting the law), constitute a misrepresentation.[301] Nevertheless, some courts outside Texas have allowed actions by non-clients for an attorney's negligent opinion.[302] For example, in *Eisenberg v. Gagnon*, an attorney who issued a tax opinion for use in a limited partnership offering memorandum was held liable to third party investors for negligent misrepresentation.[303] The court's rationale was that the plaintiff's action "was not one for legal malpractice," but one asserting that the attorney had deceived the third party investors "in a business transaction in which he had a pecuniary interest," by participating in the sale of worthless securities in which he would receive a major part of the proceeds.[304] The court based liability on Section 552 of the Restatement, which provides as follows: "One who . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."[305]

[301] *See, e.g.*, Transport Ins. Co. v. Faircloth, 898 S.W.2d 269, 276 (Tex. 1994); Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983); Arlington Home, Inc. v. Peak Envtl. Consultants, Inc., 361 S.W.3d 773, 781 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding that a home inspector for mold did not commit negligent misrepresentation when stating an opinion as to the absence of mold based on current mold tests). *But see* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 793 (Tex. 1999) (stating that a "typical negligent misrepresentation case involves one party to a transaction receiving and relying on an evaluation, such as an opinion letter, prepared by another party's attorney"); *Cunningham*, 365 S.W.3d at 188–89 (noting that cover letter contained no legal opinions regarding the documents that were attached, and that the letter did not represent the documents were accurate); Ironshore Europe DAC v. Schiff Hardin, LLP, 284 F. Supp. 3d 845, 852 (E.D. Tex. 2018) (holding that the doctrine of attorney immunity did not preclude claim for negligent misrepresentation against law firm for omitting material facts in certain representations made to client's insurer during course of lawsuit).

[302] *See* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 906 (Cal. Ct. App. 1976); Flaherty v. Weinberg, 492 A.2d 618, 621–22 (Md. 1985); Petrillo v. Bachenberg, 655 A.2d 1354, 1360–61 (N.J. 1995) (holding that attorneys may be liable to non-clients for negligent misrepresentation under Section 552 when an attorney who represented the seller of real estate provided a broker with a composite report of some, but not all, percolation tests performed on the property, which was misleading); Holland v. Lawless, 623 P.2d 1004, 1011 (N.M. Ct. App. 1981).

[303] 766 F.2d 770 (3d Cir. 1985).

[304] *Id*. at 779–80.

[305] RESTATEMENT (SECOND) OF TORTS § 552 (1977).

§ 5 Assignment of Legal Malpractice Claims

As a general rule, legal malpractice claims are not assignable in Texas.[306] In *State Farm Fire and Casualty Co. v. Gandy*, the Texas Supreme Court weighed the potential advantage of such assignments, freeing the defendant client from liability while funding the plaintiff's judgment, with the disadvantage of creating a potential conflict of interest between the client and her defense attorney.[307] It did not mention the one contrary court of appeals decision,[308] but concluded:

> The threat that a plaintiff might offer to settle with a defendant for an assignment of claims against the defendant's lawyer would tend to make the defendant's lawyer less zealous in his advocacy, so as not to provoke the plaintiff, and would make the defendant and his lawyer wary of each other, disintegrating the trust relationship necessary for effective representation.[309]

Two years earlier, *Zuniga v. Groce, Locke & Hebdon*, squarely addressed the assignability issue.[310] The plaintiffs obtained a judgment

[306] *See* State Farm Fire & Casualty Co. v. Gandy, 925 S.W.2d 696, 707–08 (Tex. 1996); *see also* PPG Indus. v. JMB/Houston Ctrs. Ltd. P'ship, 146 S.W.3d 79, 107 (Tex. 2004) (citing Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref'd)); Am. Homeowner Pres. Fund, LP v. Pirkle, 475 S.W.3d 507, 518 (Tex. App.—Fort Worth 2015, pet. denied); APM Enters. v. Nat'l Loan Acquisitions Co., No. 06-14-00027-CV, 2014 WL 5317753, at *6 (Tex. App.—Texarkana Oct. 27, 2014, no pet.) (mem. op.); Magill v. Watson, 409 S.W.3d 673, 677–78 (Tex. App.—Houston [1st Dist.] 2013, no pet.); InLiner Americas, Inc. v. Macomb Funding Grp., L.L.C., 348 S.W.3d 1, 6 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); Bradshaw v. White, No. 08-03-00186-CV, 2004 WL 1045469, at *3 (Tex. App.—El Paso May 6, 2004, no pet.) (mem. op.); City of Houston v. S. Elec. Servs., Inc., No. 01-06-00180-CV, 2007 WL 1228549, at *2 (Tex. App.—Houston [1st Dist.] Apr. 26, 2007, no pet.) (mem. op.); *In re* Erickson, No. 16-10437-tmd, 2016 WL 5349727, at *2 (Bankr. W.D. Tex. Sept. 26, 2016); Camp v. RCW & Co., No. H-05-3580, 2007 WL 1306841, at *6 (S.D. Tex. May 3, 2007); Britton v. Seale, 81 F.3d 602, 603–05 (5th Cir. 1996); Vinson & Elkins v. Moran, 946 S.W.2d 381, 389 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.); McLaughlin v. Martin, 940 S.W.2d 261, 263–64 (Tex. App.—Houston [14th Dist.] 1997, no writ); City of Garland v. Booth, 895 S.W.2d 766, 769–70 (Tex. App.—Dallas 1995, writ denied).

[307] *See Gandy*, 925 S.W.2d at 708.

[308] *See* Stonewall Surplus Lines Ins. Co. v. Drabek, 835 S.W.2d 708, 711 (Tex. App.—Corpus Christi 1992, writ denied).

[309] *Gandy*, 925 S.W.2d at 708.

[310] 878 S.W.2d 313, 314 (Tex. App.—San Antonio 1994, writ ref'd). The Texas Supreme Court's "writ refused" designation indicates its approval and adoption of the appellate court

against the manufacturing company, whose insurer had become insolvent.[311] Thereafter, the manufacturing company assigned to the plaintiffs its right to sue the manufacturing company's lawyer for malpractice, and the plaintiffs agreed not to collect the judgment from the manufacturing company.[312] In its opinion, the *Zuniga* court outlined several theories supporting its holding that legal malpractice claims are not assignable.[313] Foremost, the court noted that "to allow assignability would make possible the commercial marketing of legal malpractice causes of action by strangers, which would demean the legal profession."[314] The court found that the motive in most legal malpractice assignments was the plaintiff's inability to collect a judgment from an insolvent defendant.[315] For example, "[i]n several instances, the malpractice plaintiff was the original plaintiff who, unable to collect against the original defendant, obtained the malpractice action in hopes of satisfying the underlying judgment."[316] The court determined that the assignment in the case at bar was "a transparent device to replace a judgment-proof, uninsured defendant with a solvent defendant."[317] For this reason, the court determined that:

> [T]o allow assignments would exact high costs: the plaintiff would be able to drive a wedge between the defense attorney and his client by creating a conflict of interest; in time, it would become increasingly risky to represent the underinsured, judgment-proof defendant; and the malpractice case would cause a reversal of the positions taken by each set of lawyers and clients, which would embarrass and demean the legal profession.[318]

decision. *See* TEX. R. APP. P. 56.1(c); Int'l Holdings, Inc. v. Westinghouse Elec. Corp., 856 S.W.2d 479, 483 (Tex. App.—San Antonio 1993, no writ) (noting that decision in which supreme court refuses an application for writ of error is as binding as a decision of the supreme court itself), *disapproved on other grounds*, *In re* Smith Barney, Inc., 975 S.W.2d 593 (Tex. 1998); *see also Gandy*, 925 S.W.2d at 707–08 (discussing and restating *Zuniga*'s holding as its own).

[311] *See Zuniga*, 878 S.W.2d at 314.

[312] *See id.*

[313] *Id.* at 316.

[314] *Id.*

[315] *See id.*

[316] *Id.*

[317] *Id.* at 317.

[318] *Id.*

In the underlying tort case, the Zunigas' position was that they had a valid tort case, and that they would prevail even if their opponent's lawyer was capable.[319] However, to prove causation in the malpractice case assigned to the Zunigas, they would have to take the position that they would have lost but for the incompetence or negligence of their opponent's counsel.[320] According to the court, "[f]or the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth."[321] Concluding that the costs to the legal system of assignment outweighed the benefits, the court held that "an assignment of a legal malpractice action arising from litigation is invalid."[322]

Gandy and *Zuniga* place Texas in line with the majority of courts in other jurisdictions,[323] which generally hold that "assignments of legal

[319] *See id.* at 318.

[320] *See id.*

[321] *Id.*

[322] *Id.*

[323] *See* Webb v. Gittlen, 217 Ariz. 363, 366 (2008) (declining to reach issue, but citing Schroeder v. Hudgins, 690 P.2d 114, 118–19 (Ariz. Ct. App. 1984) (discussing the holding of various courts which found that a cause of action for legal malpractice is not assignable)); Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976) (rejecting assignability due to potential commercialization of malpractice claims and detrimental effect on attorney-client relationship); People v. Adams, 243 P.3d 256, 263 (Colo. 2010) (citing Roberts v. Holland & Hart, 857 P.2d 492, 495–96 (Colo. Ct. App. 1993) (rejecting assignability on public policy grounds and general nonassignability of matters of personal trust or personal services); Washington v. Fireman's Fund Ins. Co., 459 So. 2d 1148, 1149 (Fla. Dist. Ct. App. 1984) (per curiam) (stating that a cause of action for legal malpractice is not assignable on grounds of public policy); Hoth v. Stogsdill, 569 N.E.2d 34, 39 (Ill. App. Ct. 1991) (explaining that cause of action for legal malpractice is not assignable to a bankruptcy trustee); State Farm Mut. Auto. Ins. Co. v. Estep, 873 N.E.2d 1021, 1025–26 (Ind. 2007) (discussing policy reasons for prohibiting assignment of malpractice claims); Rosby Corp. v. Townsend, Yosha, Cline & Price, 800 N.E.2d 661, 662 (Ind. Ct. App. 2003) (stating that barring assignment of all legal malpractice claims protects unique nature of the attorney-client relationship); Bank IV Wichita, Nat'l Assoc. v. Arn, Mullins, Unruh, Kuhn & Wilson, 827 P.2d 758, 764–66 (Kan. 1992) (rejecting both assignment of legal malpractice claims and equitable subrogation of debtor's malpractice claims by creditor on policy of nonassignability of personal causes of action); Davis v. Scott, 320 S.W.3d 87, 90 (Ky. 2010); Beaty v. Hertzberg & Golden, P.C., 571 N.W.3d 716, 721 (Mich. 1997); Burnison v. Johnston, 764 N.W.2d 96, 97 (Neb. 2009); Chaffee v. Smith, 645 P.2d 966, 966 (Nev. 1982); Can Do, Inc. v. Manier, Herod, Hollabaugh & Smith, 922 S.W.2d 865, 866–70 (Tenn. 1996) (disallowing assignment of legal malpractice actions on policy grounds including risk of collusion and impairment of attorney-client relationship).

malpractice claims offend public policy."[324] Numerous courts have quoted (or cited) with approval a California court's explanation for this prohibition:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandising such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the

[324] Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves, 709 F. Supp. 44, 50 n.7 (D. Conn. 1989); *see also Schroeder*, 690 P.2d at 118–19 (stating that cause of action for legal malpractice is not assignable); *Goodley*, 133 Cal. Rptr. at 87 (stating that assignment of cause of action for legal malpractice violates public policy); Learning Curve Int'l, Inc. v. Seyfarth Shaw LLP, 392 Ill. App. 3d 1068, 1074 (Ill. App. Ct. 2009) (citing Clement v. Prestwich, 448 N.E.2d 1039, 1041 (Ill. App. Ct. 1983) (refusing to allow assignment of a cause of action for legal malpractice on grounds of public policy)); Joos v. Drillock, 338 N.W.2d 736, 739 (Mich. Ct. App. 1983) (stating that a cause of action for legal malpractice may not be assigned because of public policy and attorney-client relationship).

> sanctity of the highly confidential and fiduciary relationship existing between attorney and client.[325]

In those jurisdictions that have allowed the assignment of legal malpractice actions,[326] the rationale usually has been stated as follows:

> By contrast, a claim for damages based upon legal malpractice does not involve personal injury in that it arises out of negligence and breach of contract, and the injury

[325] *Goodley*, 133 Cal. Rptr. at 87; *see also* Cook v. Nationwide Ins. Co., 962 F. Supp. 2d 807, 817 (D. Md. 2013) (mem. op.); *In re* Thomas, 387 B.R. 808, 813 (D. Colo. 2008); Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP, 357 F. Supp. 2d 951, 959 (E.D. Va. 2005); Alcman Servs. Corp. v. Bullock, 925 F. Supp. 252, 258 (D. N.J. 1996); Scarlett v. Barnes, 121 B.R. 578, 582 (W.D. Mo. 1990); *Cont'l Casualty*, 709 F. Supp. at 50 n.7; White Mountains Reinsurance Co. of Am. v. Borton Petrini, LLP, 164 Cal. Rptr. 3d 912, 913, 915–17 (Cal. Ct. App. 2013) (quoting *Goodley* at length but recognizing small exception for certain transfers of claims as part of a larger commercial transfer between insurance companies); Law Office of David J. Stern v. Security Nat'l Servicing Corp., 969 So.2d 962, 969 (Fla. 2007); St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani, 293 P.3d 661, 665–67 (Idaho 2013) (quoting *Goodley* with approval but holding that malpractice claims are assignable when included in a commercial transaction and are transferred at the same time as other assets or liabilities); Brocato v. Prairie State Farmers Ins. Ass'n, 520 N.E.2d 1200, 1201–02 (Ill. App. 1988); *Bank IV Wichita, Nat'l Assoc.*, 827 P.2d at 765; *Rosby Corp.*, 800 N.E.2d at 662; Associated Ins. Serv., Inc. v. Garcia, 307 S.W.3d 58, 63 (Ky. 2010); Taylor v. Babin, 13 So.3d 633, 639–40 (La. Ct. App. 2009); Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 534 n.15 (Mich. 1991); VinStickers, LLC v. Stinson Morrison Hecker LLP, 369 S.W.3d 764, 766–67 (Mo. Ct. App. 2012); Tower Homes v. Heaton, 377 P.3d 118, 122–23 (Nev. 2016); *Chaffee*, 645 P.2d at 966; *Can Do, Inc.*, 922 S.W.2d at 868–69; *Zuniga*, 878 S.W.2d at 316 n.4; MNC Credit Corp. v. Sickels, 497 S.E.2d 331, 333–34 (Va. 1998); Del. CWC Liquidation Corp. v. Martin, 584 S.E.2d 473, 478–79 (W. Va. 2003).

[326] *See* Stichting v. Schreiber, 407 F.3d 34, 46 n.5 (2d Cir. 2005) (observing that "intermediate New York State courts have routinely upheld the assignability of legal malpractice actions"); Oppel v. Empire Mut. Ins. Co., 517 F. Supp. 1305, 1307 (S.D.N.Y. 1981) (applying New York law); Gurski v. Rosenblum & Filan, LLC, 885 A.2d 163, 171 (Conn. 2005) (stating that not every assignment of a legal malpractice claim is barred); Villanueva v. First Am. Title Ins. Co., 740 S.E.2d 108, 109 (Ga. 2013) (holding that "legal malpractice claims are not per se unassignable"); N.H. Ins. Co. v. McCann, 707 N.E.2d 332, 336 (Mass. 1999) (stating that not all assignments are barred); Gregory v. Lovlien, 26 P.3d 180, 184–85 (Or. Ct. App. 2001) (holding that not all legal malpractice assignments are barred); Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 539 A.2d 357, 359 (Pa. 1988); Cerberus Partners, L.P. v. Gadsby & Hannah, 728 A.2d 1057, 1060 (R.I. 1999) (holding that legal malpractice claims may be assigned as part of a general commercial assignment); *see also* FDIC v. Nathan, 804 F. Supp. 888, 895–96 (S.D. Tex. 1992) (applying federal law to determine assignability of legal malpractice claims, the court held them assignable from bank to FDIC, even when contrary to state law). As the above cases show, some courts "allowing" malpractice claims to be assigned do so on a more limited basis than others.

> alleged concerns purely pecuniary interests. The rights involved are more akin to property rights which *can* be assigned prior to liquidation.
>
> The only matter which remains to be considered is whether public policy precludes a client from assigning a claim for negligence and breach of contract against his or her attorney . . . .
>
> We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected.[327]

In Texas, the prohibition against assignability does not bar a client from instituting a malpractice action against his attorney, but does prevent the client from assigning the malpractice claim to an adversary in the underlying litigation.[328]

Two additional issues have been raised since the *Zuniga* decision in 1994: (1) how far does the bar against assignments extend when the malpractice arises in a non-litigation context, and (2) may a court force an assignment through turnover or by order? As to the first issue, the bar has not been limited to situations where the malpractice was committed in the context of litigation. In a subsequent suit by beneficiaries under a will against an estate's law firm,[329] the court of appeals held that public policy concerns should guide its analysis: "Assignments should be permitted or prohibited based on the likely effect on society, and in particular, on the

[327] *Hedlund Mfg. Co.*, 539 A.2d at 359 (citations omitted).

[328] *See* Vinson & Elkins v. Moran, 946 S.W.2d 381, 396 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) ("[O]ur holding does not shield attorneys from malpractice suits nor does it deprive clients of the right to assert claims against their attorneys, it simply prevents them from giving or selling that right to others."); City of Garland v. Booth, 895 S.W.2d 766, 770–71 (Tex. App.—Dallas 1995, writ denied). For a discussion of the policy considerations against assignability, *see generally* Amy E. Douthitt, Comment, *Selling Your Attorney's Negligence: Should Legal Malpractice Claims Be Assignable in Texas?*, 47 BAYLOR L. REV. 177 (1995). The opposite view is articulated by Michael Sean Quinn, *On the Assignment of Malpractice Claims*, 37 S. TEX. L. REV. 1203 (1996).

[329] *See Moran*, 946 S.W.2d at 389 (indicating that several of the beneficiaries had "assigned" their malpractice claims to two beneficiaries who prosecuted the case).

legal system."[330] Nevertheless, the court concluded the assignment of legal malpractice claims is incompatible with the attorney's duty of loyalty and the duty of confidentiality.[331] These policy considerations compelled the court to hold "that all legal malpractice claims are not assignable."[332] In response to the appellees' argument that *Zuniga* was not controlling, the court said:

> [W]e find the [*Zuniga*] court's actual holding, based on its analysis and review of authority, is much broader and bars the assignment of all legal malpractice claims. The reasoning in the case extends well beyond its facts. Thus, based on the policy considerations stated in *Goodley*, *Zuniga*, and the other cases discussed, we hold that the best rule is to bar all assignments of legal malpractice claims.[333]

It should be noted, however, that a handful of Texas courts have suggested that malpractice claims may be assigned in limited circumstances or where the policy considerations identified in *Zuniga* do not apply.[334]

The second issue above provoked a similar response. A Texas court may not force assignment through turnover or execution that which would be barred by voluntary assignment: "Assignment and turnover, though different, are linked because the public policy concerns that would bar

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[330] *Id.* at 392.

[331] *See id.* at 394.

[332] *Id.*

[333] *Id.* at 395; *see also* McLaughlin v. Martin, 940 S.W.2d 261, 264 (Tex. App.—Houston [14th Dist.] 1997, no writ) ("[W]e believe the policy considerations voiced in *Zuniga* apply equally to legal malpractice claims that arise out of litigation and those that do not.").

[334] InLiner Americas, Inc. v. Macomb Funding Grp., L.L.C., 348 S.W.3d 1, 7 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (stating that "there are circumstances, inapplicable here, in which a malpractice claim may be litigated by someone other than the client" without explaining what these circumstances might be); Wright v. Sydow, 173 S.W.3d 534, 551 n.16 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (stating without elaboration that "two" exceptions exist to general rule prohibiting assignment of legal malpractice claims); Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 633 (Tex. App.—Dallas 2000, pet. denied) (stating generally that "the Texas Supreme Court has not precluded the transfer of [all] legal malpractice claims"); City of Garland v. Booth, 971 S.W.2d 631, 634 (Tex. App.—Dallas 1998, pet. denied) (stating generally that "a legal malpractice claim is assignable if it does not have the public policy concerns present in *Zuniga*"); Baker v. Mallios, 971 S.W.2d 581, 587 (Tex. App.—Dallas 1998) (upholding plaintiff's assignment of share of proceeds in malpractice action because public policy concerns were not implicated), *aff'd on other grounds*, 11 S.W.3d 157 (Tex. 2000).

voluntary assignment also oppose forced transfer through turnover."[335] Accordingly, legal malpractice claims are not subject to turnover.[336]

CHAPTER IV: NATURE OF LEGAL MALPRACTICE

§ 1 Generally

Although there are several theories under which one might seek recovery against an attorney, the ultimate issue in a legal malpractice case is whether there has been a breach of duty which has caused damage.[337] As such, a legal malpractice claim may be described as a claim for professional negligence.[338] Specifically, in order for a plaintiff to establish a legal malpractice claim against a former attorney, he must prove the following: (1) the attorney owed the plaintiff a duty; (2) attorney breached the duty; (3) the breach proximately caused the plaintiff's injuries; and (4) the plaintiff incurred damages.[339]

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[335] Charles v. Tamez, 878 S.W.2d 201, 206 (Tex. App.—Corpus Christi 1994, writ denied); *see also In re* Farmers Ins. Exch., No. 13-14-00330-CV, 2014 WL 6804986, at *3 n.3 (Tex. App.—Corpus Christi Dec. 4, 2014, no pet.) (mem. op.); D&M Marine, Inc. v. Turner, 409 S.W.3d 853, 857–58 (Tex. App.—Fort Worth 2013, no pet.).

[336] *See* Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 317 n.5 (Tex. App.—San Antonio 1994, writ ref'd)); *Tamez*, 878 S.W.2d at 208. After the plaintiff's attempt to collect on a judgment failed, plaintiff sought turnover of the defendant's cause of action for legal malpractice against the law firm for its failure to settle. The court held that unasserted causes of action for legal malpractice for failure to settle were not assets subject to turnover, reasoning that "allowing a party to force a suit for malpractice on behalf of a satisfied opponent does not promote the specific purpose of the turnover statute or the overall purpose of the Texas legal system." *Tamez*, 878 S.W.2d at 208. Considering the claim to be "intrinsically personal" and "subjective," the court concluded that only the client can properly decide whether she is dissatisfied with her lawyers. *Id.* at 207.

[337] *See* Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 112 (Tex. 2009) (discussing what a plaintiff must prove to establish legal malpractice claim); Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995); Sledge v. Alsup, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ); *accord* Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989); Schlager v. Clements, 939 S.W.2d 183, 186 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

[338] Trousdale v. Henry, 261 S.W.3d 221, 237 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *see* Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., 284 S.W.3d 416, 427 n.10 (Tex. App.—Austin 2009, no pet.).

[339] *See Akin, Gump, Strauss, Hauer & Feld*, 299 S.W.3d at 112; Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 783 (Tex. 2006); Poledore v. Fraley, No. 01-09-00658-CV, 2010 WL 3928516, at *4 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, pet. denied) (mem.

As a general rule, Texas courts prohibit plaintiffs from "dividing or fracturing a negligence claim" into additional causes of action.[340] In other words, if the real issue to be resolved is whether the attorney exercised the degree of care, skill, and diligence that attorneys of ordinary skill and knowledge commonly possess and exercise, then that claim sounds in negligence and therefore may not be "fractured" into separate claims for breach of fiduciary duty, fraud, breach of contract, or DTPA, etc.[341] The Texas Supreme Court, however, has never directly addressed the anti-fracturing rule.

Many Texas courts have attempted to distinguish between legal malpractice claims and other separate causes of action, such as breach of fiduciary duty.[342] Whether a plaintiff's allegations against an attorney are actually claims for professional negligence or something else is a question of law to be determined by the court.[343]

As explained by the court of appeals in *Sledge v. Alsup*:

> Nothing is to be gained by fracturing a cause of action arising out of bad legal advice or improper representation into claims for negligence, breach of contract, fraud or some other name. If a lawyer's error or mistake is actionable, it should give rise to a cause of action for legal malpractice with one set of issues which inquire if the

op.); *Trousdale*, 261 S.W.3d at 227; Rangel v. Lapin, 177 S.W.3d 17, 22 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

[340] *Trousdale*, 261 S.W.3d at 227; *see* Isaacs v. Schleier, 356 S.W.3d 548, 556 (Tex. App.—Texarkana 2011, pet. denied); Duerr v. Brown, 262 S.W.3d 63, 70 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

[341] *Beck*, 284 S.W.3d at 426–27; Murphy v. Gruber, 241 S.W.3d 689, 692–93 (Tex. App.—Dallas 2007, pet. denied) ("Professional negligence, or the failure to exercise ordinary care, includes giving a client bad legal advice or otherwise improperly representing the client."); Rangel v. Lapin, 177 S.W.3d 17, 24 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) ("A cause of action arising out of bad legal advice or improper representation is legal malpractice.").

[342] *See Trousdale*, 261 S.W.3d at 229 (holding that plaintiff's breach of fiduciary duty claims were separate and independent from her legal malpractice claims where attorneys misrepresented status of her action and refused to return her file); *Murphy*, 241 S.W.3d at 693 ("[A] lawyer can commit professional negligence by giving an erroneous legal opinion or erroneous advice, by delaying or failing to handle a matter entrusted to the lawyer's care, or by not using a lawyer's ordinary care in preparing, managing, and prosecuting a case."); *Rangel*, 177 S.W.3d at 24 (holding that while plaintiff alleged separate and distinct cause of action for breach of contract, the crux of plaintiff's claim was that law firm did not provide adequate legal representation).

[343] *Isaacs*, 356 S.W.3d at 556; *Duerr*, 262 S.W.3d at 70; *Murphy*, 241 S.W.3d at 692.

> conduct or omission occurred, if that conduct or omission was malpractice and if so, subsequent issues on causation and damages. Nothing is to be gained in fracturing that cause of action into three or four different claims and sets of special issues. That is not in accordance with the recent trend in this state to simplify issues which are presented to a jury. The real issue remains one of whether the attorney exercised that degree of care, skill and diligence as lawyers of ordinary skill and knowledge commonly possess and exercise.[344]

Simply put, "a legal malpractice action sounds in tort and is governed by negligence principles."[345] On the other hand, the court in *Jampole v. Matthews* recognized a cause of action for breach of contract independent of a legal malpractice claim where the client claims the attorney charged excessive fees.[346] The *Jampole* court said:

> [W]e distinguish . . . between an action for negligent legal malpractice and one for fraud allegedly committed by an attorney relating to the establishing and charging of fees for services. Similarly, we distinguish between an action for negligent legal practice and one for breach of contract relating to excessive fees for services.[347]

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[344] 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ) (citations omitted).

[345] Stanfield v. Neubaum, 494 S.W.3d 90, 97 (Tex. 2016) (quoting Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996)); Belt v. Oppenheimer, Blend, Harrison & Tate, 192 S.W.3d 780, 783 (Tex. 2006) (citing Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex.1989)); Ghidoni v. Skeins, 510 S.W.3d 707, 711 (Tex. App.—San Antonio 2016, no pet.) ("A cause of action for legal malpractice is in the nature of a tort . . . ."); *In re* Haynes & Boone, LLP, 376 S.W.3d 839, 847 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding [mand. denied]) ("the state-law tort of legal malpractice"); *In re* Smith, 366 S.W.3d 282, 285 (Tex. App.—Dallas 2012, orig. proceeding) (legal malpractice "is a tort"); Sotelo v. Stewart, 281 S.W.3d 76, 80 (Tex. App.—El Paso 2008, pet. denied) ("Legal malpractice is a tort cause of action based on negligence."); Black v. Wills, 758 S.W.2d 809, 814 (Tex. App.—Dallas 1988, no writ) ("[A] cause of action for legal malpractice is in the nature of a tort . . . ."). *But see* Klein v. Reynolds, Cunningham, Peterson & Cordell, 923 S.W.2d 45, 49 (Tex. App.—Houston [1st Dist.] 1995, no writ); Jampole v. Matthews, 857 S.W.2d 57, 62–63 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (recognizing cause of action for breach of contract independent of a legal malpractice claim where client claims attorney charged excessive fees).

[346] 857 S.W.2d at 62–63.

[347] *Id.* at 62.

Although both negligence and breaches of fiduciary obligations may be characterized as "legal malpractice," there is a difference between the competence required by the standard of care and the fiduciary obligations required by the standard of conduct.[348] Some courts, for example, simply treat the representation of adverse interests as falling within the definition of the usual standard of care requiring the competent exercise of knowledge, skill, and ability by the attorney.[349]

But regardless of how the claim is characterized, in Texas, violations of the standards set forth in the Texas Disciplinary Rules of Professional Conduct may subject an attorney to a legal malpractice claim. Texas courts have held that a "violation of a disciplinary rule does not give rise to a private cause of action,"[350] yet Texas courts also have routinely used ethical

[348] *See* 2 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 15.3 (2018 ed.) ("In defining the tort of legal malpractice, one approach is to include the fiduciary obligations within the standard of care. Although the attorney-client relationship imposes fiduciary obligations, negligent conduct alone usually does not implicate a breach of those obligations . . . . An analytical approach recognizes that an attorney's duties to a client include two obligations: (1) competent representation and (2) compliance with the fiduciary obligations. The fiduciary obligations set a standard of 'conduct,' analogous to the standard of 'care,' which pertains to the requisite skill, knowledge and diligence. Thus, the standard of care concerns negligence and the standard of conduct concerns a breach of loyalty or confidentiality." (footnotes omitted)).

[349] The duty of loyalty can be categorized as a fiduciary duty. *Id.* § 15:4. But a conflict can also implicate the standard of care: a conflict can occur "because competent representation of one client compels conduct that is adverse to the interests of the other client. The standard of care measures objectively the conduct that is required for competent representation . . . ." *Id.* § 17:2. Indeed, "[r]epresentation of conflicting interests is forbidden because it can preclude competent representation for one or more of the multiple clients." *Id.* § 17:3.

[350] Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 158 n.2 (Tex. 2004) ("[T]he Rules do not define standards of civil liability of lawyers for professional conduct."); D'Andrea v. Epstein, Becker, Green, Wickliff & Hall, P.C., 418 S.W.3d 791, 797 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (acknowledging that Texas disciplinary rules do not establish civil liability for attorneys); Brown v. Green, 302 S.W.3d 1, 15 n.17 (Tex. App.—Houston [14th Dist.] 2009, no pet.); Jones v. Blume, 196 S.W.3d 440, 450 (Tex. App.—Dallas 2006, pet. denied); Greenberg Traurig of New York, P.C. v. Moody, 161 S.W.3d 56, 96 (Tex. App.—Houston [14th Dist.] 2004, no pet.). The Texas Disciplinary Rules of Professional Conduct make clear in their preamble that a violation of the Rules does not create civil liability. TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 15. Instead, a disciplinary proceeding is the proper venue to raise a claim that a lawyer has violated a rule of professional conduct. *See* McGuire, Craddock, Strother & Hale, P.C. v. Transcon. Realty Inv'rs, Inc., 251 S.W.3d 890, 896 (Tex.App.—Dallas 2008, pet. denied).

obligations as appropriate standards in legal malpractice cases or when defining an attorney's duties to a client.[351]

§ 2 Fiduciary Relationship

In Texas, a fiduciary relationship exists between attorneys and clients as a matter of law.[352] The relationship of attorney and client is one of the highest trust and confidence and in dealing with a client, an attorney must act with utmost fairness and in good faith.[353] Because a fiduciary relationship exists between an attorney and his client, an attorney has a duty

[351] *See, e.g.*, Nolan v. Foreman, 665 F.2d 738, 743 & n.9 (5th Cir. 1982) (holding that Texas State Bar Rules provide cause of action for client, but not for third party); Sealed Party v. Sealed Party, No. Civ. A. H-04-2229, 2006 WL 1207732, at *8 (S.D. Tex. May 4, 2006) ("Texas and Federal courts regularly have referred to the Texas Rules to help define standards of attorney conduct in tort cases."); *In re* Pace, 456 B.R. 253, 280 (Bankr. W.D. Tex. 2011) ("Texas courts have used the Rules as standards for conduct in malpractice and breach of fiduciary duty cases."); Emp'rs Cas. Co. v. Tilley, 496 S.W.2d 552, 559 (Tex. 1973) (approving enunciated "Guiding Principles" for guidance of liability insurers furnishing legal counsel for their insureds); Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 905 (Tex. App.—Dallas 2001) ("[T]he trier of fact may consider the construction of a relevant rule of professional conduct that is designed for the protection of persons in the position of the claimant as evidence of the standard of care and breach of the standard."), *rev'd on other grounds*, 145 S.W.3d 150 (Tex. 2004); *see also* Huber v. Taylor, 469 F.3d 67, 82 (3d Cir. 2006) (referring to the Texas Disciplinary Rules of Professional Conduct while discussing attorney's fiduciary duties); Royston, Rayzor, Vickery, & Williams, LLP v. Lopez, 467 S.W.3d 494, 503 (Tex. 2015) ("The Disciplinary Rules are not binding as to substantive law regarding attorneys, *although they inform that law*." (emphasis added)).

[352] Meyer v. Cathey, 167 S.W.3d 327, 330 (Tex. 2005) (per curiam); Trousdale v. Henry, 261 S.W.3d 221, 229 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 253 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

[353] *See* Law Office of Oscar C. Gonzalez, Inc. v. Sloan, 447 S.W.3d 98, 108 (Tex. App.—San Antonio 2014) ("An attorney must use 'the utmost good faith in dealings with the client' and 'reasonable care in rendering professional services to the client.'"), *rev'd on other grounds*, 479 S.W.3d 833, 834 (Tex. 2016) (per curiam); *Trousdale*, 261 S.W.3d at 229 ("The Texas Supreme Court has noted that the term fiduciary refers to integrity and fidelity and contemplates fair dealing and good faith . . . as the basis of the transaction." (quoting Kinzbach Tool Co. v. Corbett–Wallace Corp., 160 S.W.2d 509, 512 (Tex. 1942))) (internal quotation marks omitted); *see also Meyer*, 167 S.W.3d at 330 ("In certain formal relationships, such as an attorney-client or trustee relationship, a fiduciary duty arises as a matter of law."); Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (holding that a fiduciary relationship exists between attorney and client, and, as fiduciary, the attorney is obligated to render full and fair disclosure of facts material to client's representation, as client must feel free to rely on attorney's advice).

to represent his client with undivided loyalty,[354] to preserve his client's confidences,[355] and to disclose to his client any information that might prevent the fulfillment of these obligations.[356] These fiduciary obligations

[354] *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999) (noting that an attorney who has been hired by a client for the benefit and protection of the client's interests must pursue said interests with undivided loyalty as allowed within the confines of the Texas Disciplinary Rules of Professional Conduct); *Tilley*, 496 S.W.2d at 558 (holding that attorney who is the attorney of record and legal representative of a person owes that person unqualified loyalty); D'Andrea v. Epstein, Becker, Green, Wickliff & Hall, P.C., 418 S.W.3d 791, 796 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding firm owed client a duty of reasonable prudence, fiduciary duties of loyalty, and good faith for both matters that the firm handled for client, regardless of whether matters are related).

[355] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05; Kennedy v. Gulf Coast Cancer & Diagnostic Ctr. at Se., Inc., 326 S.W.3d 352, 360 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (stating that "attorney who uses a client's confidential information for his own interest and against the client's interest to the client's detriment may be liable for breach of fiduciary duty"); Brown v. Green, 302 S.W.3d 1, 8 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("An attorney can breach his or her fiduciary duty to a client by, among other things , . . . misusing client confidences . . . ."); Murphy v. Gruber, 241 S.W.3d 689, 693 (Tex. App.—Dallas 2007, pet. denied) (observing that lawyer's breach of fiduciary duty can occur when the lawyer improperly uses client confidences); Capital City Church of Christ v. Novak, No. 03-04-00750-CV, 2007 WL 1501095, at *1 (Tex. App.—Austin May 23, 2007, no pet.) (mem. op.) (same); Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("Breach of fiduciary duty by an attorney most often involves [among other things] the attorney's . . . improper use of client confidences . . . ."); Byrd v. Woodruff, 891 S.W.2d 689, 700 (Tex. App.—Dallas 1994, writ denied) (holding that existence of attorney-client relationship gives rise to duties on attorney's part to use utmost good faith in dealings with client, to maintain confidences of client, and to use reasonable care in rendering professional services to client; as long as attorney-client relationship continues, such duties exist); Yaklin v. Glusing, Sharpe & Krueger, 875 S.W.2d 380, 383 (Tex. App.—Corpus Christi 1994, no writ) ("Once the attorney-client relationship is established, numerous duties are owed the client by the lawyer, which, among others, are to use utmost good faith in dealings with the client, to maintain the confidences of the client, and to use reasonable care in rendering professional services to the client."). *Cf. In re* Colum. Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824 (Tex. 2010) ("If the lawyer works on a matter, there is an irrebuttable presumption that the lawyer obtained confidential information during representation. When the lawyer moves to another firm and the second firm is representing an opposing party in ongoing litigation, a second irrebuttable presumption arises; it is presumed that the lawyer will share the confidences with members of the second firm, requiring imputed disqualification of the firm." (citations omitted)).

[356] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c) (requiring in case of conflict "full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any" in order to continue representation); Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron & Blue, 843 F. Supp. 2d 673, 685 (N.D. Tex. 2011) (noting a breach of fiduciary duty occurs when an attorney fails to disclose conflicts of

are at the heart of the attorney-client relationship, and enable the client to place unhesitating trust in the attorney's ability to represent him effectively. Since the attorney-client relationship "is one of 'most abundant good faith,' requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception,"[357] all transactions between attorney and client growing out of such relationship are subject to the closest scrutiny.[358]

The attorney's fiduciary obligations may even attach to a *prospective* client.[359] Under Texas law, the fiduciary relationship between an attorney

interest); *see Tilley*, 496 S.W.2d at 558 ("If a conflict arises between the interests of the insurer and the insured, the attorney owes a duty to the insured to immediately advise him of the conflict."); *Trousdale*, 261 S.W.3d at 229 ("As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation." (citing Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988))); Burnap v. Linnartz, 914 S.W.2d 142, 150 (Tex. App.—San Antonio 1995, writ denied) ("Ordinarily there is nothing improper about an attorney representing more than one interest 'so long as the attorney discloses the consequences of the joint representation to all of his clients, and all parties as well as the attorney consent [to representation].'").

[357] *Goffney*, 56 S.W.3d at 193; *see also* Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., 284 S.W.3d 416, 429 (Tex. App.—Austin 2009, no pet.); *Trousdale*, 261 S.W.3d at 229; *Byrd*, 891 S.W.2d at 700; *Yaklin*, 875 S.W.2d at 383.

[358] *See, e.g.*, Anglo-Dutch Petro. Int'l, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 458 (Tex. 2011) ("[I]t is beyond dispute that attorney-client agreements are subject to heightened scrutiny by the courts because of the fiduciary nature of the attorney-client relationship." (citing Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 560 (Tex. 2006))); Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964); Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied) ("[T]he relation between attorney and client is highly fiduciary . . . and their dealings with each other are subject to the same scrutiny as a transaction between trustee and beneficiary.").

[359] *See* Royston, Rayzor, Vickery, & Williams, LLP v. Lopez, 467 S.W.3d 494, 504 (Tex. 2015) ("Prospective clients who enter such contracts are legally protected to the same extent as other contracting parties from, for example, fraud, misrepresentation, or deceit in the contracting process."); Gillis v. Provost & Umphrey Law Firm, LLP, No. 05-13-00892-CV, 2015 WL 170240, at *13 (Tex. App.—Dallas, Jan. 14, 2015, no pet.) (discussing attorney duties to prospective clients); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05, cmt. 1 ("Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer."). *But see* Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 253–56 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (holding fact issue existed regarding whether attorney-client relationship arose prior to agreement because plaintiff was still considering other attorney for representation, contract explicitly stated that representation was conditioned upon the parties agreeing to terms, and client prohibited attorneys from reviewing any information it considered proprietary until the parties had signed fee agreement).

and his client extends to preliminary consultations between the client and the attorney regarding the attorney's possible retention; all that is required for fiduciary obligations to exist is that the parties, explicitly or by their conduct, manifest an intention to create the attorney-client relationship.[360]

As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation,[361] because the client must feel free to rely on the attorney's advice. "Facts which might ordinarily require investigation likely may not excite suspicion where a fiduciary relationship is involved."[362] Consequently, there must be complete disclosure of all information which may bear upon the quality of the attorney's representation, including an explanation of its legal significance.[363] An attorney must therefore disclose any fact which may

[360] *See* Sotelo v. Stewart, 281 S.W.3d 76, 80–81 (Tex. App.—El Paso 2008, pet. denied) (explaining that attorney-client relationship can be implied from parties' conduct indicating intent to enter into such relationship); *Tanox, Inc.*, 105 S.W.3d at 253–56.

[361] *See Anglo-Dutch Petro. Int'l, Inc.*, 352 S.W.3d at 450 ("Part of the lawyer's duty is to inform the client of all material facts."); Willis v. Maverick, 760 S.W.2d 642, 643–45 (Tex. 1988) (holding that where attorney failed to disclose that agreement incident to divorce allowed partition and sale of marital home, he breached fiduciary duty); Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet denied.) ("A fiduciary has much more than the traditional obligation not to make any material misrepresentations; he has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes."); Crean v. Chozick, 714 S.W.2d 61, 62 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (stating that attorney who failed to disclose effect of signing admissions breached his fiduciary duty).

[362] *Willis*, 760 S.W.2d at 645 (citing Robinson v. Weaver, 550 S.W.2d 18, 23 (Tex. 1977) (Pope, J., dissenting)); Williard Law Firm, L.P. v. Sewell, 464 S.W.3d 747, 752 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

[363] *See* Nolan v. Foreman, 665 F.2d 738, 741 (5th Cir. 1982); Fleming v. Curry, 412 S.W.3d 723, 736–37 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C., 284 S.W.3d 416, 431 (Tex. App.—Austin 2009, no pet.) (attorney's failure to disclose his incompetence implicates the duty of ordinary care); Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); Bright v. Addison, 171 S.W.3d 588, 597 (Tex. App.—Dallas 2005, pet. denied); Ames v. Putz, 495 S.W.2d 581, 583 (Tex. Civ. App.—Eastland 1973, writ ref'd). The ABA Standing Committee on Ethics and Professional Responsibility recently opined that a lawyer has a duty to inform a current client if the lawyer believes that he or she may have "materially erred" in the client's representation. Am. Bar Assoc. Standing Committee on Ethics and Professional Responsibility, Formal Opinion 481 (Apr. 17, 2018), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_481.authcheckdam.pdf. That duty does not extend to former clients where the lawyer discovers the error after the attorney-client relationship has ended. *Id.*

limit his ability to satisfy his fiduciary obligations, such as any personal interest.[364] An attorney also must inform the client of any relevant event or information over which the client has the right to exercise discretion or control.[365] Thus, some have even argued that "lack of trial experience must be disclosed to prospective clients."[366] However, an attorney does not have an obligation to inform the client of matters that extend beyond the scope of the representation.[367]

In Texas, attorneys have been found to have breached their fiduciary obligations because of conflicts of interest, placing their personal interests over those of the client,[368] failing to disclose important facts and legal

[364] *See* Jim Arnold Corp. v. Bishop, 928 S.W.2d 761, 768 (Tex. App.—Beaumont 1996, no writ) (holding fact issue existed as to attorney's breach of fiduciary duty when attorney worked with party having an interest contrary to his client's interest without informing the client of the arrangment); *see also Beck*, 284 S.W.3d at 429 (attorney must disclose conflicts of interest); Spera v. Fleming, Hovenkamp & Grayson, P.C., 25 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (fact issue existed whether attorneys had duty to tell clients about potential conflict of interest in time for clients to obtain other counsel prior to hearings). *But see* City of Garland v. Booth, 895 S.W.2d 766, 773 (Tex. App.—Dallas 1995, writ denied) (stating that fact that trial court found substantial relationship between party and counsel representing opponent, justifying disqualification of counsel, did not warrant presumption in party's subsequent action for breach of fiduciary duty and unconscionability that counsel shared parties' confidences with opponent).

[365] *See* Nath v. Tex. Children's Hosp., 446 S.W.3d 355, 367 n.15 (Tex. 2014) ("An attorney owes a client a duty to inform the client of matters material to the representation, provided such matters are within the scope of the representation."); Neese v. Lyon, 479 S.W.3d 368, 387 (Tex. App.—Dallas 2015, no pet.) (same); Haas v. George, 71 S.W.3d 904, 913 (Tex. App.—Texarkana 2002, no pet.) (holding evidence existed that attorney failed to notify client of settlement offer); Garrett v. Giblin, 940 S.W.2d 408, 410 (Tex. App.—Beaumont 1997, no writ) (describing letter from attorney advising client he had medical malpractice claim against surgeon); *see also* Carranza v. Fraas, 820 F. Supp. 2d 118, 123 (D.D.C. 2011) (noting the "duty to inform clients of all settlement offers"); *In re* Russin, 462 P.2d 812, 813 (Ariz. 1969) (reprimanding attorney for his failure to inform clients of his conclusion that their claim could not withstand a counterclaim and his decision not to oppose counterclaim); Salopek v. Schoemann, 124 P.2d 21, 24 (Cal. 1942) (explaining that the attorney's failure to inform client of consequences of legal tactics if those tactics pursued to conclusion was a breach of a legal duty).

[366] *See* Tracy Walters McCormack & Christopher John Bodnar, *Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155, 200 (2010).

[367] Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 160 (Tex. 2004).

[368] *See Beck*, 284 S.W.3d at 429 (noting that common ground for breach of fiduciary duty occurs when attorneys place their personal interest above their clients); Archer v. Med. Protective Co., 197 S.W.3d 422, 427–28 (Tex. App.—Amarillo 2006, pet. denied) (holding that client's allegation that attorney placed his own interest ahead of client's by desiring to keep the business and favor of insurance company supports an independent claim for breach of fidiciary duty); Cantu v. Butron, 921 S.W.2d 344, 351 (Tex. App.—Corpus Christi 1996, writ denied) (holding

consequences to the client,[369] and improper use of client confidences.[370] Attorneys also can be held liable for the fraudulent concealment of relevant information.[371] If an attorney violates his professional responsibility by concealing facts where there is a duty to reveal them, the existence of disciplinary procedures does not preclude the attorney from also being held civilly liable.[372]

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that attorney breached his fiduciary duty when he took advantage of his clients' trust and confidence in executing a forty-five percent contingency fee agreement). *See generally* O'Dowd v. Johnson, 666 S.W.2d 619 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (finding a breach of the attorney's fiduciary duty in his failure to return to client funds entrusted to him); Avila v. Havana Painting Co., 761 S.W.2d 398 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (stating that the attorney's failure to deliver to the client funds collected on his behalf was breach of his fiduciary duty).

[369] *See* Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet denied.) (attorneys breached their fiduciary duty by failing to make appropriate disclosures of legal effects of assignment of certain property proceeds); Ames v. Putz, 495 S.W.2d 581, 582–83 (Tex. Civ. App.—Eastland 1973, writ ref'd) (describing attorney's failure to disclose material facts and resulting legal consequences); Norwood v. Piro, 887 S.W.2d 177, 181–82 (Tex. App.—Texarkana 1994, writ denied) (stating that fact question existed whether attorney fraudulently concealed from clients that probate court's decision was final); Rhodes v. Batilla, 848 S.W.2d 833, 840–42 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (finding negligent handling of tax).

[370] *See* Gillis v. Provost & Umphrey Law Firm, LLP, No. 05-13-00892-CV, 2015 WL 170240, at *13 (Tex. App.—Dallas Jan. 14, 2015, no pet.) ("'An attorney who uses a client's confidential information for his own interest and against the client's interest to the client's detriment may be liable for breach of fiduciary duty.'" (quoting Kennedy v. Gulf Coast Cancer & Diagnostic Ctr. at Se., Inc., 326 S.W.3d 352, 360 (Tex.App. —Houston [1st Dist.] 2010, no pet.))); Brown v. Green, 302 S.W.3d 1, 8 (Tex. App.—Houston [14th Dist.] 2009, no pet.); Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265–66 (Tex. App.—Corpus Christi 1991, writ denied) (finding improper use of client confidence); Sherwood v. South, 29 S.W.2d 805, 809 (Tex. Civ. App.—San Antonio 1930, writ ref'd) (finding improper use of client confidential information).

[371] *See* Cook v. Brundidge, Fountain, Elliott & Churchill, 533 S.W.2d 751, 759 (Tex. 1976) (reversing summary judgment for law firm, where client had no notice of partner's lack of authority to act for partnership in private investment relationship between client and partner); Easton v. Phelan, No. 01-10-01067-CV, 2012 WL 1650024, at *8 (Tex. App.—Houston [1st Dist.] May 10, 2012, no pet.) (mem. op.) (citing Hennigan v. Harris County, 593 S.W.2d 380, 383–84 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (allowing Constable to recover damages against attorney after needlessly incurring costs that he would not have incurred if attorney had told him that judgment had been satisfied)); *Norwood*, 887 S.W.2d at 182. Fraudulent concealment is also used as an affirmative defense to toll the statute of limitations. *See, e.g.*, Trousdale v. Henry, 261 S.W.3d 221, 234–35 (Tex.App.—Houston [14th Dist.] 2008, pet. denied).

[372] *See Hennigan*, 593 S.W.2d at 383; *see also* Fleming v. Kinney, 395 S.W.3d 917, 925–26 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding that former clients could pursue

Failure of the attorney to disclose relevant information is tantamount to concealment.[373] However, there can be no liability for failing to reveal information of which the attorney had no knowledge. *Wright v. Lewis* is illustrative.[374] In *Wright*, the client was indicted in federal court on numerous counts of making false statements on Medicare claims submitted to a government agency.[375] The client was offered a plea bargain whereby he could plead guilty to one felony count, but he rejected that offer.[376] The client subsequently pled not guilty at trial, and was convicted on twenty-five counts.[377] After the conviction was affirmed on appeal, the client sued his attorney, complaining of the attorney's failure to disclose the existence of a misdemeanor plea bargain offer. The trial court granted the attorney's motion for summary judgment, which asserted the client's causes of action were barred by the statute of limitations and there was no viable cause of action or the necessary proximate cause and the court of appeals affirmed the summary judgment.[378] In *Wright*, the client failed to establish a prima facie case against his attorney because there was no probative evidence that a "misdemeanor plea bargain offer was ever communicated to" the attorney.[379] The court's ruling explained that the client must show that the

claims for breach of fiduciary duty after attorney made undisclosed decision to charge them for certain expenses); Camp Mystic, Inc. v. Eastland, 390 S.W.3d 444, 461 (Tex. App.—Eastland 2012, pet. granted, judgm't vacated w.r.m.) (holding evidence existed of breach of fiduciary duty when attorney "represent[ed] all sides to the reorganization transaction and fail[ed] to disclose conflicts of interest"); Haas v. George, 71 S.W.3d 904, 913 (Tex. App.—Texarkana 2002, no pet.) (holding evidence existed that attorney failed to notify client of settlement offer).

[373] *See* Willis v. Maverick, 760 S.W.2d 642, 643–45 (Tex. 1988) (during divorce proceeding, attorney failed to disclose to wife a provision in divorce decree permitting husband to partition and sell the marital home without her consent); Haas v. George, 71 S.W.3d 904, 913 (Tex. App.—Texarkana 2002, no pet.); Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet denied.).

[374] 777 S.W.2d 520, 524 (Tex. App.—Corpus Christi 1989, writ denied) (holding attorney was not liable where there was no probative evidence of a misdemeanor plea bargain offer). *Cf.* Home Loan Corp. v. Tex. Am. Title Co., 191 S.W.3d 728, 731 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("[A] fiduciary duty of full disclosure requires disclosure of all material facts *known to the fiduciary* that might affect the rights of the person to whom the duty is owed." (emphasis added)). *But see* Victory Lane Prods., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 780–81 (S.D. Miss. 2006) (holding that actual knowledge is not needed under Mississippi law).

[375] 777 S.W.2d at 521.

[376] *See id.*

[377] *See id.*

[378] *See id.* at 521, 525.

[379] *See id.* at 524.

inaction of an attorney in failing to disclose material information was the proximate cause of some injury to him.[380] Accordingly, there can be no liability for failing to reveal information of which the attorney had no knowledge.[381]

§ 3 Standard of Care

In a legal malpractice action, an aggrieved client must establish the same four basic elements that exist in other negligence actions: (1) a duty owed to the client by the attorney; (2) a breach of that duty; (3) a causal link between the breach and the client's injury; and (4) the amount of the damages incurred.[382]

A lawyer is held to the standard of care which would have been exercised by a reasonably prudent attorney.[383] However, an attorney who

[380] *See id.* at 522; *see also* Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988); McClung v. Johnson, 620 S.W.2d 644, 647 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). Likewise, the DTPA applies to situations where an attorney has failed to disclose material information concerning services which were known at the time of the transaction and which were a producing cause of actual damages to the client. *See* TEX. BUS. & COM. CODE § 17.46(24). *Cf*. Jones v. Zearfoss, 456 S.W.3d 618, 623 (Tex. App.—San Antonio 2015, no pet.) (dealing with seller's duty to disclose material facts under DTPA); First City Mortg. Co. v. Gillis, 694 S.W.2d 144, 146 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (involving broker's duty to disclose material facts under the DTPA).

[381] *See Wright*, 777 S.W.2d at 522–24. *Cf*. Robinson v. Preston Chrysler-Plymouth, Inc., 633 S.W.2d 500, 502 (Tex. 1982) (holding there could be no liability for failing to disclose what one did not know); Sheehan v. Adams, 320 S.W.3d 890, 897 (Tex. App.—Dallas 2010, no pet.) (citing Pfeiffer v. Ebby Halliday Real Estate, Inc., 747 S.W.2d 887, 889–90 (Tex. App.—Dallas 1988, no writ) (finding no evidence that a real estate agent had knowledge of defects in property)); Home Loan Corp. v. Tex. Am. Title Co., 191 S.W.3d 728, 731 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (discussing fiduciary's duty to disclose "known" facts); Holland Mortg. & Inv. Corp. v. Bone, 751 S.W.2d 515, 521 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (finding no evidence that a lender had knowledge of building defects).

[382] *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995); Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989); Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C., 284 S.W.3d 416, 426 (Tex. App.—Austin 2009, no pet.) (listing elements plaintiff must prove to prevail on professional-negligence claim against lawyer); Schlager v. Clements, 939 S.W.2d 183, 186 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

[383] *See* Floyd v. Hefner, 556 F. Supp. 2d 617, 660 (S.D. Tex. 2008) (applying Texas law); Law Office of Oscar C. Gonzalez, Inc. v. Sloan, 447 S.W.3d 98, 107–08 (Tex. App.—San Antonio 2014) ("The existence of an attorney-client relationship gives rise to a duty on the attorney's part to act with ordinary care, in other words, in a manner consistent with the standard of care expected to be exercised by a reasonably prudent attorney." (citing *Cosgrove*, 774 S.W.2d at 664)), *rev'd on other grounds*, 479 S.W.3d 833 (Tex. 2016) (per curiam); Edwards v. Dunlop-Gates, 344 S.W.3d 424, 433 (Tex. App.—El Paso 2011, pet. denied); *Beck*, 284 S.W.3d at 426.

holds himself out as a specialist or expert in the field should be held to the standard of the reasonably prudent expert attorney in that field.[384] There are two components to the applicable standard of care. The first element addresses the diligence which an attorney must exercise, while the second concerns the minimum degree of skill and knowledge which he must display.[385] In determining whether the attorney has exercised reasonable skill and care, his conduct is judged by the degree of its departure from the diligence and skill which a practicing lawyer of ordinary skill, prudence and knowledge of the law would exercise in a similar case under similar circumstances.[386] Thus, an attorney is expected to exercise a reasonable and ordinary degree of care and skill in the performance of his or her legal duties.[387]

Nevertheless, "if an attorney makes a decision which a reasonably prudent attorney *could* make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable."[388] Accordingly, an "attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect."[389] In short, "[a]ttorneys cannot be held strictly liable for all of their clients' unfulfilled expectations."[390] In *Campbell v. Doherty*, for example, the court refused to hold an attorney liable for malpractice, even though the attorney did not object to an instruction to the jury panel prior to voir dire regarding a Mary

[384] *See* Streber v. Hunter, 221 F.3d 701, 722 (5th Cir. 2000); Rhodes v. Batilla, 848 S.W.2d 833, 843 (Tex. App.—Houston [14th Dist.] 1993, writ denied); 2 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 20:4 (2018 ed.) ("[A]n attorney whose skill and conduct are questioned may find that his or her conduct is to be judged by comparison to the skills of a renowned specialist in the same field.").

[385] *Rhodes*, 848 S.W.2d at 843.

[386] *See* Camp Mystic, Inc. v. Eastland, 390 S.W.3d 444, 453 (Tex. App.—San Antonio 2012, pet. granted, judgm't vacated w.r.m.) (quoting Willis v. Maverick, 760 S.W.2d 642, 645 (Tex.1988)); *see also* Sullivan v. Bickel & Brewer, 943 S.W.2d 477, 481 (Tex. App.—Dallas 1995, writ denied); Campbell v. Doherty, 899 S.W.2d 395, 397 (Tex. App.—Houston [14th Dist.] 1995, writ denied); Byrd v. Woodruff, 891 S.W.2d 689, 701 (Tex. App.—Dallas 1994, writ denied).

[387] *See, e.g.*, *Sloan*, 447 S.W.3d at 107; *Edwards*, 344 S.W.3d at 433; Tijerina v. Wennermark, 700 S.W.2d 342, 344 (Tex. App.—San Antonio 1985, no writ), *overruled on other grounds by Cosgrove*, 774 S.W.2d at 665.

[388] Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 530 (Tex. App.—Austin 2004, no pet.) (quoting *Cosgrove*, 774 S.W.2d at 665) (emphasis in original). *Accord* Hall v. Stephenson, 919 S.W.2d 454, 466 (Tex. App.—Fort Worth 1996, writ denied); *Campbell*, 899 S.W.2d at 397; *Byrd*, 891 S.W.2d at 700–01.

[389] *Cosgrove*, 774 S.W.2d at 665.

[390] *Id.*

Carter agreement to which his client was not a party.[391] After the jury failed to award damages to them, the attorney's clients argued the instruction improperly identified them as a party to the Mary Carter agreement.[392] In the face of summary judgment evidence that a reasonably prudent attorney would not permit his clients to be so identified and would have objected to such characterization, the court ruled that, because the instruction itself was both legally and factually correct in that it did not identify the clients as parties to the Mary Carter agreement, a reasonably prudent attorney could have made the decision not to ask for an additional instruction clarifying the matter and summary judgment for the attorney was therefore proper.[393]

The same standard of care applicable to attorneys in civil practice is applicable to attorneys in criminal practice.[394] In Texas, however, plaintiffs convicted of a criminal offense may recover for legal malpractice against their attorney only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise.[395] The Texas Supreme Court adopted this rule because of public policy concerns about criminals profiting from their illegal conduct and because allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the convict.[396]

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[391] 899 S.W.2d at 397–98; *see also* Nalle Plastics Family Ltd. P'ship v. Porter, Rogers, Dahlman & Gordon, P.C., 406 S.W.3d 186, 202–03 (Tex. App.—Corpus Christi 2013, pet. denied) (holding that although lawyer could have foreseen that action would lead to lawsuit against his client, the action was "one that a reasonably prudent attorney could have made"); Juarez v. Elizondo, No. 04-06-00433-CV, 2007 WL 835427, at *2–3 (Tex. App.—San Antonio Mar. 21, 2007, pet. denied) (mem. op.) (emphasizing that a "reasonably prudent attorney could have made the decision not to request any changes" to the charge).

[392] *See Campbell*, 899 S.W.2d at 397–98.

[393] *See id.*

[394] *See* Tijerina v. Wennermark, 700 S.W.2d 342, 344 (Tex. App.—San Antonio 1985, no writ), *overruled on other grounds by Cosgrove*, 774 S.W.2d at 665; *see also* Veschi v. Stevens, 861 S.W.2d 291, 292 (Tex. App.—San Antonio 1993, no writ); *see also* Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 n.3 (Tex. 1995) (stating that client must be exonerated to prove causation, but then normal elements of legal malpractice claim apply); 3 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 27:4 (2018 ed.) (stating that the standard of care for criminal attorneys is also "ordinary care"); Cort Thomas, Note, 37 AM. J. CRIM. L. 331, 334 (2010) ("Courts apply the same standard in civil and criminal malpractice claims: ordinary care.").

[395] *See* Dugger v. Arredondo, 408 S.W.3d 825, 833 (Tex. 2013) (citing *Peeler*, 909 S.W.2d at 496–98); Saks v. Sawtelle, Goode, Davidson & Troilo, P.C., 880 S.W.2d 466, 469 (Tex. App.—San Antonio 1994, writ denied); White v. Walker, 872 S.W.2d 346, 348 (Tex. App.—Beaumont 1994, writ denied).

[396] *See Dugger*, 408 S.W.3d at 829, 833; *Peeler*, 909 S.W.2d at 497–98.

Appointed counsel are subject to the same obligations and standard of care as retained counsel, and have the same exposure to malpractice claims.[397] Texas courts have consistently held a court-appointed attorney to the same duty to "defend the rights of his involuntary client with the same vigor and astuteness he would employ in the defense of clients who had expressly employed him for such purpose."[398]

§ 4 Question of Fact

The determination of an attorney's negligence and the amount of damages proximately caused by that negligence are usually questions of fact.[399] However, after the jury makes its factual determinations, the court

[397] *See* Sims v. Sims, 589 S.W.2d 865, 866 (Tex. Civ. App.—Fort Worth 1979, no writ) ("An attorney appointed or assigned to represent an indigent, etc., person has a duty to act and to diligently protect all the rights of such person."). The same rule applies in federal courts. In *Ferri v. Ackerman*, the United States Supreme Court held that a court-appointed attorney for an indigent defendant in a federal criminal trial, upon later being sued by a defendant in the state court for malpractice, was not as a matter of law judicially immune from suit. 444 U.S. 193, 205 (1979).

[398] *In re* Guardianship of Glasser, 297 S.W.3d 369, 375 (Tex. App.—San Antonio 2009, no pet.) (quoting *In re* Estate of Stanton, 202 S.W.3d 205, 208 (Tex. App.—Tyler 2005, pet. denied)); Ex'rs of Estate of Tartt v. Harpold, 531 S.W.2d 696, 698 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (citing Madero v. Calzado, 281 S.W. 328 (Tex. Civ. App.—San Antonio 1926, writ dism'd) ("The attorney ad litem should exhaust all remedies available to his client. The attorney ad litem may be called upon to represent his client on appeal and should do so when it is in the interest of his client.")); *see also* Cahill v. Lyda, 826 S.W.2d 932, 933 (Tex. 1992) (stating that attorney ad litem, who is appointed to represent a defendant served with citation by publication who failed to file answer or appear before court, must exhaust all remedies available to client and, if necessary, represent client's interest on appeal); Simons v. State, 805 S.W.2d 519, 521 (Tex. App.—Waco 1991, no writ) (holding that attorneys working for program which provided for defense of indigent prisoners being prosecuted for offenses committed while in prison were responsible to the courts which appointed them, to State Bar for observance of disciplinary rules, and to their clients for effective assistance of counsel); *Sims*, 589 S.W.2d at 866; Duncan v. Adams, 210 S.W.2d 180, 182 (Tex. Civ. App.—Beaumont 1948, no writ) ("We have concluded that the attorney who was appointed by the trial court had the duty and responsibility of determining after judgment whether an appeal should be taken in behalf of his clients . . . ."), *aff'd*, 215 S.W.2d 599 (Tex. 1948).

[399] *See* Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 n.2 (Tex. 1989); Grider v. Mike O'Brien, P.C., 260 S.W.3d 49, 55 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 533 (Tex. App.—Austin 2004, no pet.); Schlager v. Clements, 939 S.W.2d 183, 187 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (stating that although proximate cause in legal malpractice action is usually question of fact, it may be determined as matter of law if circumstances are such that reasonable minds could not arrive at different conclusion); Klein v. Reynolds, Cunningham, Peterson & Cordell, 923 S.W.2d 45, 47 (Tex. App.—Houston [1st Dist.] 1995, no writ); Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ

then determines the legal question of "'whether such facts found by the jury constitute professional misconduct.' If the trial court determines the facts constitute professional misconduct, it then enters judgment in favor of the plaintiff."[400]

The factors a jury may consider when evaluating the conduct of an attorney include custom, specialization, local circumstances, and ethical requirements.[401] Consideration of customary professional practice is important because such evidence is highly probative of the reasonableness of attorney conduct in a particular situation.[402]

§ 5 Application of Legal Standard

As a general proposition, lawyers are authorized to practice their profession, to advise their clients, and to interpose any defenses or supposed defenses without making themselves liable for damages.[403] However, an attorney is required to know the clearly defined rules of law found in statutes, treatises, and case law, and to deal with them correctly.[404]

denied), *rev'd on other grounds*, 890 S.W.2d 807 (Tex. 1995); Rhodes v. Batilla, 848 S.W.2d 833, 840 (Tex. App.—Houston [14th Dist.] 1993, writ denied); Mosaga, S.A. v. Baker & Botts, 780 S.W.2d 3, 6 (Tex. App.—Eastland 1989, no writ).

[400] *Rhodes*, 848 S.W.2d at 840 (quoting Hebisen v. State, 615 S.W.2d 866, 867–68 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ)); *see also Millhouse*, 775 S.W.2d at 627–28 (holding that in cases of appellate legal malpractice, determination of causation is to be resolved by court as question of law); *Grider*, 260 S.W.3d at 55 (same).

[401] *See* 2 R. MALLEN & J. SMITH, LEGAL MALPRACTICE §§ 20.4–20.9 (2018 ed.) (discussing each factor).

[402] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. c (2000) (citing "customary practice" as factor informing the "kind and extent of effort" appropriate for lawyer to take).

[403] *See* Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015); Kruegel v. Murphy, 126 S.W. 343, 345 (Tex. Civ. App.—1910, writ ref'd).

[404] *See, e.g.*, Martin v. Burns, 429 P.2d 660, 662 (Ariz. 1967) (holding attorney is *not* liable for mistake regarding unsettled area of law); Rapid Grp., Inc. v. Yellow Cab of Columbus, Inc., 557 S.E.2d 420, 422 (Ga. Ct. App. 2001) ("In general, legal malpractice liability attaches when an attorney fails to apply well-settled legal principles or procedures."); Darby & Darby, P.C. v. VSI Int'l, Inc., 739 N.E.2d 744, 747 (N.Y. 2000) ("If at that time laws and rules are clearly defined, an attorney's disregard of them is seldom excusable."). *But see* Haussecker v. Childs, 935 S.W.2d 930, 934 (Tex. App.—El Paso 1996) ("Subjective good faith of the attorney, however, is not a defense to an action for attorney malpractice."), *aff'd*, 974 S.W.2d 31 (Tex. 1998).

Attorneys should also know the rules of the courts before whom they practice.[405]

An attorney may be liable for damages to a client resulting from the attorney's incorrect interpretation of caselaw or a statute where the law was clear and the attorney failed to advise the client of the potential consequences in the event the attorney's interpretation proved to be erroneous.[406] Although attorneys do not normally violate the standard if they make a mistake or erroneous judgment in an area where the law is unsettled, Texas courts have held that subjective good faith is not a defense to a claim for legal malpractice.[407] Consequently, in *Bobbitt v. Weeks*, the court held it was error for a jury instruction to state that an attorney could not be held negligent if he acted in good faith and in the honest belief his advice and acts were well-founded and in the best interest of the client.[408] Likewise, the court in *Haussecker v. Childs* ruled that an attorney's good faith belief that his clients' claims were barred by the statute of limitations would not be a defense to a legal malpractice claim.[409]

On the other hand, some courts hold that an attorney cannot be held liable for negligently advising his client when the attorney's advice was

[405] *See, e.g.*, Zarosky v. State, No. 03-03-00116-CV, 2004 WL 1114539, at *3 (Tex. App.—Austin May 20, 2004, no pet.) (mem. op.); Rios v. State, 791 S.W.2d 509, 511 (Tex. App.—Corpus Christi 1989, no writ). *Cf.* Aldrich v. State, 296 S.W.3d 225, 251 (Tex. App.—Fort Worth 2009, pet. ref'd) ("[D]efense counsel's . . . misinterpretation of the rules of evidence fell below an objective standard of reasonableness.").

[406] *See* Mosaga, S.A. v. Baker & Botts, 780 S.W.2d 3, 5 (Tex. App.—Eastland 1989, no writ) (holding that attorney prepared agreement in violation of statute where statute was unambiguous); *Rapid Grp., Inc.*, 557 S.E.2d at 422, 424 (holding attorney liable when he "failed to assert the well-known independent contractor defense to a claim of respondeat superior"); Wood v. McGrath, North, Mullin & Kratz, P.C., 589 N.W.2d 103, 108 (Neb. 1999) (holding that attorney is not immune from suit for failing to warn client "of unsettled legal issues relevant to a settlement"); First Nat'l Bank of Clovis v. Diane, Inc., 698 P.2d 5, 9–10 (N.M. Ct. App. 1985) (holding attorney liable for failure to warn client of possibility that his interpretation of statute was incorrect, where the language was clear); *Haussecker*, 935 S.W.2d at 934–37 (finding that fact question existed regarding attorney's interpretation of discovery rule as applied to clients' causes of action).

[407] *See, e.g.*, Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989); Bobbitt v. Weeks, 774 S.W.2d 638, 639 (Tex. 1989) (per curiam); *Haussecker*, 935 S.W.2d at 934.

[408] 774 S.W.2d at 638; *see* Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., 284 S.W.3d 416, 426 (Tex. App.—Austin 2009, no pet.) (standard is objective one, not subjective good faith); Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 530 (Tex. App.—Austin 2004, no pet.) (same).

[409] 935 S.W.2d at 934; *see Cosgrove*, 774 S.W.2d at 663–65 (disregarding jury findings concerning attorney's good faith where attorney realized—after limitations ran—that he filed suit against wrong person); *Beck*, 284 S.W.3d at 426 (standard is objective).

based upon his informed judgment concerning an issue where no clear statement of the law existed at the time he gave the advice, even if the attorney's judgment was subsequently proven erroneous.[410] Further, an attorney ordinarily will not be held liable for failing to predict or anticipate a change in the law.[411]

If the law on a particular subject is doubtful or debatable, an attorney will usually not be held responsible for failing to anticipate how the uncertainty will be resolved.[412] Nevertheless, in such a situation an attorney is obligated to undertake reasonable research to ascertain the relevant legal principles and to make an informed decision.[413]

Numerous Texas decisions have recognized a cause of action for various acts or omissions by an attorney which resulted in injury to the client's

[410] *See* Nalle Plastics Family Ltd. P'ship v. Porter, Rogers, Dahlman & Gordon, P.C., 406 S.W.3d 186, 203 (Tex. App.—Corpus Christi 2013, pet. denied) (holding attorney was entitled to summary judgment on failure-to-advise claims because his "actions and inactions were at least based on unsettled law"); *Zenith Star*, 150 S.W.3d at 532 n.6 (noting that the "state of the law was at least unclear" and did not require attorney to take actions urged by client in malpractice suit); *see also In re* Olick, 565 B.R. 767, 783 n.29 (Bankr. E.D. Pa. 2017); Biomet Inc. v. Finnegan Henderson LLP, 967 A.2d 662, 668 (D.C. 2009); Composition Roofers Local 30/30B v. Katz, 581 A.2d 607, 610 (Pa. Super. Ct. 1990).

[411] *See Cosgrove*, 774 S.W.2d at 665 (holding that "attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect"); *Zenith Star Ins. Co.*, 150 S.W.3d at 530 (same); Kaufman v. Stephen Cahen, P.A., 507 So. 2d 1152, 1153 (Fla. Dist. Ct. App. 1987); Jerry's Enters. v. Larkin, Hoffman, Daly & Lindgren, Ltd., 691 N.W.2d 484, 492 (Minn. Ct. App. 2005); Ross v. State, 26 S.W.3d 600, 602 (Mo. Ct. App. 2000); Howard v. Sweeney, 499 N.E.2d 383, 386 (Ohio Ct. App. 1985). *Cf.* Dennis v. State, 51 S.W.3d 877, 879 (Mo. Ct. App. 2001) ("An attorney is not required to be clairvoyant in advising his client what the state *might* do in electing to use provisions to enhance punishment.").

[412] *See Nalle Plastics*, 406 S.W.3d at 203 (holding attorney's actions "were at least based on unsettled law"); *see also* Gray Ins. Co. v. Heggy, No. Civ.-11-733-C, 2012 WL 4128034, at *3 (W.D. Okla. Sept. 19, 2012); Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975); Manley v. Brown, 989 P.2d 448, 452 (Okla. 1999). *Cf.* United States v. Fields, 565 F.3d 290, 294 (5th Cir. 2009) (same for claims of ineffective assistance of counsel; defense attorney does not have duty to anticipate changes in law).

[413] *See Biomet*, 967 A.2d at 666; Aloy v. Mash, 696 P.2d 656, 659 (Cal. 1985); *Smith*, 530 P.2d at 595; Blanks v. Shaw, 89 Cal. Rptr. 3d 710, 743–44 (Cal. Ct. App. 2009). *Cf.* Gumpert v. State, 48 S.W.3d 450, 457 (Tex. App.—Texarkana 2001, pet. ref'd) (holding that client who claimed ineffective assistance of counsel did not prove "that counsel failed to familiarize himself with the applicable law"). This requirement flows from the attorneys' "duty to zealously represent their clients within the bounds of the law." *See* Gaia Envtl., Inc. v. Galbraith, 451 S.W.3d 398, 403 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

economic interest. The alleged negligence may consist of inaction or delay by the attorney,[414] inaction which allows the client's cause of action to become barred by the statute of limitations,[415] an attorney's erroneous

[414] *See* Primis Corp. v. Milledge, No. 14-08-00753-CV, 2010 WL 2103936, at *1–3 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (mem. op.) (affirming trial court's take-nothing judgment in attorney's favor when attorney negligently allowed default judgment to be rendered against client but there was no causation for damages); Duerr v. Brown, 262 S.W.3d 63, 72 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding that allegations that attorney did not timely pursue administrative appeal sound in negligence); Trousdale v. Henry, 261 S.W.3d 221, 235–37 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (discussing when claim for malpractice accrued after client's claim was dismissed); West v. Hubble, No. 05-06-01683-CV, 2008 WL 2941854, at *2 (Tex. App.—Dallas Aug. 1, 2008, pet. denied) (mem. op.) ("Examples of legal malpractice include . . . delaying or failing to handle a matter entrusted to the attorney's care . . . ."); Grider v. Mike O'Brien, P.C., 260 S.W.3d 49, 53–54 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (describing procedure for evaluating claim that appeal was not timely filed); Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 636–37 (Tex. App.—Dallas 2000, pet. denied) (holding that legal malpractice claim accrued when trial court entered final judgment against client); Holland v. Hayden, 901 S.W.2d 763, 765 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (finding that attorney's negligence resulted in default judgment being rendered against client); Mackie v. McKenzie, 900 S.W.2d 445, 448–49 (Tex. App.—Texarkana 1995, writ denied) (explaining when client may sue attorney on ground that attorney caused him to lose his cause of action); Sample v. Freeman, 873 S.W.2d 470, 473–74 (Tex. App.—Beaumont 1994, writ denied) (permitting client to sue attorney for failure to timely file suit); Schlosser v. Tropoli, 609 S.W.2d 255, 259 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (alleging that attorney failed to prosecute suit and allowed it to be dismissed for want of prosecution); DeBakey v. Staggs, 605 S.W.2d 631, 632 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (stating that attorney allegedly failed to timely obtain daughter's name change). *But see* Huckin v. Connor, 928 S.W.2d 180, 182 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (holding that client was judicially estopped from claiming that his attorney failed to timely file suit).

[415] *See* Floyd v. Hefner, 556 F. Supp. 2d 617, 643 (S.D. Tex. 2008) ("[T]he jury can find negligence as a matter of common knowledge . . . when an attorney allows the statute of limitations to run on a client's claim."); *Cosgrove*, 774 S.W.2d at 663 (alleging that attorney had filed suit against passenger rather than driver, had alleged wrong location of accident, and had failed to correct error before statute of limitations ran); Ames v. Putz, 495 S.W.2d 581, 582 (Tex. Civ. App.—Eastland 1973, writ ref'd) (alleging attorney had allowed statute to run on personal injury claim); City Nat'l Bank v. Smith, No. 06-15-00013-CV, 2016 WL 2586607, at *7 (Tex. App.—Texarkana May 24, 2016, pet. denied) (mem. op.) (discussing damages in case where attorney missed statute of limitations); James V. Mazuca & Assocs. v. Schumann, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied) (holding no expert testimony is needed to prove negligence when attorney allows limitations to run); Villarreal v. Cooper, 673 S.W.2d 631, 632–34 (Tex. App.—San Antonio 1984, no writ) (alleging attorney failed to timely bring suit); Anderson v. Sneed, 615 S.W.2d 898, 900–01 (Tex. Civ. App.—El Paso 1981, no writ) (alleging attorney failed to timely file suit against the proper parties). *But see* Medrano v. Reyes, 902 S.W.2d 176, 178 (Tex. App.—Eastland 1995, no writ) (finding that withdrawing law firm was not liable for failing to file wrongful death action prior to

advice or opinion,[416] the failure to advise the client of relevant information,[417] the improper preparation of legal documents,[418] or other omissions.[419]

running of limitations period where the firm sent letter to clients, the clients retained new counsel, and letter was received twenty-one months before limitations ran).

[416] *See* Isaacs v. Schleier, 356 S.W.3d 548, 559 (Tex. App.—Texarkana 2011, pet. denied) (explaining that legal malpractice claim may arise from erroneous legal opinion and advice); Murphy v. Mullin, Hoard & Brown, L.L.P., 168 S.W.3d 288, 291 (Tex. App.—Dallas 2005, no pet.) (faulty tax advice); Kimleco Petro., Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied) (holding that claim arising from attorney's erroneous advice sounds in negligence); Rhodes v. Batilla, 848 S.W.2d 833, 840–41 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (stating that attorney advised his client to get a "paper divorce" to thwart IRS collection attempts); Zidell v. Bird, 692 S.W.2d 550, 553 (Tex. App.—Austin 1985, no writ).

[417] *See* Smith v. Knight, 608 S.W.2d 165, 166 (Tex. 1980) (per curiam) (alleging that attorney's title examination failed to discover and inform client of recorded lien); *Isaacs*, 356 S.W.3d at 559 (explaining that legal malpractice claim may arise from failure to give advice or opinion when legally required to do so); Kemp v. Jensen, 329 S.W.3d 866, 872 (Tex. App.—Eastland 2010, pet. denied) ("Texas courts have consistently held that the failure to disclose significant information about a client's case is professional negligence and not a breach of fiduciary duty."); Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C., 284 S.W.3d 416, 431, 436 (Tex. App.—Austin 2009, no pet.) (stating that lawyer's failure to disclose his own incompetence relates only to the duty of ordinary care); *Kimleco*, 91 S.W.3d at 923 (holding that claim arising from attorney's failure to provide advice when legally obliged to provide it sounds in negligence); Bloyed v. Gen. Motors Corp., 881 S.W.2d 422, 436 (Tex. App.—Texarkana 1994), *aff'd*, 916 S.W.2d 949 (Tex. 1996) (finding that attorneys owed a duty to clients to make full and fair disclosure of every facet of proposed settlement, especially in class action); Wright v. Lewis, 777 S.W.2d 520, 522 (Tex. App.—Corpus Christi 1989, writ denied) (holding that client must show that inaction of attorney in failing to disclose material information was proximate cause of some injury to him in order to prevail on malpractice claim; however, there can be no liability for failing to reveal information of which attorney had no knowledge); Pack v. Taylor, 584 S.W.2d 484, 485 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.) (alleging attorney advised client's personal injury claim would not be impaired by execution of release), *disapproved on other grounds by* Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988); Yarbrough v. Cooper, 559 S.W.2d 917, 920 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (alleging attorney failed to properly handle client's tax problems and failed to inform client of failure to do so); Rice v. Forestier, 415 S.W.2d 711, 712 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) (alleging that attorney was negligent in failing to inform client that he would not represent client in new matter). *But see* Garrett v. Giblin, 940 S.W.2d 408, 410–11 (Tex. App.—Beaumont 1997, no writ) (stating that a letter from attorney to client, which was signed by both parties, was sufficient to put client on notice that he had medical malpractice claim against surgeon).

[418] *See* FDIC v. Nathan, 804 F. Supp. 888, 896 (S.D. Tex. 1992) (alleging attorneys aided thrift's officers in breaching their fiduciary duties by structuring, documenting, and closing fraudulent loans); Willis v. Maverick, 760 S.W.2d 642, 643 (Tex. 1988) (alleging attorney had failed to retain provision in agreement preventing sale of marital home); Estate of Jobe v. Berry, 428 S.W.3d 888, 903 (Tex. App.—Texarkana 2014, no pet.) (observing that late filing of tax form was "wrongful,

A. Settlement

Clients frequently claim attorney negligence arising from the settlement of a dispute. For instance, the client may assert a settlement was made to avoid a liability created by the attorney's negligence,[420] or contend that he

injury-causing conduct"); *Murphy*, 168 S.W.3d at 289 n.1 (holding that claims based on "negligent drafting or review of certain documents" are for malpractice); The Vacek Grp., Inc. v. Clark, 95 S.W.3d 439, 441 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (discussing limitations for filing malpractice claim based on attorney's handling of corporate divorce); Burnap v. Linnartz, 914 S.W.2d 142, 150–51 (Tex. App.—San Antonio 1995, writ denied) (alleging attorney negligently prepared documents); *Rhodes*, 848 S.W.2d at 841 (alleging attorney was negligent in handling tax forms and failing to discuss consent form with client); Mosaga, S.A. v. Baker & Botts, 780 S.W.2d 3, 5 (Tex. App.—Eastland 1989, no writ) (alleging attorney prepared agreement in violation of statute).

[419] *See In re* Nick Julian Motors, 148 B.R. 22, 24 (Bankr. N.D. Tex. 1992) (stating that failure of debtor's counsel to appear for trial or require client to attend trial of adversary proceeding was gross negligence); Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 (Tex. 1989) (alleging attorney failed to file statement of facts); *Cosgrove*, 774 S.W.2d at 663 (alleging attorney had filed suit against passenger rather than driver, had alleged wrong location of accident, and had failed to correct error before statute of limitations ran); Riverwalk CY Hotel Partners, Ltd. v. Akin Gump Strauss Hauer & Feld, LLP, 391 S.W.3d 229, 237 (Tex. App.—San Antonio 2012, no pet.) (noting that law firm's failure to tender defense of lawsuit to insurance carrier would give rise to a malpractice claim); *Isaacs*, 356 S.W.3d at 557 ("Disobeying a client's lawful instruction has been routinely recited to be a malpractice claim."); Murphy v. Gruber, 241 S.W.3d 689, 698–99 (Tex. App.—Dallas 2007, pet. denied) (holding that claims that lawyers failed to properly communicate with clients are claims for professional negligence); *Kimleco*, 91 S.W.3d at 924 (holding that claim arising from attorney's failure to handle matter entrusted to his or her care sounds in negligence); Cantu v. Butron, 921 S.W.2d 344, 349–50 (Tex. App.—Corpus Christi 1996, writ denied) (alleging attorney deceptively obtained signatures of clients on contracts raising contingency fee without explanation); Hall v. Rutherford, 911 S.W.2d 422, 424 (Tex. App.—San Antonio 1995, writ denied) (alleging attorney failed to plead and prove claim for informed consent, designate certain fact witnesses and call expert to testify). *But see* Estate of Pollack v. McMurrey, 858 S.W.2d 388, 391 (Tex. 1993) (holding that an attorney is under no duty to answer a lawsuit until client is actually served and requests attorney to file answer); Klein v. Reynolds, Cunningham, Peterson & Cordell, 923 S.W.2d 45, 48 (Tex. App.—Houston [1st Dist.] 1995, no writ) (stating that law firm's failure to include arguments or authority in motion for rehearing did not constitute negligence as a matter of law); Campbell v. Doherty, 899 S.W.2d 395, 397–98 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (holding that attorney for home developer was not negligent in failing to object to jury instruction describing effect of Mary Carter agreement).

[420] *See* U.S. Nat'l Bank v. Davies, 548 P.2d 966, 967 (Or. 1976). *Cf.* Post v. St. Paul Travelers Ins. Co., 691 F.3d 500, 505 (3d Cir. 2012) (explaining client's claims that attorney's alleged discovery misconduct prejudiced their case in the eyes of the jury and forced the clients to settle); Rodriguez v. West Publ'g Corp., 563 F.3d 948, 959 (9th Cir. 2009) (detailing how conflict existed in a class action between the class counsel and the contracting class representatives as to settlement decisions).

was required to pay a greater settlement,[421] or required to accept a smaller settlement because of his attorney's negligence.[422] Consequently, in *Edmondson v. Dressman*, the court held that a client who settled a case was not required to have the settlement set aside before bringing a legal malpractice action against her attorney for negligently advising her to settle the case for an unreasonable sum.[423] Likewise, in *Collins v. Perrine*, the plaintiffs brought a legal malpractice suit against their attorneys who had represented them in a medical malpractice action which was settled.[424] The court held that allowing a plaintiff to bring a legal malpractice claim did not undermine the policy that encouraged settlement of claims, because the legal malpractice action was an entirely separate action to seek

[421] *See* Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 695 (Tex. 2000) (claiming attorney's negligence forced excess insurer to settle the claim for too much); Stonewall Surplus Lines Ins. Co. v. Drabek, 835 S.W.2d 708, 712 (Tex. App.—Corpus Christi 1992, writ denied) (finding that fact question existed as to whether settlement value of case was affected by sanction order); Royal Ins. Co. of Am. v. Miles & Stockbridge, P.C., 138 F. Supp. 2d 695, 699 (D. Md. 2001) (alleging attorney recommended settlement at too high of a cost because attorney did not consider the likelihood of a successful appeal); Namikas v. Miller, 171 Cal. Rptr. 3d 23, 25–26 (Ca. Ct. App. 2014) (claiming attorneys negligently recommended excessive spousal support in marital settlement agreement); Public Taxi Serv., Inc. v. Barrett, 357 N.E.2d 1232, 1237 (Ill. App. Ct. 1976).

[422] *See* Elizondo v. Krist, 415 S.W.3d 259, 260 (Tex. 2013) (alleging inadequate settlement); Hoover v. Larkin, 196 S.W.3d 227, 229 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (claiming attorney failed to inform client that settlement was for a gross amount rather than a net amount); Edmondson v. Dressman, 469 So. 2d 571, 574 (Ala. 1985) (sustaining cause of action for negligently advising client to settle case for unreasonably low sum permissible); Crist v. Loyacono, 65 So. 3d 837, 840 (Miss. 2011) (alleging lawyers prematurely settled for less than they could have); Becker v. Julien, Blitz & Schlesinger, P.C., 406 N.Y.S.2d 412, 413–14 (N.Y. Sup. Ct. 1977) (alleging that attorney's malpractice forced client to settle); Griswold v. Kilpatrick, 27 P.3d 246, 247 (Wash. Ct. App. 2001) (alleging "the settlement figure would have been higher but for the attorney's delay in initiating settlement negotiations"). For an excellent discussion of possible liability for malpractice in the area of settlement, *see* 3 R. MALLEN & J. SMITH, LEGAL MALPRACTICE §§ 21:16, 33:83–33:94 (2018 ed.).

[423] 469 So. 2d at 574; *see also Elizondo*, 415 S.W.3d at 263 (describing negligent-settlement damages as "the difference between the result obtained for the client and the result that would have been obtained with competent counsel"); Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262, 1271 (Fed. Cir. 2007) (discussing the "impaired settlement value theory" of damages in legal malpractice claims).

[424] 778 P.2d 912, 915–17 (N.M. Ct. App. 1989); *see also* Nowak v. Pellis, 248 S.W.3d 736, 741 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (holding that client was not barred from suing attorney for difference between full value of medical malpractice claims and what he received after settlement).

compensation for the attorney's negligent performance.[425] The mere fact that a client agrees to a settlement of the underlying dispute is not a bar to a subsequent malpractice action against the attorney.[426] However, in *Mackie v. McKenzie*, the court held that a disgruntled client suffered no damages as a matter of law where she received settlement proceeds greater than the sum she would have received had she succeeded in her will contest.[427]

In an insurance context, an insured may have a cause of action against the insurer for any negligence of the attorney hired by the insurer in failing to settle a claim within policy limits. In *Ranger County Mutual Insurance Co. v. Guin*, for example, the Texas Supreme Court determined an insurer, in undertaking to defend its insured, becomes the agent of the insured and the attorney hired to represent the insured becomes the "subagent."[428] Attorneys hired by an insurer therefore have an obligation to be prudent and to exercise due care to protect the insured's interests.[429] On the other hand, attorneys cannot be held liable for an insurer's negligent failure to accept a settlement offer within the policy limits.[430]

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[425] *See Collins*, 778 P.2d at 917; *see also* Wassall v. DeCaro, 91 F.3d 443, 446–47 (3d Cir. 1996) (explaining that policy of encouraging settlements does not bar client from suing attorney if it was the attorney's negligence that forced client to settle); Gen. Nutrition Corp. v. Gardere Wynne Sewell, LLP, No. 2:08-CV-831, 2008 WL 411951, at *3 (W.D. Pa. Sept. 23, 2008) (mem. op.) (explaining that it was settlement of underlying case that made client's "alleged damages actual and concrete"). *Cf. Nowak*, 248 S.W.3d at 741 (permitting suit against attorneys after client settled underylying case).

[426] *See Nowak*, 248 S.W.3d at 741; Ayre v. J.D. Bucky Allshouse, P.C., 942 S.W.2d 24, 28 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Wassall*, 91 F.3d at 446–47; *Gen. Nutrition Corp.*, 2008 WL 411951, at *3; Virsen v. Rosso, Beutel, Johnson, Rosso & Ebersold, 356 N.W.2d 333, 336–37 (Minn. Ct. App. 1984); Crestwood Cov. Apartments Bus. Trust v. Turner, 164 P.3d 1247, 1253 (Utah 2007).

[427] 900 S.W.2d 445, 451 (Tex. App.—Texarkana 1995, writ denied); Duerr v. Brown, 262 S.W.3d 63, 77 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("Lyon does not establish that Duerr was eligible for a greater recovery than that already received under the settlement agreement."); *see also* Boone v. Bender, 74 A.D.3d 1111, 1113 (N.Y. App. Div. 2010) (holding that client's after-the-fact dissatisfaction with settlement is not enough to show malpractice).

[428] 723 S.W.2d 656, 659 (Tex. 1987).

[429] *See* Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, 215 S.W.2d 904, 932 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.); Unauthorized Practice of Law Comm. v. Am. Home Assurance Co., 261 S.W.3d 24, 27 (Tex. 2008) (holding that lawyer owes unqualified loyalty to insured); N. Cnty. Mut. Ins. Co. v. Davalos, 140 S.W.3d 685, 690 (Tex. 2004) (emphasizing that lawyer "owes unqualified loyalty to the insured").

[430] Ecotech Int'l, Inc. v. Griggs & Harrison, 928 S.W.2d 644, 649 (Tex. App.—San Antonio 1996, writ denied); *see* Lehman-Menley v. Bos. Old Colony Ins. Co., No. A-05-CV-1054 LY, 2006 WL 2167258, at *2 (W.D. Tex. July 31, 2006); Seger v. Yorkshire Ins. Co., 503 S.W.3d 388, 395–96

B. Appeals

An attorney also may be liable for legal malpractice in connection with the appeal of a case. The attorney may have failed to take the necessary preliminary steps to appeal, may have failed to file the appeal timely, or may have failed to file the required records and statements necessary to perfect the appeal.[431] An attorney's failure to file proper pleadings in the trial court and misrepresentations concerning the filing of an appeal which cause financial damage to the client are also actionable.[432] To succeed in an appellate malpractice claim, the client is required to prove that, but for the attorney's negligence, he would have prevailed on the appeal.[433]

(Tex. 2016) (addressing *insurer's* negligent failure "to settle a claim covered by an applicable policy within policy limits").

[431] *See In re* Frazin, No. 02-32351-bjh-13, 2008 WL 5214036, at *22 (Bankr. N.D. Tex. Sept. 23, 2008) (claiming attorneys failed to properly review record and cite to it in appellate briefing); Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 (Tex. 1989) (alleging attorney failed to file statement of facts); Porter v. Kruegel, 155 S.W. 174, 175 (Tex. 1913) (alleging attorney failed to appeal); Finley v. Fargason, No. 03-09-00685-CV, 2010 WL 4053711, at *4 (Tex. App.—Austin Oct. 15, 2010, no pet.) (mem. op.) (complaining attorney failed to raise certain argument on appeal); Grider v. Mike O'Brien, P.C., 260 S.W.3d 49, 53–54 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (alleging law firms incorrectly advised client on due date for notice of appeal and failed to competently prosecute appeal); *In re* Clare Constat, Ltd., No. 07-05-0347-CV, 2005 WL 3062023, at *1 (Tex. App.—Amarillo Nov. 15, 2005, orig. proceeding [mand. denied]) (asserting attorneys did not timely file notice of appeal); Smith v. Heard, 980 S.W.2d 693, 695 (Tex. App.—San Antonio 1998, pet. denied) (alleging appellate briefing was "fatally defective"); Maxey v. Morrison, 843 S.W.2d 768, 770–71 (Tex. App.—Corpus Christi 1992, writ denied) (alleging attorney failed to prosecute an appeal). *But see* Klein v. Reynolds, Cunningham, Peterson & Cordell, 923 S.W.2d 45, 47 (Tex. App.—Houston [1st Dist.] 1995, no writ) (holding that law firm's failure to include arguments or authority in motion for rehearing was not negligence as a matter of law); Veschi v. Stevens, 861 S.W.2d 291, 293 (Tex. App.—San Antonio 1993, no writ) (finding that failure to include record of pretrial hearings in statement of facts on appeal of client's conviction was not legal malpractice).

[432] *See* Lucas v. Nesbitt, 653 S.W.2d 883, 886 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); *see also* Duerr v. Brown, 262 S.W.3d 63, 74 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding that claim for attorney's alleged mishandling of administrative appeal was malpractice claim); Murphy v. Gruber, 241 S.W.3d 689, 698 (Tex. App.—Dallas 2007, pet. denied) (holding that claims for attorney's failure to "properly advise, inform, and communicate" sound in negligence).

[433] *See Millhouse*, 775 S.W.2d at 627; *Finley*, 2010 WL 4053711, at *4; *Grider*, 260 S.W.3d at 55; *In re Clare Constat, Ltd.*, 2005 WL 3062023, at *2; *Maxey*, 843 S.W.2d at 770.

C. Client Instructions

The failure to follow the client's legitimate instructions can form the basis for attorney liability.[434] In *Garrett v. Giblin*, a client claimed that a law firm failed to file timely a medical malpractice suit against a surgeon.[435] As summary judgment proof, the law firm submitted a directive letter signed by the attorneys and the client specifically instructing the firm not to sue the surgeon.[436] The court held that this letter was sufficient to put the client on notice he had a malpractice claim against the surgeon, and, thus, the law firm acted properly in not including the surgeon in the suit.[437] A lawyer, however, has no duty to follow his client's unlawful instructions.[438] Although an instruction to act may be implied from the circumstances,[439] if

[434] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a)(1)–(3); Isaacs v. Schleier, 356 S.W.3d 548, 557 (Tex. App.—Texarkana 2011, pet. denied) ("Disobeying a client's lawful instruction has been routinely recited to be a malpractice claim."); McInnis v. Mallia, No. 14-09-00931-CV, 2011 WL 782229, at *7 (Tex. App.—Houston [14th Dist.] Mar. 8, 2011, pet. denied) (mem. op.) ("An attorney can commit professional negligence by . . . disobeying a client's lawful instruction . . . ."); Kimleco Petro., Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923–24 (Tex. App.—Fort Worth 2002, pet. denied) (observing that disobeying client's lawful instruction can be malpractice); Garrett v. Giblin, 940 S.W.2d 408, 410 (Tex. App.—Beaumont 1997, no writ) (holding that letter signed by attorney and client indicated attorney's understanding that client had instructed him not to sue surgeon in a malpractice case); Zidell v. Bird, 692 S.W.2d 550, 553 (Tex. App.—Austin 1985, no writ) ("The attorney's negligence may consist in . . . disobeying a client's lawful instruction . . . ."); Haesly v. Whitten, 580 S.W.2d 104, 106 (Tex. Civ. App.—Waco 1979, no writ) (alleging attorney failed to carry out client's specific instructions in partition suit); Lane v. Mitchell, 289 S.W. 195, 196 (Tex. Civ. App.—San Antonio 1926, writ dism'd w.o.j.) (stating that attorney is required to disgorge fees when he compromises suit against client's express instructions).

[435] 940 S.W.2d at 409.

[436] *See id.* at 410.

[437] *See id.*

[438] *See* Meyers v. Textron Fin. Corp., 609 F. App'x 775, 779–80 (5th Cir. 2015) (affirming sanctions for bad-faith litigation against attorney who knowingly made false allegation at client's behest); Nasco, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 706–08 (5th Cir. 1990) (upholding disbarment of attorneys for their bad-faith conduct while representing clients), *aff'd*, 501 U.S. 32 (1991); Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 482–83 (Tex. 2015) (stating that attorney may be liable to third parties for fraud if attorney's actions are foreign to the duties of an attorney); Chu v. Hong, 249 S.W.3d 441, 446 (Tex. 2008) ("An attorney who personally steals goods or tells lies on a client's behalf may be liable for conversion or fraud in some cases.").

[439] *See* Am. Acceptance Corp. v. Elmer G. Gibbons, III, Inc., 704 F. Supp. 684, 687 (E.D. La. 1988), *aff'd*, 881 F.2d 1072 (5th Cir. 1989) (stating that although client did not specifically request that attorney "draft and record documents in a manner which would secure for AAC a first lien on the movables, it was implicit that AAC desired the highest ranking lien . . . that could be obtained under the law"); Abshire v. Nat'l Union Fire Ins. Co., 636 So. 2d 226, 232 (La. Ct. App. 1993)

the client has not given instructions, an attorney cannot be liable for a failure to initiate action.[440] This principle does not negate an attorney's duty to advise a client of the necessity to take actions that may be against his wishes.[441] Furthermore, a client may, by contract, negotiate away his right to control litigation strategy and settlement.[442]

D. Supervision

Negligent supervision may, in certain instances, create a basis for liability against attorneys who practice together.[443] Thus, in *FDIC v. Nathan*, the court allowed a lawsuit to proceed against a partner in a law

(holding attorney was not excused from duty to tell client how to secure good collateral on property merely because "client never asked him if he needed such advice").

[440] *See Garrett*, 940 S.W.2d at 410; Smith v. Smith, 241 S.W.3d 904, 908 (Tex. App.—Beaumont 2007, no pet.) ("An attorney's employment only authorizes the attorney to do those things authorized by the client."); Ernst v. Lawler, 557 So. 2d 1220, 1221 (Ala. 1990) (finding no malpractice where attorney did not prepare or record deed and, under written agreement between parties, the transfer of property was to take place upon request of client and client never requested the property be transferred); Mauldin v. Weinstock, 411 S.E.2d 370, 373–74 (Ga. Ct. App. 1991) (refusing to fault attorney for not taking action when client refused to authorize the action); Lorash v. Epstein, 767 P.2d 1335, 1337–38 (Mont. 1989) (holding that attorney who drafted mechanic's lien was not liable for failure to foreclose lien absent client instructions to foreclose).

[441] *See* Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 160 (Tex. 2004) (recognizing attorney's duty to "inform the client of matters material to the representation"); Garris v. Severson, Merson, Berke & Melchior, 252 Cal. Rptr. 204, 209 (Cal. Ct. App. 1988) (holding that attorney breached his duty to his client by not disclosing the full extent of client's liability and failing to advise of settlement even though client thought lawsuit a "hoax" and "ridiculous").

[442] *See* Unauthorized Practice of Law Comm. v. Am. Home Assurance Co., 261 S.W.3d 24, 26 (Tex. 2008) ("The right to defend in many policies gives the insurer complete, exclusive control of the defense."); Mitchum v. Hudgens, 533 So. 2d 194, 196–98 (Ala. 1988) (stating that insurance contract provision gave insurers exclusive right to negotiate and settle claims; therefore, attorney did not commit malpractice in settling medical malpractice case against physician's wishes). For an excellent discussion of the relationship between the insured and his insurer, together with the various reasons why control over the defense of a lawsuit can be a matter of contract, *see* Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 264 (1995).

[443] The Texas Rules of Disciplinary Conduct state that a supervisory lawyer shall be subject to discipline for another lawyer's violation of the rules if the supervisory lawyer "orders, encourages, or knowingly permits" the violation. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.01(a). If the supervisory lawyer is a partner, general counsel of a government agency's legal department, or directly supervises another lawyer, then the supervisory lawyer is also responsible for the subordinate lawyer's violations that the supervisory lawyer knew of but "knowingly fail[ed] to take reasonable remedial action to avoid or mitigate the consequences." *Id.*

firm for failing to supervise attorneys in his firm and for failing to deter negligent and unethical conduct.[444] Moreover, the Texas Supreme Court, in *Cook v. Brundidge, Fountain, Elliott & Churchill* observed that "the fiducial obligations of a law partnership set it apart from commercial partnerships . . . ."[445] Thus, if an attorney is "apparently carrying on in the usual way the business of the partnership" or "acting in the ordinary course of the business of the partnership," the partnership is liable for the attorney's malfeasance.[446] On the other hand, liability for legal malpractice cannot be imposed on a successor partnership to a negligent law firm.[447]

With respect to a nonlawyer employed or retained by or associated with an attorney, such attorney must make reasonable efforts to ensure the person's conduct is compatible with the attorney's professional obligations.[448]

§ 6 Negligence as a Matter of Law

There are few instances in which an attorney in a legal malpractice action can be held liable as a matter of law. Errors of this nature usually involve the attorney's failure to enter an appearance, to file a responsive pleading, or to appear at trial.[449]

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[444] 804 F. Supp. 888, 897–98 (S.D. Tex. 1992).

[445] 533 S.W.2d 751, 757 (Tex. 1976).

[446] *Id.* at 759.

[447] *See* Med. Designs, Inc. v. Shannon, Gracey, Ratliff & Miller, L.L.P., 922 S.W.2d 626, 627 (Tex. App.—Fort Worth 1996, writ denied); *see also* E-Quest Mgmt., LLC v. Shaw, 433 S.W.3d 18, 23 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (explaining that Texas "strongly embraces" a "nonliability" rule for successor entities—in this case, a corporation).

[448] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.03(a).

[449] *See* Rice v. Forestier, 415 S.W.2d 711, 713 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) (reviewing record of jury trial and concluding that "under this record" the attorney "owed a duty to inform [client] that [he] was not going to file an answer"); *see also* Okorafor v. Jeffreys, No. 01-07-006180-CV, 2009 WL 793750, at * 10 (Tex. App.—Houston [1st Dist.] March 26, 2009, no pet.) (mem. op.) (holding that evidence was sufficient to sustain a legal malpractice judgment against attorney despite absence of expert testimony where client presented evidence that, during the underlying litigation, the attorney failed to respond or attend a discovery sanctions hearing and damages hearing, failed to timely advise the client of the entry of a judgment against him, and failed to timely file a notice of appeal); Alexander v. Turtur & Associates, 146 S.W.3d 113, 119 (Tex. 2004) (stating that, in some cases, client's testimony is sufficient to show causal link between lawyer's negligence and client's harm); Liu v. Allen, 894 A.2d 453, 460 (D.C. 2006) ("[A]n attorney's negligence sometimes may be so 'clear,' even if an explanation is attempted, that expert testimony is superfluous and the attorney even may be found negligent as a matter of law."); Brizak

There are, however, other situations where an attorney's conduct can constitute negligence as a matter of law. For example, *Silver v. George* involved a suit by a payee against the maker of a note and the law firm which drafted the note.[450] The court held "it is a per se violation of an attorney's duty for him to draw a note which is on its face usurious."[451] The court further held that an attorney may be liable to the named parties to the note, including the payee, even though the payee did not hire the attorney or pay his fee.[452] Also, in *Doe v. Hughes, Thorsness, Gantz, Powell & Brundin*, the court held an attorney was "liable, as a matter of law, for its failure to obtain the biological mother's consent to the adoption of her child in conformity with the requirements of the Indian Child Welfare Act."[453] This was the "only . . . prudent course of action open," so the attorney breached the duty of care by acting otherwise.[454]

Failure to appear on the trial date or notify the client of the trial setting also has been held to constitute negligence as a matter of law.[455] So too have the failure to disclose an offer of settlement to the client until the day of trial, and the refusal to pursue settlement at the client's request been held to constitute negligence as a matter of law,[456] as has the failure to file a

v. Needle, 571 A.2d 975, 982 (N.J. Super. Ct. App. Div. 1990) ("Expert evidence is not required in a legal malpractice case to establish an attorney's duty of care where the duty is so basic that it may be determined by the court as a matter of law."). *But see* McRoberts v. Ryals, 863 S.W.2d 450, 453 (Tex. 1993) (holding that counsel's reliance upon district clerk's misleading statement of law was not negligence as matter of law); Peck v. Meda-Care Ambulance Corp., 457 N.W.2d 538, 543 (Wis. Ct. App. 1990) (finding that attorney cannot be held per se liable for violating a rule that generally prohibits lawyer from testifying for client).

[450] 618 P.2d 1157, 1159 (Haw. Ct. App. 1980), *aff'd*, 644 P.2d 955, 959 (Haw. 1982) (holding that attorneys were not negligent per se because note was not "flat out" usurious).

[451] *Id.*

[452] *See id.*; *see also* Hamilton v. Needham, 519 A.2d 172, 175 n.6 (D.C. 1986) (holding that malpractice may be shown as a matter of law when lawyer omitted requested residuary clause from will).

[453] 838 P.2d 804, 807 (Alaska 1992); *see* L.D.G., Inc. v. Robinson, 290 P.3d 215, 221 (Alaska 2012) (discussing *Doe*, 838 P.2d at 805).

[454] *Doe*, 838 P.2d at 807.

[455] *See* Kuehn v. Garcia, 608 F.2d 1143, 1148 (8th Cir. 1979); McGrath v. Everest Nat'l Ins. Co., No. 2:07 cv 34, 2010 WL 567301, at *9 (N.D. Ind. Feb. 11, 2010) ("[T]his court finds that Brenner Ford indeed owed a duty of care to Everest in the handling of the defense of the Everest insureds and breached that duty by the implementation of the oft-quoted 'misguided strategy' of refusing to enter an appearance and failing to respond to the complaint.").

[456] *See* Joos v. Auto-Owners Ins. Co., 288 N.W.2d 443, 445 (Mich. Ct. App. 1979).

statement perfecting a client's security interest[457] and the failure to file suit timely.[458] Sexual harassment, if established, may be sufficient to constitute malpractice per se, without the need for expert testimony.[459] Additionally, the failure to perfect an appeal has been held to be negligence as a matter of law.[460] These omissions are so clearly below the applicable standard of care

[457] *See* Barnes v. Turner, 606 S.E.2d 849, 851 n.7 (Ga. 2004); Lory v. Parsoff, 745 N.Y.S.2d 218, 219 (N.Y. App. Div. 2002); Practical Offset, Inc. v. Davis, 404 N.E.2d 516, 520, 523 (Ill. App. Ct. 1980).

[458] *See* James V. Mazuca & Assocs. v. Schumann, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied) (stating that "[t]he most common example of a case requiring no expert testimony is one in which an attorney allows the statute of limitations to run on a client's claim" and citing cases from other jurisdictions); Gallagher v. Wilson, No. 02-09-276-CV, 2010 WL 3377787, at *4 (Tex. App.—Fort Worth Aug. 26, 2010, no pet.) (mem. op.) (same); Bagan v. Hays, No. 03-08-00786-CV, 2010 WL 3190525, at * 3 (Tex. App.—Austin Aug. 12, 2010, no pet.) (mem. op.) (same).

[459] *See* McDaniel v. Gile, 281 Cal. Rptr. 242, 248–49 (Cal. Ct. App. 1991). In 2002, the American Bar Association passed a flat ban against lawyer-client sexual relationships that occur after the legal representation begins. MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (1983 amended 2002) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."). However, the State Bar of Texas membership referendum voted to reject the no-sex-with-client proposed rule in 2011. Moss, Frederick & Chamblin, Patricia, *Lover vs. Lawyer: The Sex with Clients Debate in Texas*, State Bar Litigation Section Report, THE ADVOCATE, Vol. 55, at 48–57 n.45 (April 7, 2011); *see also* Suppressed v. Suppressed, 565 N.E.2d 101, 105–06 (Ill. App. Ct. 1990) (stating that attorney was not liable for engaging in sexual relationship with client because fiduciary duty does not extend to personal relationships and client's only damages consisted of emotional harm). In 2016, the American Bar Association adopted an anti-discrimination provision to the Model Rules of Professional Conduct. Rule 8.4(g) provides that it is professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (1983 amended 2016). Texas Rule 5.08(a) prohibits similar discriminatory acts: "A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.08(a).

[460] *See* Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 (Tex. 1989) (holding that because a plaintiff suing for appellate malpractice must show that but for the negligence of the attorney, the client would have prevailed on appeal, the question of causation was to be determined as a question of law); Klein v. Reynolds, Cunningham, Peterson & Cordell, 923 S.W.2d 45, 47 (Tex. App.—Houston [1st Dist.] 1995, no writ) (same); Okorafor v. Jeffreys, No. 01-07-006180-CV, 2009 WL 793750, at * 10 (Tex. App.—Houston [1st Dist.] Mar. 26, 2009, no pet.) (mem. op.) (holding that evidence was sufficient to sustain a legal malpractice judgment against attorney despite absence of expert testimony where client presented evidence that, during the underlying litigation, the attorney

and diligence that there can be no reasonable doubt as to their negligent nature. However, it is important to remember that while failure to adhere to a standard of conduct prescribed by a statute or rule or reasonable client instruction may constitute negligence as a matter of law, a legal malpractice plaintiff still must prove the attorney's negligent conduct caused injury to the client.

§ 7 Litigation Tactics

Because attorneys involved in litigation are vested with broad discretionary powers, it has historically been more difficult for errors in litigation to form the basis of liability.[461] For this reason, a cause of action usually does not exist against a trial attorney simply because the client disagreed with the trial tactics used.[462] Trial lawyers have found the broad discretion accorded them to be a relatively safe haven when their tactical decisions subsequently proved incorrect or ineffective. Unlike other professions, in which all efforts on behalf of clients are generally directed toward a common goal, the litigation process is an adversary system in which parties are in competition. Thus, although litigators strive toward the common goal of attaining justice, the reality is that in most lawsuits, a substantial percentage of the litigants are disappointed.

In the leading case of *Woodruff v. Tomlin*, the Sixth Circuit, sitting en banc and applying Tennessee law, held a breach of an attorney's duty of care to exercise reasonable skill and diligence during the course of

failed to respond or attend a discovery sanctions hearing and damages hearing, failed to timely advise the client of the entry of a judgment against him, and failed to timely file a notice of appeal); *see also* Coble v. Green, 722 N.W.2d 898, 902–03 (Mich. Ct. App. 2006) (holding as a matter of law that attorney was negligent when he failed to timely file claim of appeal, application for leave to appeal, and docketing statement).

[461] *See, e.g.*, Morgan v. Giddings, 1 S.W. 369, 370–71 (Tex. 1886); Campbell v. Doherty, 899 S.W.2d 395, 397–98 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (holding that attorney for home developer was not negligent in failing to object to instruction to jury panel describing effect of Mary Carter agreement). This flows from the fact that if "an attorney makes a decision which a reasonably prudent attorney *could* make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable." Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 530 (Tex. App.—Austin 2004, no pet.) (quoting Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989)).

[462] *See* Allen v. Wiseman, No. 01-A-01-9710-CV00565, 1998 WL 391803, *4 (Tenn. Ct. App. 1998) (holding that there can be no liability for lawyer's acts or omissions in the conduct of litigation if based on honest exercise of professional judgment, but lawyer is still bound to exercise a reasonable degree of skill and care).

litigation, including trial, could subject him to malpractice liability.[463] Even though the court reaffirmed the principle that judgments about trial tactics are immune from malpractice claims, the court in *Woodruff* determined that the failure to argue for a negligence per se jury instruction on the basis of relevant statutes and then omitting reference to the statutes on appeal, as well as neglecting to interview potentially favorable witnesses prior to trial, could constitute malpractice.[464] The court reasoned that not using the statutes was a failure to apply common and ordinary principles of law, and the fact these failures arose during trial and continued on appeal did not insulate the attorney from liability.[465] The court also rejected the attorney's argument that the decision not to interview witnesses was a professional judgment immune from malpractice attack.[466] Since the witnesses might have greatly enhanced the plaintiffs' case, and because the attorney was aware of their existence and their potential value, he was under a duty to investigate.[467] His failure to do so was negligent preparation rather than the mistaken exercise of professional acumen.[468] Significantly, however, the trial court's rejection of the plaintiff's other negligence claims was affirmed on the ground that the alleged acts and omissions fell within the ambit of the trial attorney's professional judgment.[469]

Historically, Texas courts consistently concluded that a trial attorney's professional judgments were immune from serving as a basis for liability. Consequently, a trial lawyer's judgment with respect to whom should be joined as additional defendants,[470] whether to request a specific type of relief,[471] whether to object to certain evidence during trial,[472] or other trial

[463] 616 F.2d 924, 928–30 (6th Cir. 1980) (en banc).

[464] *Id.* at 933–35.

[465] *See id.* at 935.

[466] *See id.* at 934.

[467] *See id.*

[468] *See id.*

[469] *See id.* at 930–33.

[470] *See* Cook v. Irion, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ), *disapproved in part by* Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989) (rejecting good faith as a defense to malpractice claims).

[471] *See* Medrano v. Miller, 608 S.W.2d 781, 784 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.), *disapproved in part by Cosgrove*, 774 S.W.2d at 664 (rejecting good faith as a defense to malpractice claims).

[472] *See* Campbell v. Doherty, 899 S.W.2d 395, 397–98 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (stating that an attorney for a home developer was not negligent in failing to object to jury instruction describing effect of Mary Carter agreement).

related matters[473] were traditionally protected decisions. In 1989, however, *Cosgrove v. Grimes* eroded much of that protection for Texas attorneys.[474] In *Cosgrove*, where the attorney had sued the wrong party, the Texas Supreme Court acknowledged that "[i]n some instances an attorney is required to make tactical or strategic decisions," but decided that allowing protection for "this unique attorney work product" created "too great a burden for wronged clients to overcome."[475] The court thereupon disregarded the jury findings that established the judgmental immunity defense and reversed and rendered in the client's favor.[476] After *Cosgrove*, the tactical and strategic decisions of trial lawyers are measured by the standard of care which would be exercised by a reasonably prudent attorney, and the jury will evaluate the attorney's decision based on the information that the attorney has at the time. However, if the decision made by the attorney is only one "which a reasonably prudent attorney could make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable."[477]

Not all trial-related decisions are matters of judgment. In *Heath v. Herron*, for example, the attorney failed to file a verified denial of partnership and of the failure of consideration as required by Texas Rule of Civil Procedure 93, which contributed to an adverse judgment against the client.[478] In holding that the attorney breached his legal duties and that his breach was a proximate cause of the client's damages, the court said:

> [T]he failure to deny partnership status by a verified denial results in an admission of the existence of a partnership

[473] *See, e.g.*, Gen. Motors Corp. v. Hebert, 501 S.W.2d 950, 957 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.) ("Attorneys engaged in the trial of cases have heavy responsibilities, and must have latitude in making tactical decisions as to how best to represent their clients within the bounds of propriety.").

[474] 774 S.W.2d at 664.

[475] *Id.* at 664–65.

[476] *See id.* at 665–66.

[477] *Id.* at 665; Nalle Plastics Family Ltd. P'ship v. Porter, Rogers, Dahlman & Gordon, P.C., 406 S.W.3d 186, 200 (Tex. App.—Corpus Christi 2013, pet. denied); Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., 284 S.W.3d 416, 426 n.9 (Tex. App.—Austin 2009, no pet.); Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 530 (Tex. App.—Austin 2004, no pet.). *Accord* Hall v. Stephenson, 919 S.W.2d 454, 466 (Tex. App.—Fort Worth 1996, writ denied); Campbell v. Doherty, 899 S.W.2d 395, 397 (Tex. App.—Houston [14th Dist.] 1995, writ denied); Byrd v. Woodruff, 891 S.W.2d 689, 700–01 (Tex. App.—Dallas 1994, writ denied).

[478] 732 S.W.2d 748, 752 (Tex. App.—Houston [14th Dist.] 1987, writ dism'd by agr.).

> which cannot be controverted at trial. Nor was [the attorney]'s omission a mere error in judgment for which he would not be held liable since he admitted in testimony that he would have filed a verified denial had he thought of it. We therefore hold that [the attorney] had a duty under the circumstances to file a verified denial of partnership and failure of consideration on behalf of [the client] in the . . . suit.[479]

Likewise, "[w]hen an attorney fails to make reasonable inquiries concerning his pending litigation, he fails to exercise due diligence."[480] In addition, "[a]n attorney has a duty to make an independent investigation of the facts of his client's case; counsel's failure to seek out and interview potential witnesses is ineffective where the result is that any viable defense available to the accused is not advanced."[481]

[479] *Id.* (citations omitted).

[480] Almendarez v. Valentin, No. 14-10-00085-CV, 2011 WL 2120115, at *4–5 (Tex. App.—Houston [14th Dist.] May 24, 2011, no pet.) (per curiam) (mem. op.) (declining to set aside default judgment when attorney did not show that failure to appear was accident); *In re* Botello, No. 04-08-00562-CV, 2008 WL 5050437, at *4 (Tex. App.—San Antonio Nov. 26, 2008, orig. proceeding) (mem. op.) ("[T]he inquiry used to determine if a party has been diligent is whether he and his counsel used such care as prudent and careful men would ordinarily use in their own cases of equal importance."); Thottumkal v. McDougal, No. 14-03-00807-CV, 2004 WL 1607649, at *1–2 (Tex. App.—Houston [14th Dist.] July 20, 2004, pet. denied) (mem. op.) (denying bill of review because neither client nor attorney excercised due diligence); Melton v. Ryander, 727 S.W.2d 299, 302 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (concluding that where neither the party nor his attorney used due diligence to learn about trial date, unless attorney could show no negligence, post-answer default judgment will stand); *see also* Tate v. State, 762 S.W.2d 678, 681 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) (imposing duty on lawyer to know status of case and contents of court's files even when different lawyers represented the state at motion hearing and at trial); Conrad v. Orellana, 661 S.W.2d 309, 313 (Tex. App.—Corpus Christi 1983, no writ) (stating that attorney's failure to exercise due diligence will cause bill of review to fail).

[481] Pinkston v. State, 744 S.W.2d 329, 332 (Tex. App.—Houston [1st Dist.] 1988, no pet.); *see* Perez v. State, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010); Shamim v. State, 443 S.W.3d 316, 321–22 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *In re* I.R., 124 S.W.3d 294, 299 (Tex. App.—El Paso 2003, no pet.).

§ 8 Proximate Cause

The burden of proof in a malpractice case is on the client who seeks to recover damages from the attorney for alleged malpractice.[482] A legal malpractice claim is normally a tort claim; the plaintiff must therefore show that the attorney's conduct proximately caused some injury to him.[483] In order to prove that the client's damages were proximately caused by the attorney's conduct in a conflict of interest situation, the client must establish that had independent counsel been retained, the independent counsel would have given different advice which would have yielded a more favorable outcome for the client.[484] The determination of proximate cause is usually a question of fact to be decided by the trier of fact.[485]

[482] *See* Rogers v. Zanetti, 518 S.W.3d 394, 402 (Tex. 2017); Haddy v. Caldwell, 403 S.W.3d 544, 546 (Tex. App.—El Paso May 8, 2013, pet. denied); Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 533 (Tex. App.—Austin 2004, no pet.); Williams v. Briscoe, 137 S.W.3d 120, 124 (Tex. App.—Houston [1st Dist.] 2004, no pet.); Aiken v. Hancock, 115 S.W.3d 26, 29 (Tex. App.—San Antonio 2003, pet. denied); Hall v. Rutherford, 911 S.W.2d 422, 424 (Tex. App.—San Antonio 1995, writ denied); Mackie v. McKenzie, 900 S.W.2d 445, 448 (Tex. App.—Texarkana 1995, writ denied); Sipes v. Petry & Stewart, 812 S.W.2d 428, 430 (Tex. App.—San Antonio 1991, no writ); Jackson v. Urban, Coolidge, Pennington & Scott, 516 S.W.2d 948, 949 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) ("Where a client sues his attorney on the ground that the latter caused him to lose his cause of action, the burden of proof is on the client to prove that his suit would have been successful but for the negligence of his attorney, and to show what amount would have been collectible had he recovered the judgment.").

[483] *See Rogers*, 518 S.W.3d at 400; Stanfield v. Neubaum, 494 S.W.3d 90, 96 (Tex. 2016); Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 112 (Tex. 2009); Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 117 (Tex. 2004); Willis v. Maverick, 760 S.W.2d 642, 644–45 (Tex. 1988); Wright v. Lewis, 777 S.W.2d 520, 522 (Tex. App.—Corpus Christi 1989, writ denied).

[484] *See* Murphy v. Edwards & Warren, 245 S.E.2d 212, 217–18 (N.C. Ct. App. 1978). *Accord* Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C., 284 S.W.3d 416, 438–39 (Tex. App.—Austin 2009, no pet.) (concluding that allegations regarding conflict of interest concerned the quality of the attorneys' representation sounded in negligence); Murphy v. Gruber, 241 S.W.3d 689, 698 (Tex. App.—Dallas 2007, pet. denied) (holding that client's claim that attorneys did not advise client of conflict of interest went to "the quality of the . . . representation"). This reflects the general causation rule for legal malpractice: "but-for causation." *See Rogers*, 518 S.W.3d at 403.

[485] *See* Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 (Tex. 1989); Green v. McKay, 376 S.W.3d 891, 898 (Tex. App.—Dallas 2012, pet. denied); Grider v. Mike O'Brien, P.C., 260 S.W.3d 49, 55 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Zenith Star Ins. Co.*, 150 S.W.3d at 533. Likewise, issues of negligence and damages are usually questions for the trier of fact. *See, e.g.*, UDR Tex. Props., L.P. v. Petrie, 517 S.W.3d 98, 105 (Tex. 2017) (Willett, J., concurring) ("It goes without saying that under tort law generally, questions of negligence and proximate cause are quintessential jury questions."); Gunn v. McCoy, 489 S.W.3d 75, 101 (Tex. App.—Houston [14th Dist.] 2016, pet.

However, proximate cause may be determined as a matter of law if circumstances are such that reasonable minds could not arrive at a different conclusion.[486]

Proximate cause consists of two elements: (1) cause in fact and (2) foreseeability.[487] The plaintiff must prove both of these elements to establish liability.[488] Moreover, these elements cannot be established by mere conjecture, guess, or speculation.[489] "Cause in fact means that the act or omission was a substantial factor in bringing about the injury and without which no harm would have occurred."[490]

In *Rogers v. Zanetti*, the Texas Supreme Court confirmed the meaning of "cause in fact."[491] This standard "requires not only that the act or omission be a substantial factor but also that it be a but-for cause of the injury or occurrence."[492] In other words, apart from possible exceptions in cases dealing with concurrent causation, cause in fact "is essentially but-for causation."[493] Simply put, whether "a negligent lawyer's conduct is the cause in fact of the client's claimed injury requires an examination of the hypothetical alternative: What should have happened if the lawyer had not been negligent?"[494]

This standard can be articulated in different ways depending on the nature of the client's claim. If the client claims his lawyer's negligence

granted) ("The amount of damages to which a plaintiff is entitled is generally a fact question."); Rhodes v. Batilla, 848 S.W.2d 833, 840 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

[486] *See Green*, 376 S.W.3d at 898; *Zenith Star Ins. Co.*, 150 S.W.3d at 533; Schlager v. Clements, 939 S.W.2d 183, 187 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *see also* Axcess Int'l, Inc. v. Baker Botts, L.L.P., No. 05-14-01151-CV, 2016 WL 1162208, at *1 (Tex. App.—Dallas Mar. 24, 2016, pet. denied) (mem. op.) (concluding client's "causation evidence is legally insufficient to support" its breach-of-fiduciary-duty and fraud claims against law firm).

[487] *See Rogers*, 518 S.W.3d at 402; Doe v. Boys Clubs, Inc., 907 S.W.2d 472, 477 (Tex. 1995); McClure v. Allied Stores, Inc., 608 S.W.2d 901, 903 (Tex. 1980); Rodriguez v. Klein, 960 S.W.2d 179, 184 (Tex. App.—Corpus Christi 1997, no writ); Marshall v. Joske's Inc., 581 S.W.2d 192, 194 (Tex. Civ. App.—San Antonio 1979, no writ).

[488] *See Doe*, 907 S.W.2d at 477; Clark v. Waggoner, 452 S.W.2d 437, 439–40 (Tex. 1970).

[489] *See McClure*, 608 S.W.2d at 903; *see also Rodriguez*, 960 S.W.2d at 184.

[490] *McClure*, 608 S.W.2d at 903; *see also Rogers*, 518 S.W.3d at 402; Hall v. Stephenson, 919 S.W.2d 454, 466 (Tex. App.—Fort Worth 1996, writ denied).

[491] 518 S.W.3d at 403.

[492] *Id.*

[493] *Id.* (quoting Ryder Integrated Logistics, Inc. v. Fayette Cnty., 453 S.W.3d 922, 929 (Tex. 2015) (per curiam)).

[494] *Id.* at 404.

caused him to lose the case, then the plaintiff must establish the former suit would have been won "but for" the attorney's breach of duty.[495] In other cases, the client may allege that the attorney's actions "materially and unfavorably affect[ed] the value of the client's underlying claim or defense."[496] Thus, as the court explained in *Rogers v. Zanetti*, the precise articulation of the standard "is but a reflection of the plaintiff's pleadings; different cases involve different injuries and different causal links."[497]

In any event, if the client was the plaintiff in the underlying suit, then she must also prove the judgment would have been collectible.[498] These principles flow from the so-called "suit within a suit"[499] requirement:

> [I]n pursuing such an inquiry in a suit between an attorney and client the court is, in a sense, compelled to try a "moot case,"—a suit without a plaintiff and without a defendant. It is impossible to say what defenses would have been urged by the defendants in the compromised cause. It also presents the anomaly of trying two suits in one, in which the liability of persons not parties to the suit on trial is in question.[500]

[495] *Id.*; Rangel v. Lapin, 177 S.W.3d 17, 22 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) ("If a legal malpractice case arises from prior litigation, a plaintiff must prove that, 'but for' the attorney's breach of his duty, the plaintiff would have prevailed in the underlying case."); *McClure*, 608 S.W.2d at 903; *see* Elizondo v. Krist, 415 S.W.3d 259, 263 (Tex. 2013) (recognizing that client can recover "the difference between the result obtained for the client and the result that would have been obtained with competent counsel").

[496] *Rogers*, 518 S.W.3d at 404.

[497] *Id.*

[498] *See* Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 112 (Tex. 2009) ("When the claim is that lawyers improperly represented the plaintiff in another case, the plaintiff must prove and obtain findings as to the amount of damages that would have been recoverable and collectible if the other case had been properly prosecuted." (citing Cosgrove v. Grimes, 774 S.W.2d 662, 665–66 (Tex. 1989))); Schlager v. Clements, 939 S.W.2d 183, 187–88 (Tex. App.—Houston [14th Dist.] 1996, writ denied); Hall v. Rutherford, 911 S.W.2d 422, 424 (Tex. App.—San Antonio 1995, writ denied); Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana, writ denied); Jackson v. Urban, Coolidge, Pennington and Scott, 516 S.W.2d 948, 949 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

[499] *Rangel*, 177 S.W.3d at 22 (describing plaintiff's burden of the "but for" causation aspect as the "suit-within-a-suit" requirement).

[500] Lynch v. Munson, 61 S.W. 140, 142 (Tex. Civ. App. 1901, no writ); *see also Cosgrove*, 774 S.W.2d at 666 (holding that jury issues should have included phrase "if the suit had been properly prosecuted").

Similarly, where the former suit was never litigated, the plaintiff must establish he would have prevailed had the attorney exercised the ordinary skill of his profession.[501]

Because it is well recognized that an attorney involved in litigation is not an insurer of a result, where the client is a defendant and a judgment is entered against him, the client must establish he would have had a meritorious defense but for the malpractice of his attorney.[502] A "meritorious defense" is one that, if proved, would cause a different result upon retrial of the case.[503] In the criminal case context, for a dissatisfied client to recover against an attorney, the client must show that he would have been acquitted but for the attorney's negligence,[504] though some jurisdictions may allow the client to prevail if he shows he would have received a lesser sentence.[505] In Texas, however, as in many other states, the

[501] *See* Elizondo v. Krist, 415 S.W.3d 259, 263 (Tex. 2013) (discussing proof required when attorney settled client's case for too low before lawsuit was even filed); Gibson v. Johnson, 414 S.W.2d 235, 238–39 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.). *Cf. Mackie*, 900 S.W.2d at 448–49.

[502] *See* Green v. McKay, 376 S.W.3d 891, 901–02 (Tex. App.—Dallas 2012, pet. denied); Tommy Gio, Inc. v. Dunlop, 348 S.W.3d 503, 510–11 (Tex. App.—Dallas 2011, pet. denied); Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 533–34 (Tex. App.—Austin 2004, no pet.); Rice v. Forestier, 415 S.W.2d 711, 713 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).

[503] *See Green*, 376 S.W.3d at 898; *Tommy Gio, Inc.*, 348 S.W.3d at 510–11; Heath v. Herron, 732 S.W.2d 748, 752–53 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (stating that attorney's failure to file verified denial of partnership deprived client of viable defense); *Rice*, 415 S.W.2d at 713.

[504] *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–98 (Tex. 1995); Stallworth v. Ayers, 510 S.W.3d 187, 192–93 (Tex. App.—Houston [1st Dist.] 2016, no pet.); Byrd v. Phillip Galyen, P.C., 430 S.W.3d 515, 522 (Tex. App.—Fort Worth 2014, pet. denied); Saks v. Sawtelle, Goode, Davidson & Troilo, 880 S.W.2d 466, 469 (Tex. App.—San Antonio 1994, writ denied); White v. Walker, 872 S.W.2d 346, 347–48 (Tex. App.—Beaumont 1994, writ denied); Ang v. Martin, 114 P.3d 637, 639 (Wash. 2005) (en banc).

[505] *See* Lawson v. Nugent, 702 F. Supp. 91, 93–95 (D.N.J. 1988) (holding that client who alleged that his attorney's negligence in criminal case caused client to serve more time in prison than he would have otherwise served may recover damages for emotional distress); Schlumm v. Terrence J. O'Hagan, P.C., 433 N.W.2d 839, 845–47 (Mich. Ct. App. 1988) (stating that guilty plea does not necessarily preclude legal malpractice action if client can show that he would have received better result or lesser prison sentence had his lawyer acted differently); Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989) (explaining that to recover against attorney, dissatisfied client in criminal case must show he would have received lesser sentence). *Cf.* Barker v. Capotosto, 875 N.W.2d 157, 166–67 (Iowa 2016) (holding that criminal defendant who gets conviction set aside is not barred from suing former attorney merely because the defendant "may have been guilty of some lesser charge that would have resulted in a lower sentence").

sole-proximate-cause bar prevents criminal defendants from blaming their attorneys unless "they have been exonerated on direct appeal, through post-conviction relief, or otherwise."[506]

The second element of proximate cause is foreseeability.[507] In a legal malpractice case, the "plaintiff proves foreseeability of the injury by establishing that 'a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission.'"[508] Thus, in *Villareal v. Cooper*, the court reversed a summary judgment in the attorney's favor because the negligence of a successor attorney was foreseeable.[509] In that case, the client's first attorney failed to file a personal injury suit during the sixteen months he represented her and then, seventy-seven days before limitations would have barred the client's claim, advised her that her case was not worth pursuing.[510] The client promptly hired another attorney but limitations ran without a suit being filed.[511] The court decided that "[u]nder the facts of [this] case, we are not prepared to hold that seventy-seven days is adequate for another attorney to take proper action."[512] Fact issues were therefore raised as to the first attorney's culpability.[513]

The El Paso Court of Appeals squarely addressed the limits of foreseeability in *Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley*,

[506] Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–98 (Tex. 1995); Stallworth v. Ayers, 510 S.W.3d 187, 192–93 (Tex. App.—Houston [1st Dist.] 2016, no pet.); Byrd v. Phillip Galyen, P.C., 430 S.W.3d 515, 522 (Tex. App.—Fort Worth 2014, pet. denied); *see also* Foondle v. O'Brien, 346 P.3d 970, 973–74 (Alaska 2015).

[507] *See* Doe v. Boys Clubs, Inc., 907 S.W.2d 472, 477 (Tex. 1995).

[508] *See* Stanfield v. Neubaum, 494 S.W.3d 90, 97 (Tex. 2016); Finley v. Fargason, No. 03-09-00685-CV, 2010 WL 4053711, at *4 (Tex. App.—Austin Oct. 15, 2010, no pet.) (mem. op.) (discussing lack of evidence that failure to notify opposing party of deposition would cause foreseeable harm); Grider v. Mike O'Brien, P.C. 260 S.W.3d 49, 57 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (noting rule for foreseeability); Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc., 779 S.W.2d 474, 478 (Tex. App.—El Paso 1989, writ denied) (finding that attorneys were not liable for failure to predict corporation's bankruptcy); *see also* Villarreal v. Cooper, 673 S.W.2d 631, 634 (Tex. App.—San Antonio 1984, no writ) (stating that legal malpractice of successor attorney was foreseeable); Byrd v. Woodruff, 891 S.W.2d 689, 701–02 (Tex. App.—Dallas 1994, writ dism'd by agr.) (finding that fact issue existed whether wrongdoer's acts were foreseeable).

[509] 673 S.W.2d 631, 634 (Tex. App.—San Antonio 1984, no writ).

[510] *See id.* at 632.

[511] *Id.*

[512] *Id.* at 634.

[513] *Id.*

Inc.[514] In *Dyer*, the court affirmed a summary judgment in the attorneys' favor, concluding that attorneys who were hired to dissolve two sole shareholders' business relationship did not act unreasonably in failing to predict the corporation's bankruptcy.[515] Accordingly, the attorneys were not liable in formalizing a business separation agreement providing for payment to one party by the corporation rather than by the other party, where there was no evidence that the corporation was in trouble or that the terms of agreement were unfair.[516]

The Texas Supreme Court held in *Alexander v. Turter & Associates* that expert testimony may be required to establish causation when a legal malpractice case arises out of a bench trial.[517] *Alexander* involved a complicated technical issue before a bankruptcy judge. The expert testimony requirement, however, will extend to any case where the causal link is "beyond the jury's common understanding."[518]

The Texas Supreme Court's recent decision in *Zanetti* provides an example of this requirement.[519] The client sued his lawyers for failing to designate a damages expert in the underlying case, arguing this would have led the jury to reach a lower verdict against him.[520] But the court held the client failed to raise a fact issue on causation despite purported expert testimony on causation. The court reasoned that the experts did not show why the jury in the underlying case would have believed the client's expert (had an expert been offered) enough to change its verdict.[521] Merely having an expert in the malpractice case opine on alternative damages figures or baldly assert the verdict was caused by the attorneys' failure to offer an alternative damages model is not enough.[522]

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[514] 779 S.W.2d 474, 478 (Tex. App.—El Paso 1989, writ denied).

[515] *Id.* at 478.

[516] *Id.* at 477–78.

[517] 146 S.W.3d 113, 115 (Tex. 2004).

[518] *Id.* at 119–20; *see, e.g.*, Lewis v. Nolan, No. 01-04-00865-CV, 2006 WL 2864647, at *5 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (mem. op.) (expert testimony needed on question of whether failure to file response to summary judgment motion caused plaintiff to lose case); Kothmann v. Cook, No. 07-05-0335-CV, 2007 WL 1075171, at *4 (Tex. App.—Amarillo Apr. 11, 2007, no pet.) (mem. op.) (holding that expert testimony was needed to prove causation on breach of fiduciary duty claim that arose out of protracted litigation in multiple counties and in particular a hearing about property rights).

[519] Rogers v. Zanetti, 518 S.W.3d 394, 405 (Tex. 2017).

[520] *Id.* at 400.

[521] *Id.* at 405, 407–08, 410.

[522] *Id.* at 407.

The Texas Supreme Court again considered the question of whether an expert's opinion on causation in a legal malpractice case was conclusory in *Starwood Management, LLC v. Swaim*.[523] In *Swaim*, plaintiff sued defendant attorneys for legal malpractice and breach of fiduciary duty in connection with the permanent seizure of its aircraft by the DEA.[524] Defendants filed summary judgment motions challenging the causation element of the legal malpractice claim.[525] In response to the motions for summary judgment, plaintiff presented affidavits of two attorney/experts who opined that defendants' negligence caused the forfeiture of the aircraft.[526] The experts opined that based on their handling of five similar cases, but for the defendant's negligence, the plaintiff would have recovered her airplane.[527] The trial court and court of appeals determined that the affidavits were too conclusory and would not be considered.[528]

The Texas Supreme Court reversed, explaining that the test is not whether the expert conducted a case-by-case analysis, but whether the opinion sufficiently explains the link between the facts relied upon and the opinion reached.[529] The court concluded that it is unnecessary for an expert to provide a legal analysis of every possible contingency, no matter how remote.[530] The court reiterated that to avoid being conclusory, an expert opinion must explain "how and why the negligence caused the injury" and establish a "demonstrable and reasoned basis on which to evaluate [the] opinion."[531]

§ 9 Damages

A dissatisfied plaintiff-client must prove not only that his suit would have been successful but for the malpractice of his attorney, but also must show the amount of damages he would have recovered had he been

[523] 530 S.W.3d 673, 676 (Tex. 2017).

[524] *Id.* at 677.

[525] *Id.*

[526] *Id.* at 678.

[527] *Id.*

[528] *Id.*

[529] *Id.* at 679.

[530] *Id.* at 681.

[531] *Id.* at 679; *see* Barnett v. Schiro, No. 05-16-00999-CV, 2018 WL 329772, at *6 (Tex. App.—Dallas Jan. 9, 2018, no pet.) (mem. op.) (affirming that legal malpractice expert's affidavit was too conclusory and failed to "sufficiently link his conclusions to the facts and explain why the alleged negligence caused the injury").

successful.[532] The client therefore must establish not just the amount of damages that would have been recovered in the underlying case, but those damages that would have been recovered "if the matter had been properly prosecuted" by the attorney.[533] In Texas, it is possible an attorney can be held liable for actual damages *and* for any exemplary damages the plaintiff can show would have been awarded *in the underlying suit*.[534] In legal malpractice cases, it is improper for the trial judge in the first case to testify as to the judgment he would have entered.[535] Instead, the trier of fact must apply an objective standard and decide what a reasonable judge or jury would have done in the underlying case.[536] The client also must show the judgment he would have obtained in the underlying case would have been

[532] *See Rogers*, 518 S.W.3d at 404; Elizondo v. Krist, 415 S.W.3d 259, 263 (Tex. 2013); Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 114 (Tex. 2009); Williams v. Briscoe, 137 S.W.3d 120, 124 (Tex. App.—Houston [1st Dist.] 2004, no pet.); Fireman's Fund Am. Ins. Co. v. Patterson & Lamberty, Inc., 528 S.W.2d 67, 69 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); Patterson & Wallace v. Frazer, 79 S.W. 1077, 1083 (Tex. Civ. App. 1904, no writ); Rhodes v. Batilla, 848 S.W.2d 833, 837, 841 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (finding attorney negligent in handling tax forms and failing to discuss consent form with client).

[533] *Elizondo*, 415 S.W.3d at 263; *Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 299 S.W.3d at 112; Cosgrove v. Grimes, 774 S.W.2d 662, 666 (Tex. 1989); *Williams*, 137 S.W.3d at 124; Sample v. Freeman, 873 S.W.2d 470, 474 (Tex. App.—Beaumont 1994, writ denied).

[534] At least one early Texas court has reached this conclusion. *See* Patterson & Wallace v. Frazer, 79 S.W. 1077, 1083 (Tex. 1904); *see also* Parsons v. Greenberg, No. 02-10-00131-CV, 2012 WL 310505, at *11 (Tex. App.—Fort Worth Feb. 2, 2012, pet. denied) (mem. op.) (stating that court found no cases explicitly overruling *Patterson*). There is, however, a split of authority in jurisdictions across the nation. *Compare* Jacobsen v. Oliver, 201 F. Supp. 2d 93, 101 (D.D.C. 2002) (allowing recovery of lost punitives), *and* Elliot v. Videan, 791 P.2d 639, 645–46 (Ariz. Ct. App. 1989) (allowing recovery of lost punitives), *and* Scognamillo v. Olsen, 795 P.2d 1357, 1361 (Colo. Ct. App. 1990) (explaining that it was proper to include punitive damages awarded in underlying suit), *and* Haberer v. Rice, 511 N.W.2d 279, 286 (S.D. 1994) (allowing recovery of lost punitives), *with* Ferguson v. Lieff, Cabraser, Heimann & Bernstein, 69 P.3d 965, 974 (Cal. 2003) (lost punitives not recoverable), *and* Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389, 417 (Ill. 2006) (lost punitives not recoverable), *and* Osborne v. Keeney, 399 S.W.3d 1, 19–20 (Ky. 2012) (lost punitives not recoverable), *and* Summerville v. Lipsig, 270 A.D.2d 213, 213 (N.Y. App. Div. 2000) (lost punitives not recoverable).

[535] *See* Joachim v. Chambers, 815 S.W.2d 234, 240–41 (Tex. 1991) (finding an abuse of discretion in court's refusal to strike judge's testimony as expert witness "in the circumstances of this case"); *see also* Marrs v. Kelly, 95 S.W.3d 856, 861–62 (Ky. 2003); Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118, 125 (Wis. 1985).

[536] *See* Rogers v. Zanetti, 518 S.W.3d 394, 406 (Tex. 2017); Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 119 (Tex. 2004); *see also* Leibel v. Johnson, 728 S.E.2d 554, 556 (Ga. 2012); Ang v. Martin, 114 P.3d 637, 640 (Wash. 2005); *Helmbrecht*, 362 N.W.2d at 125.

collectible.[537] Evidence of collectability includes testimony of the financial worth of the original defendant or the existence of applicable insurance.[538]

Conversely, if it is alleged that the attorney's negligence causes a defendant to lose his case, the client must prove he had a meritorious defense.[539] A defense is meritorious if it would lead to a different result in a retrial of the case.[540] In the case of settlement, the proper measure of damages is "the difference between the value of the settlement handled properly and improperly . . . ."[541] However, a client suffers no damages where she receives settlement proceeds greater than the sum she would have received had she succeeded in the underlying suit.[542]

In *Elizondo v. Krist*, the Texas Supreme Court addressed whether a malpractice plaintiff could recover damages for an allegedly inadequate settlement arising out of a refinery explosion that produced over 4,000 claims.[543] The Supreme Court clarified its prior jurisprudence that damages in legal malpractice cases are the difference between the result obtained in

[537] *See Cosgrove*, 774 S.W.2d at 666 (addressing an issue on the amount of damages that would have been collected); Schlosser v. Tropoli, 609 S.W.2d 255, 257 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (holding evidence existed that judgment in underlying suit "would have been collectible").

[538] *See Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 299 S.W.3d at 114 (evidence of solvency); Webb v. Stockford, 331 S.W.3d 169, 177 (Tex. App.—Dallas 2011, pet. denied); James V. Mazuca & Assocs. v. Schumann, 82 S.W.3d 90, 96 (Tex. App.—San Antonio 2002, pet. denied); Sample v. Freeman, 873 S.W.2d 470, 474 (Tex. App.—Beaumont 1994, writ denied); *Schlosser*, 609 S.W.2d at 257.

[539] *See* Green v. McKay, 376 S.W.3d 891, 898 (Tex. App.—Dallas 2012, pet. denied); Tommy Gio, Inc. v. Dunlop, 348 S.W.3d 503, 510–11 (Tex. App.—Dallas 2011, pet. denied); Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 534 (Tex. App.—Austin 2004, no pet.); Heath v. Herron, 732 S.W.2d 748, 753 (Tex. App.—Houston [14th Dist.] 1987, writ denied); Rice v. Forestier, 415 S.W.2d 711, 714 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) (concluding that meritorious defense existed because debt actually belonged to corporation and client would not have been personally liable).

[540] *See Green*, 376 S.W.3d at 898; *Heath*, 732 S.W.2d at 753.

[541] Elizondo v. Krist, 415 S.W.3d 259, 263 (Tex. 2013); *Heath*, 732 S.W.2d at 753; *see* Rizzo v. Haines, 555 A.2d 58, 63, 64–65 (Pa. 1989) (awarding damages for failure to settle where client authorized settlement of $750,000, defense offered $550,000 saying, "I can get you more . . . what do you really want?" but attorney insisted, unbeknownst to his client, on $2 million and jury awarded $450,000); Thurston v. Continental Cas. Co., 567 A.2d 922, 924 (Me. 1989) (stating that although client was insolvent at the time the insurance carrier negligently prevented settlement within the policy limits, that did not necessarily foreclose possibility that some actual economic harm occurred, such as injury to good will and expenses in dealing with judgment and later settlement).

[542] *See* Mackie v. McKenzie, 900 S.W.2d 445, 451 (Tex. App.—Texarkana 1995, writ denied).

[543] 415 S.W.3d 259, 260 (Tex. 2013).

the underlying case and the case's true value, defined as the recovery that would have been obtained following a trial in which the client had reasonably competent, malpractice-free counsel.[544] The court held that a plaintiff need not necessarily prove what would have happened had the case gone to trial with competent counsel.[545] Instead, when a case involves an allegedly inadequate settlement, damages may be proven if an expert measures the true settlement value of a particular case by persuasively comparing all the circumstances of the case to the settlements obtained in other cases with similar circumstances.[546] In *Elizondo*, the Texas Supreme Court found that the plaintiffs did *not* satisfy this alternative approach because of an analytical gap in their expert's testimony, which rendered his affidavit conclusory and therefore no obstacle to summary judgment.[547]

Elizondo acknowledged that the suit-within-a-suit approach of determining the value of success after trial was a valid method for proving malpractice damages, but held that it was not the only method for proving such damages.[548] Considering the refinery had settled all cases and not tried any to a verdict, a comparison of those other settlements with the plaintiffs' case could have proven malpractice damages.[549] According to the court, the attorney's affidavit failed to make the requisite comparison. Although the attorney had recited the pertinent settlement factors and facts, had shown his personal experience with other settlements, and had concluded that the Elizondos' settlement was inadequate, he failed to tie the facts of the Elizondos' case to the settlement factors or to the other settlements.[550] Relying on *Burrow v. Arce*, the court held that, absent such a comparison, there was an analytical gap between the data Gonzalez purported to rely on and his proffered opinion, which rendered Gonzalez's affidavit conclusory and, effectively, no evidence.[551]

By not limiting recoverable damages to the suit within a suit approach, the court left the door open to legal malpractice claims based on allegedly inadequate settlements. However, the court did suggest that for an expert to opine on the inadequacy of a settlement, he must compare the settlement at

[544] *Id.* at 263.

[545] *Id.*

[546] *Id.*

[547] *Id.* at 265–66.

[548] *Id.* at 270.

[549] *Id.* at 263.

[550] *Id.* at 265–66.

[551] *Id.*

issue to other actual settlements under similar circumstances in order to avoid a challenge based on an analytical gap in the expert analysis.[552]

Attorney liability may also exist in non-litigation or transactional areas as well. In the title examination area, for example, there is little attorney discretion and the lawyer should not leave doubts about title undisclosed to the client.[553] In malpractice cases based on faulty title examination, "the exact nature of damages may depend on the nature of the client's interest in the property, the character of the attorney's error, and the other facts of the case."[554]

Other types of transactional work will expose attorneys to potential liability for malpractice. For example, in *Roberts v. Burkett*, lenders who sued their attorneys in connection with the attorneys' role in attempting to enforce a promissory note secured by a second lien on undeveloped commercial real estate, were not entitled to recover a percentage of the borrower's equity in the property as part of their measure of damages.[555] The court's rationale was that if successful, they would have been placed in a better position than they would have been but for the attorneys' negligence inasmuch as the alleged negligence only caused the borrowers to lose the benefit of the bargain.[556] When an attorney representing two parties in a sales transaction fails to disclose a growing conflict between the buyers

[552] *Id.* at 266.

[553] *See* Tolpo v. Decordova, 146 S.W.3d 678, 683 (Tex. App.—Beaumont 2004, no pet.) (holding that anecdotal evidence about what provisions are in some earnest money contracts is not evidence that attorney breached standard of care by not including those provisions in a different earnest money contract); Pigott v. Mitchell, No. 01-92-00958-CV, 1993 WL 177633, at *2 (Tex. App.—Houston [1st Dist.] May 27, 1993, no writ) (not designated for publication) ("[T]here was evidence to support the finding that [attorney's] choice to rely solely on the title report was not reasonable or prudent under the circumstances . . . .").

[554] *See* Thompson & Knight LLP v. Patriot Expl. LLC, 444 S.W.3d 157, 163 (Tex. App.—Dallas 2014, no pet.) (discussing evidence of what seller would have paid for oil and gas leases but for lawyers' malpractice); *Pigott*, 1993 WL 177633, at *1–2, *3 (awarding mental anguish damages and actual damages for judgment rendered against client in underlying trespass action after lawyer incorrectly told client she owned house). *Accord* Nilson-Newey & Co. v. Ballou, 839 F.2d 1171, 1175 (6th Cir. 1988) (finding that measure of damages for a defective title opinion was difference between purchase price and market value of property actually conveyed); McClain v. Faraone, 369 A.2d 1090, 1092, 1095 (Del. Super. Ct. 1977) (holding attorney liable for market value of property where failure to discover judgment lien leads to foreclosure as well as out-of-pocket expenses); Rubin Res., Inc. v. Morris, 787 S.E.2d 641, 646 (W. Va. 2016) (observing that damages for transactional malpractice include lost value, loss of future expectations, or out of pocket expenses).

[555] 802 S.W.2d 42, 45–46 (Tex. App.—Corpus Christi 1990, no writ).

[556] *Id.*

and sellers, the aggrieved client is entitled to recover the amount of money he would have been able to recover had the attorney been looking out for that client's best interest.[557]

Since an attorney's negligence is actionable only where it is the proximate cause of the claimed damages,[558] where a former client suffers no damage, recovery is not permitted.[559] The trier of fact is entitled, for example, to determine the damages that would have been recovered and collected by the client had his case not been dismissed for want of prosecution. Such an inquiry, however, does not permit the trier of fact to consider damages which are too remote to be recoverable.[560] Likewise, to recover lost profits in a legal malpractice case, the client must establish such damages with reasonable certainty.[561] At a minimum, opinions or

[557] *See* Camp Mystic, Inc. v. Eastland, 390 S.W.3d 444, 462–63 (Tex. App.—San Antonio 2012, pet. granted, judgm't vacated w.r.m.) (holding that litigation costs caused by dispute over real property lease were recoverable as damages from attorney who represented both sides to original transaction); CenTra, Inc. v. Estrin, 538 F.3d 402, 423 (6th Cir. 2008) (holding that damages against firm that represented a city and a business with competing interests could equal the cost of environmental assessment undergone by company due to firm's efforts on behalf of city to oppose business's efforts); Simpson v. James, 903 F.2d 372, 377–78 (5th Cir. 1990) (finding that seller was entitled to recover an amount equal to insurance policy that it could have recovered if attorney had properly protected it by placing lien on property or seizing existing proceeds from buyer's insurance policy); Asset Funding Grp., L.L.C. v. Adams & Reese, L.L.P., No. 07-2965, 2009 WL 3737393, at *5 (E.D. La. Nov. 5, 2009) (mem. op.) (declining to decide on summary judgment whether conflicted attorneys' failure to assert lease rejection damages on behalf of client were recoverable).

[558] *See* Rogers v. Zanetti, 518 S.W.3d 394, 402 (Tex. 2017); Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 112 (Tex. 2009); Grider v. Mike O'Brien, P.C., 260 S.W.3d 49, 55 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); Mackie v. McKenzie, 900 S.W.2d 445, 448 (Tex. App.—Texarkana 1995, writ denied).

[559] *See Rogers*, 518 S.W.3d at 404; Bell v. Phillips, No. 14-00-01189-CV, 2002 WL 576036, at *8 (Tex. App.—Houston [14th Dist.] Apr. 18, 2002, no pet.) (not designated for publication); Fireman's Fund Am. Ins. Co. v. Patterson & Lamberty, Inc., 528 S.W.2d 67, 69 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); *see also Mackie*, 900 S.W.2d at 451.

[560] *See* Swank v. Cunningham, 258 S.W.3d 647, 667 (Tex. App.—Eastland 2008, pet. denied); Avery Pharms., Inc. v. Haynes & Boone, L.L.P., No. 2-07-317-CV, 2009 WL 279334, at *7 (Tex. App.—Fort Worth Feb. 5, 2009, no pet.) (per curiam) (mem. op.); Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 635 (Tex. App.—Dallas 2000, pet. denied); Schlosser v. Tropoli, 609 S.W.2d 255, 259 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). *Cf.* Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products* 84.4 cmt. (2016) (discussing damages for legal malpractice).

[561] *See* Phillips v. Carlton Energy Grp., LLC, 475 S.W.3d 265, 278 (Tex. 2015) ("[L]ost profits can be recovered only when the amount is proved with reasonable certainty . . . ."); ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 876 (Tex. 2010); Thomas v. Carnahan Thomas, LLP, No.

estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained.[562] In *Holland v. Hayden*, a service station owner sued his former attorney for legal malpractice in connection with a default judgment rendered against him.[563] Despite the station owner's claim that paying off the judgment prevented him from expanding his business, the court refused to award damages for lost profits because of the speculative nature of that claim.[564]

A. Mental Anguish

In addition to economic losses, a legal malpractice plaintiff may—in limited circumstances—also recover mental anguish damages. Generally, most courts that have considered the issue have ruled that mental anguish damages are not recoverable in a legal malpractice claim based on negligence when those damages are the consequence of economic loss.[565]

05-11-01615-CV, 2014 WL 465818, at *5 (Tex. App.—Dallas Feb. 4, 2014, pet. denied) (mem. op.); Total Clean, LLC v. Cox Smith Matthews Inc., 330 S.W.3d 657, 663 (Tex. App.—San Antonio 2010, pet. denied); Holland v. Hayden, 901 S.W.2d 763, 766 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

[562] *Thomas*, 2014 WL 465818, at *5.

[563] 901 S.W.2d at 764–65.

[564] *Id.*

[565] *See* Vincent v. DeVries, 72 A.3d 886, 894 (Vt. 2013) (reversing trial court's award of emotional distress damages because plaintiff's losses were economic) (citing Boros v. Baxley, 621 So.2d 240, 244 (Ala. 1993) ("There can be no recovery for emotional distress, where [the legal malpractice] does not involve any affirmative wrongdoing but merely neglect of duty, and the client may not recover for mental anguish where the contract which was breached, was not predominately personal in nature." (quotations omitted))); Reed v. Mitchell & Timbanard, P.C., 903 P.2d 621, 626 (Ariz. Ct. App. 1995) ("We hold that simple legal malpractice resulting in pecuniary loss which in turn causes emotional upset, even with physical symptoms, will not support a claim for damages for emotional distress."); Aller v. Law Office of Carole C. Schriefer, P.C., 140 P.3d 23, 26–27 (Colo. App. 2005) ("[E]motional distress or other non-economic damages resulting solely from pecuniary loss are not recoverable in a legal malpractice action based on negligence." (quotations omitted)); Lickteig v. Alderson, Ondov, Leonard & Sween, P.A., 556 N.W.2d 557, 562 (Minn. 1996) (holding that an emotional distress damage award was improper where lawyer's conduct was merely negligent and not willful, wanton or malicious); Selsnick v. Horton, 620 P.2d 1256, 1257 (Nev. 1980) (holding that damages for emotional distress are not available in legal malpractice suit premised upon ordinary negligence, with no allegation of extreme and outrageous conduct); Akutagawa v. Laflin, Pick & Heer, P.A., 126 P.3d 1138, 1144 (N.M. Ct. App. 2005) ("[E]motional distress damages alone are not compensable in a legal malpractice case where, as here, there are no allegations of intentional infliction of emotional distress or some heightened level of culpability resulting in severe distress such that no reasonable person could be expected to endure."); Gautam v. De Luca, 521 A.2d 1343, 1348 (N.J. Super. Ct. App. Div. 1987) ("[E]motional distress damages should not be awarded in legal

The Texas Supreme Court in *Douglas v. Delp* adopted the same rule: "when a plaintiff's mental anguish is a consequence of economic losses caused by an attorney's negligence, the plaintiff may not recover damages for that mental anguish."[566] Thus, in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, the Texas Supreme Court held that "estate-planning malpractice claims seeking recovery for pure economic loss are limited to recovery for property damage."[567]

The court, however, declined to adopt a per se rule for all malpractice cases, noting that the standard may be different "when additional or other kinds of loss are claimed" (for example, loss of custody of a child) or "when heightened culpability is alleged."[568] As a consequence, Texas courts have occasionally allowed clients to recover mental anguish damages from their attorneys.[569]

Prior to *Douglas v. Delp*, the standard for mental anguish damages in legal malpractice claims was unclear. The Texas Supreme Court upheld an award of $500 in mental anguish damages for legal malpractice in *Cosgrove v. Grimes*.[570] Before *Cosgrove*, Texas courts generally required a showing of "egregious or extraordinary circumstances" before mental anguish

malpractice cases at least in the absence of egregious or extraordinary circumstances."); Dombrowski v. Bulson, 971 N.E.2d 338, 340 (N.Y. 2012) (finding "no compelling reason to depart from the established rule limiting recovery in legal malpractice actions to pecuniary damages" even where client alleged wrongful loss of liberty as result of criminal defense lawyer's negligence); Hilt v. Bernstein, 707 P.2d 88, 94–96 (Or. Ct. App. 1985) (holding that plaintiff was not entitled to emotional distress damages in legal malpractice claim where she was not alleging intentional or reckless conduct, and where the legal interest compromised—financial loss—did not rise to level of claims such as unlawful disinterment of remains or infringement of custody of child, for which emotional distress damages are allowed even without physical injury).

[566] 987 S.W.2d 879, 885 (Tex. 1999).

[567] 192 S.W.3d 780, 785 (Tex. 2006).

[568] *Douglas*, 987 S.W.2d at 885.

[569] *E.g.*, Copeland v. Cooper, No. 05-13-00541-CV, 2015 WL 83307, at *5 (Tex. App.—Dallas Jan. 7, 2015, pet. denied) (mem. op.) (affirming mental anguish damages award against attorney based on fraud claim); Parenti v. Moberg, No. 04-06-00497-CV, 2007 WL 1540952, at *3 (Tex. App.—San Antonio May 30, 2007, pet. denied) (not designated for publication) (holding that mental anguish damages may be awarded against attorney on a showing that the attorney acted with malice); Bellows v. San Miguel, No. 14-00-00071-CV, 2002 WL 835667, at *13 n.8 (Tex. App.—Houston [14th Dist.] May 2, 2002, pet. denied) (not designated for publication) (stating that mental anguish damages are recoverable from attorney "for knowing violations of the DTPA").

[570] 774 S.W.2d 662, 666 (Tex. 1989).

damages could be awarded for legal malpractice.[571] However, the court in *Cosgrove* affirmed the judgment for mental anguish damages without a jury finding of "egregious or extraordinary circumstances" and without even a discussion of such a requirement.[572] In adopting the current rule, *Douglas v. Delp* criticized *Cosgrove*, at least to the extent it focused "not on the attorney's conduct but on the client's condition."[573]

Punitive damages also may be appropriate where a client's damages result from the attorney's fraud, malice, or gross negligence.[574] Furthermore, in Texas it appears that if an attorney's negligence causes a client to lose a recovery of exemplary damages in the underlying suit, recovery of those damages constitutes an element of actual damages in the malpractice suit.[575] Texas authority addressing the issue, however, dates

[571] Heath v. Herron, 732 S.W.2d 748, 753 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

[572] *See* 774 S.W.2d at 666.

[573] 987 S.W.2d at 885.

[574] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (West 2015); Rhodes v. Batilla, 848 S.W.2d 833, 844 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (gross negligence); Avila v. Havana Painting Co., 761 S.W.2d 398, 400 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (concluding that punitive damages were appropriate where attorney wrongfully withheld client's funds); Fillion v. Troy, 656 S.W.2d 912, 915 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (upholding award of $90,000 in punitive damages when attorney defrauded client); *see also* Rizzo v. Haines, 555 A.2d 58, 69 (Pa. 1989) (holding an award of $150,000 in punitive damages proper when attorney used his confidential position to persuade his client to transfer $50,000 to pursue a meritless claim and the attorney withheld the judge's findings concerning the attorney's misconduct).

[575] *See* Patterson & Wallace v. Frazer, 93 S.W. 146, 148 (Tex. Civ. App.—El Paso 1906), *rev'd on other grounds*, 94 S.W. 324 (Tex. 1906). There is a split of authority in other jurisdictions as to the recovery of punitive damages. *Compare* Jacobsen v. Oliver, 201 F. Supp. 2d 93, 101 (D.D.C. 2002) (allowing recovery of lost punitives), *and* Elliot v. Videan, 791 P.2d 639, 645–46 (Ariz. Ct. App. 1989) (allowing recovery of lost punitives), *and* Scognamillo v. Olsen, 795 P.2d 1357, 1361 (Colo. Ct. App. 1990) (explaining that it was proper to include punitive damages awarded in underlying suit), *and* Haberer v. Rice, 511 N.W.2d 279, 286 (S.D. 1994) (allowing recovering of lost punitives), *with* Ferguson v. Lieff, Cabraser, Heimann & Bernstein, 69 P.3d 965, 974 (Cal. 2003) (lost punitives not recoverable), *and* Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389, 417 (Ill. 2006) (lost punitives not recoverable), *and* Osborne v. Keeney, 399 S.W.3d 1, 19 (Ky. 2012) (lost punitives not recoverable), *and* Summerville v. Lipsig, 270 A.D.2d 213, 213 (N.Y. App. Div. 2000) (lost punitives not recoverable). The jurisdictions disallowing recovery of lost punitives generally conclude that the purpose of punitive damages is to punish the defendant, not to compensate the plaintiff, and the purpose of punishing the defendant in the underlying suit would not be served by ordering the law firm to pay those damages. *See* Cappetta v. Lippman, 913 F. Supp. 302, 306 (S.D.N.Y. 1996).

back to the early 1900s, and commentators recognize that the majority view precludes recovery of lost punitive damages on public policy grounds.[576]

B. Mitigation of Damages

A client has a duty to mitigate the damages caused by an attorney's negligence.[577] Where the client has viable or alternative remedies in the underlying suit, the client must pursue these remedies before the proper amount of damages may be ascertained.[578] The duty to mitigate damages, however, does not normally require the client to file and prosecute a lawsuit, as the result is too uncertain.[579]

An aggrieved client may be entitled to a return of the attorney's fee paid by the client if the attorney has not fulfilled his obligations.[580] In Texas, the

[576] 3 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 21:14 (2018 ed.).

[577] Am. Reliable Ins. Co. v. Navratil, 445 F.3d 402, 406 (5th Cir. 2006) (holding under Louisiana law that "a client has a duty to mitigate damages caused by its attorney's malpractice," but "such a duty cannot require the client to undertake measures that are unreasonable, impractical, or disproportionately expensive considering all of the circumstances"); *see* Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553, 564 (Tex. 2015) ("A plaintiff's post-occurrence failure to mitigate his damages operates as a reduction of his damages award . . . ."); Formosa Plastics Corp., USA v. Kajima Int'l, Inc., 216 S.W.3d 436, 458–59 (Tex. App.—Corpus Christi 2006, pet. denied) ("The duty to mitigate arises in both contract and tort cases."); Mondragon v. Austin, 954 S.W.2d 191, 195 (Tex. App.—Austin 1997, writ denied) ("[A] plaintiff is expected to mitigate damages when he is reasonably able to do so.").

[578] *See* Cunningham v. Bienfang, No. 3:00-CV-0448-L, 2002 WL 31553976, at *3 (N.D. Tex. Nov. 15, 2002) (mem. op.) (holding that the fact of settlement "is not enough" to prove the exercise of reasonable care and mitigation of damages); Vanasek v. Underkofler, 50 S.W.3d 1, 11 (Tex. App.—Dallas 1999) (discussing evidence that attorney's malpractice forced client "to mitigate his damages by settling the underlying suit"), *rev'd in part on other grounds*, 53 S.W.3d 343 (Tex. 2001); *see also Navratil*, 445 F.3d at 406–07 (recognizing general duty to mitigate, but holding that client's decision to settle case instead of appealing adverse judgment was not a failure to mitigate).

[579] Stone v. Satriana, 41 P.3d 705, 712 (Colo. 2002) (holding that client need not initiate a lawsuit or appeal to mitigate damages); MB Indus., LLC v. CNA Ins. Co., 74 So. 3d 1173, 1182–83 (La. 2011) ("[A] party does not waive its right to file a legal malpractice suit by not filing an appeal of an underlying judgment unless it is determined a reasonably prudent party would have filed an appeal, given the facts known at the time and avoiding the temptation to view the case through hindsight."); Rubin Res., Inc. v. Morris, 787 S.E.2d 641, 648 (W. Va. 2016).

[580] *See* Porter v. Kruegel, 155 S.W. 174, 175 (Tex. 1913); *see also* Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 122–23 (Tex. 2009) (holding that "malpractice plaintiff may recover damages for attorney's fees paid in the underlying case to the extent the fees were proximately caused by the defendant attorney's negligence," but declining to award appellate attorneys fees from underlying case because the costs of appeal could have been incurred notwithstanding attorney's negligence at trial).

attorney's fees paid to a second attorney who attempts to undo the results caused by the legal malpractice of the first attorney is a proper item for recovery in a malpractice action.[581]

As a general rule, damages in a legal malpractice action may not be reduced by the amount of the fee the client would have paid had the matter been handled competently.[582] Under the majority view, such deductions are generally not permitted because: "[A]ny fee which [the client] may have had to pay the [attorney] had he successfully prosecuted the suit is cancelled out by the attorney's fees [the client has] incurred in retaining counsel in the [malpractice] action"[583] and "a negligent attorney in the appropriate case is not entitled to recover his legal fees . . . ."[584]

There is, however, some authority indicating there should be a reduction of the damages in a legal malpractice action by the amount of fees the client would have paid.[585] Under this approach, such reductions are considered proper because the client "should recover only what he would have received

[581] *Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 299 S.W.3d at 123 (holding evidence existed that first counsel's malpractice proximately caused client to pay fees and expenses to second counsel); *see also* De Pantosa Saenz v. Rigau & Rigau P.A., 549 So. 2d 682, 685 (Fla. App. 1989) ("[A] plaintiff has the right to recover attorneys' fees incurred in litigation with a third party, as an element of compensatory damages, if that litigation was caused by the defendant[] . . . ."). *But see* City of Garland v. Booth, 895 S.W.2d 766, 771 (Tex. App.—Dallas 1995, writ denied) (explaining that attorney's fees expended to disqualify opposing counsel are not recoverable as damages).

[582] *See* Winter v. Brown, 365 A.2d 381, 386 (D.C. App. 1976); Kane, Kane & Kritzen, Inc. v. Altagen, 165 Cal. Rptr. 534, 538 (Cal. Ct. App. 1980); Hook v. Trevino, 839 N.W.2d 434, 447 (Iowa 2013) (same rule for contingency fee); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 696 (Minn. 1980) (same rule for contingency fees); Carbone v. Tierney, 864 A.2d 308, 319 (N.H. 2004) (same rule for contingency fee); Campagnola v. Mulholland, Minion & Roe, 543 N.Y.S.2d 516, 517 (N.Y. App. 1989); Foster v. Duggin, 695 S.W.2d 526, 527 (Tenn. 1985); Shoemake v. Ferrer, 225 P.3d 990, 994 (Wash. 2010) (same rule for contingency fee). This rule applies even though the fee arrangement is contingent in nature. *See* Samuel J. Coben, *The Deduction of Contingent Attorneys' Fees Owed to the Negligent Attorney from Legal Malpractice Damage Awards: The New Modern Rule*, 24 TORT & INS. L. J. 751, 752 (1988).

[583] *Campagnola*, 543 N.Y.S.2d at 518 (quoting Andrews v. Cain, 406 N.Y.S.2d 168, 169 (N.Y. App. Div. 1978)); *see Hook*, 839 N.W.2d at 446; *Togstad*, 291 N.W.2d at 696; *Shoemake*, 225 P.3d at 994.

[584] *Campagnola*, 543 N.Y.S.2d at 519 (quoting Strauss v. Fost, 517 A.2d 143, 145 (N. J. Super. Ct. App. Div. 986)); *see Hook*, 839 N.W.2d at 446; Kluczka v. Lecci, 880 N.Y.S.2d 698, 700 (N.Y. App. Div. 2009); *Shoemake*, 225 P.3d at 994.

[585] Several courts have held that legal malpractice damages should be reduced by the amount of fees the attorney would have received if he had satisfied the standard of care. *See* Moores v. Greenberg, 834 F.2d 1105, 1111 (1st Cir. 1987); Horn v. Wooster, 165 P.3d 69, 74 (Wyo. 2007).

had the original matter been properly handled."[586] Moreover, the Texas Supreme Court has stated that if an attorney "fraudulently combined and confederated with the adversaries of his client, the [client] would be entitled to recover the fee paid . . . ."[587]

Conversely, because legal malpractice claims are torts, attorney's fees incurred prosecuting the legal malpractice claim or defending an attorney's claim for unpaid legal fees are not generally recoverable as actual damages.[588]

C. Constructive Trust

A constructive trust is an equitable remedy recognized by Texas courts for situations where one obtains legal title to property in violation of a confidential relationship with resulting unjust enrichment of the fiduciary at the expense of the beneficiary.[589] Thus, where an attorney is found to breach a fiduciary duty, he may be subject to a constructive trust on property or income he has received.[590] Texas courts have adopted the rule

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[586] *See Campagnola*, 543 N.Y.S.2d at 518; *Horn*, 165 P.3d at 74.

[587] Porter v. Krugel, 155 S.W. 174, 175 (Tex. 1913); *see also* Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 121 (Tex. 2009) (holding that fee forfeiture and disgorgement may be remedy for attorney's breach of fiduciary duty); Burrow v. Arce, 997 S.W.2d 229, 244 (Tex. 1999) (recognizing fee forfeiture as a remedy when an attorney breaches a fiduciary duty to the client).

[588] *See Akin, Gump, Strauss, Hauer & Feld*, 299 S.W.3d at 120–21 (discussing the American Rule prohibiting recovery of attorney's fees); Haden v. Sacks, 222 S.W.3d 580, 597 (Tex. App.—Houston [1st Dist.] 2007), *rev'd on other grounds*, 266 S.W.3d 447 (Tex. 2008).

[589] *See* KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 87 (Tex. 2015); Troxel v. Bishop, 201 S.W.3d 290, 297 (Tex. App.—Dallas 2006, no pet.); Mims v. Beall, 810 S.W.2d 876, 881 (Tex. App.—Texarkana 1991, no writ); Consol. Bearing & Supply Co. v. First Nat'l Bank, 720 S.W.2d 647, 649 (Tex. App.—Amarillo 1986, no writ); Miller v. Huebner, 474 S.W.2d 587, 590–91 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.); *see* RESTATEMENT (THIRD) OF RESTITUTION § 55 (AM. LAW INST. 2011).

[590] *See, e.g.*, Ginther v. Taub, 675 S.W.2d 724, 727 (Tex. 1984) (explaining that where third party knowingly participated in attorney's fraudulent conduct in regard to transfer of attorney's client's oil and gas interests, constructive trust could be placed on oil and gas interests transferred to that third party); Murphy v. Gruber, 241 S.W.3d 689, 698 (Tex. App.—Dallas 2007, pet. denied) (noting that the remedies of fee forfeiture and constructive trust are remedies available for breach of fiduciary duty claims); Smith v. Dean, 240 S.W.2d 789, 790–91 (Tex. Civ. App.—Waco 1951, no writ) (imposing constructive trust for will's other beneficiaries upon property which attorney took possession of after alleged beneficiary, who asked attorney to look after the property, disappeared, despite fact that missing beneficiary allegedly told attorney that if she never returned, he could have property).

that "an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices generally to ground equitable relief in the form of the declaration and enforcement of a constructive trust . . . ."[591]

Before a Texas court will impose a constructive trust, however, the party requesting it must establish (1) "breach of a special trust or fiduciary relationship or actual or constructive fraud"; (2) "unjust enrichment of the wrongdoer"; *and* (3) "an identifiable res that can be traced back to the original property."[592] This remedy "is not merely a vehicle for collecting assets as a form of damages"; it applies only when the tracing requirement is met.[593] A constructive trust may be imposed where actual or constructive fraud is involved,[594] or where a plaintiff's property is fraudulently conveyed.[595]

§ 10 Standard for Appellate Error

To recover for attorney malpractice in an appellate context, the client must show the appeal in the underlying action would have been successful but for the attorney's negligence.[596] The question of "whether an appeal

[591] Fitz-Gerald v. Hull, 237 S.W.2d 256, 261 (Tex. 1951) (quoting 54 AM. JUR. TRUSTS § 225 (1936)); *see also* Hsin-Chi-Su v. Vantage Drilling Co., 474 S.W.3d 284, 298–99 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); Procom Energy, L.L.A. v. Roach, 16 S.W.3d 377, 381–82 (Tex. App.—Tyler 2000, pet. denied).

[592] *Bradshaw*, 457 S.W.3d at 87.

[593] *Id.* at 88.

[594] *Id.* at 87; *Troxel*, 201 S.W.3d at 297; Hubbard v. Shankle, 138 S.W.3d 474, 486 (Tex. App.—Fort Worth 2004, pet. denied); Hatton v. Turner, 622 S.W.2d 450, 458 (Tex. Civ. App.—Tyler 1981, no writ); Horton v. Harris, 610 S.W.2d 819, 822 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (affirming trial judge's refusal to submit special issues because evidence did not raise a question of fact as to existence of actual fraud, constructive fraud or constructive fraud based on confidential relationship between parties).

[595] *See, e.g.*, Hahn v. Love, 321 S.W.3d 517, 534 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (holding fact issue existed regarding whether constructive trust should be imposed based on alleged fraudulent transfer of real property); Wheeler v. Blacklands Prod. Credit Ass'n, 627 S.W.2d 846, 851 (Tex. App.—Fort Worth 1982, no writ) ("Before a constructive trust can be imposed on property belonging to one wrongfully withholding that property from another who has an equitable claim to it, it must be established that the property subjected to the constructive trust is the property, or the proceeds from the sale thereof, or revenues therefrom, that was somehow wrongfully taken.").

[596] *See* Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 (Tex. 1989); Finley v. Fargason, No. 03-09-00685-CV, 2010 WL 4053711, at *4 (Tex. App.—Austin Oct. 15, 2010, no pet.) (mem. op.); Grider v. Mike O'Brien, P.C., 260 S.W.3d 49, 55 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *In re* Clare Constat, Ltd., No. 07-05-0347-CV, 2005 WL 3062023, at *2 (Tex. App.—

would have been successful depends on an analysis of the law and the procedural rules" and is therefore, a question of law.[597] Consequently, the trial judge in the malpractice suit reviews the transcript, statement of facts, and argument of counsel, and then applies the rules of appellate review to determine the "merits and probable outcome of an appeal."[598]

In *Millhouse v. Wiesenthal*, the Texas Supreme Court decided a judge is in a better position than a jury to make the determination of whether an appeal would have been successful.[599] Accordingly, in a legal malpractice case involving allegations of appellate error, the resolution of those issues falls exclusively within the province of a judge because a judge is better qualified to determine the probable outcome of an appeal.[600]

§ 11 Specialization

Although Texas has not yet definitely resolved the issue of whether an attorney who holds himself out as a legal specialist must be held to a higher degree of skill, it is likely that attorney-specialists will be held to a higher standard than the nonspecialist attorney.[601] Specialists in other professions are bound to exercise the degree of skill and knowledge that is reasonably possessed by a similar specialist, not merely the degree of skill and

Amarillo Nov. 15, 2005, orig. proceeding [mand. denied]) (not designated for publication); Klein v. Reynolds, Cunningham, Peterson & Cordel, 923 S.W.2d 45, 47 (Tex. App.—Houston [1st Dist.] 1995, no writ).

[597] *Millhouse*, 775 S.W.2d at 628; *Grider*, 260 S.W.3d at 55; *In re Clare Constat, Ltd.*, 2005 WL 3062023, at *2; *see also* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 33:118 (2018 ed.).

[598] *Millhouse*, 775 S.W.2d at 628; *see Grider*, 260 S.W.3d at 55; 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 33:118 (2018 ed.).

[599] 775 S.W.2d at 628.

[600] *See id.* at 627–28. In *Millhouse*, the Supreme Court reasoned that if the appeal would have failed and the trial court's judgment would have been affirmed, the attorney's negligence could not have caused any damage to plaintiff. *Id.* Conversely, if the appeal would have succeeded in reversing the judgment of the trial court, and a more favorable result was obtained, then plaintiff sustained damage because of the attorney's negligence. *Id.*

[601] *See* Streber v. Hunter, 221 F.3d 701, 722 (5th Cir. 2000); Green v. Brantley, 11 S.W.3d 259, 266 (Tex. App.—Fort Worth 1999, pet. denied) (discussing expert affidavit asserting that "an attorney board-certified in personal injury trial law is held to the standard of care that would be exercised by a reasonably prudent attorney, board certified in personal injury trial law, acting under the same or similar circumstances"); Rhodes v. Batilla, 848 S.W.2d 833, 843 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (holding that an attorney who held himself out as a "tax attorney" was held to standard of care exercised by a "reasonably prudent tax attorney").

knowledge of a general practitioner.[602] In addition, a physician specialist supervising a nonspecialist is held to a higher standard of care and skill in providing supervision than the supervised nonspecialist.[603] It therefore makes sense to hold the attorney-specialist to a higher standard in the absence of any compelling reason not to do so.

Many attorneys are board certified in various specializations and are attracting clients by publicizing their specialization. A client is entitled to expect that an attorney who holds himself out as a specialist possesses the knowledge and experience of a specialist.[604] Furthermore, an attorney who does not have the necessary expertise to handle a legal matter should refer the client to an attorney who possesses the requisite skills.[605]

§ 12 Locality Rule

The locality rule, first developed in medical malpractice cases, required that a plaintiff present expert testimony as to the nature of the applicable standards *in the defendant's community*.[606] In the past, multiple appellate courts in Texas adhered to the locality rule in the legal malpractice area.[607]

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[602] *See, e.g.*, King v. Flamm, 442 S.W.2d 679, 681 (Tex. 1969); Baker v. Story, 621 S.W.2d 639, 642 (Tex. App.—San Antonio 1981, no pet.) (holding specialist in field of neurosurgery to a higher standard than a nonspecialist in the field, who is required to "exercise only that degree of care and skill possessed by a general practitioner").

[603] *See, e.g.*, Baker v. Story, 621 S.W.2d 639, 642 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.) (holding neurosurgery specialist to higher standard than non-specialist under his supervision).

[604] *See Streber*, 221 F.3d at 722; *Rhodes*, 848 S.W.2d at 843; 2 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 20:4 (2018 ed.) ("[A]n attorney whose skill and conduct are questioned may find that his or her conduct is to be judged by comparison to the skills of a renowned specialist in the same field.").

[605] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a)(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9).

[606] *See* Birchfield v. Texarkana Mem'l Hosp., 747 S.W.2d 361, 366 (Tex. 1987) ("same or similar circumstances" encompasses locality rule).

[607] *See* Ballesteros v. Jones, 985 S.W.2d 485, 494–95 (Tex. App.—San Antonio 1998, pet. denied); Tijerina v. Wennermark, 700 S.W.2d 342, 347 (Tex. App.—San Antonio 1985, no writ) (finding San Antonio attorney qualified to give expert opinion to establish standard of competency in San Antonio), *overruled on other grounds*, Cosgrove v. Grimes, 774 S.W.2d 665 (Tex. 1989); Cook v. Irion, 409 S.W.2d 475, 478 (Tex. Civ. App.—San Antonio 1966, no writ), *overruled on other grounds*, *Cosgrove*, 774 S.W.2d 665. Other jurisdictions have adopted a "state" standard as opposed to a "locality" one. *See* Kellos v. Sawilowsky, 325 S.E.2d 757, 758 (Ga. 1985); Chapman v. Bearfield, 207 S.W.3d 736, 737 (Tenn. 2006); Russo v. Griffin, 510 A.2d 436, 438 (Vt. 1986); Moore v. Lubnau, 855 P.2d 1245, 1249 (Wyo. 1993).

In *Cook v. Irion*, the court of appeals recognized the "importance of knowledge of the local situation," and indicated "an attorney practicing in a vastly different locality would not be qualified to second-guess the judgment of an experienced attorney of the El Paso County bar . . . ."[608] In *Cook*, the court held an expert legal witness from Brewster County was unqualified to testify against the defendant-attorney who practiced in El Paso County.[609]

More recently, however, Texas courts have rarely discussed the locality rule, and its continuing relevance remains unclear. At the very least, the locality rule probably continues to apply at a statewide level of generality.[610]

The locality rule arguably retains more relevance to the legal profession than to the medical profession. It is still important for an attorney to know the local rules, practices, and customs, as well as, in a litigation context, the attitudes and preferences of various judges sitting in a particular county. It should be emphasized, however, there are certainly minimum accepted practices that must be met in every locality,[611] which perhaps explains why most courts define the standard of care without mentioning locality.[612] Moreover, with the advent of minimum continuing legal education requirements, that minimum standard is becoming an increasingly higher one.

[608] 409 S.W.2d at 478.

[609] *Id.*

[610] *See* Ramsey v. Reagan, Burrus, Dierksen, Lamon & Bluntzer, P.L.L.C., No. 03-01-00582-CV, 2003 WL 124206, at *5 (Tex. App.—Austin Jan. 16, 2003, no pet.) (mem. op.) (holding trial court did not abuse its discretion by excluding expert who did not have a Texas law license).

[611] *See* Webb v. Jorns, 488 S.W.2d 407, 411 (Tex. 1972) ("The community standard rule does not require a small office rural medical practitioner to possess either the skills or equipment of a sophisticated clinic, but the standard demands, at least, that one must exercise ordinary care commensurate with the equipment, skills and time available."); Reed v. Granbury Hosp. Corp., 117 S.W.3d 404, 409 (Tex. App.—Fort Worth 2003, no pet.) ("There are certain standards universally regarded as ordinary medical standards beneath which no common or community standards may fall.").

[612] *E.g.*, *Cosgrove*, 774 S.W.2d at 664 ("A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney."); Cunningham v. Hughes & Luce, L.L.P., 312 S.W.3d 62, 67 (Tex. App.—El Paso 2010, no pet.); Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 530 (Tex. App.—Austin 2004, no pet.); Tolpo v. Decordova, 146 S.W.3d 678, 683 (Tex. App.—Beaumont 2004, no pet.).

§ 13 Local Counsel

Where an attorney hires local counsel, it is generally true that the local counsel cannot be held liable for the negligence of the lead counsel.[613] Consequently, where local counsel is retained only for a limited purpose and lead counsel has the exclusive control of the case and the contacts and communications with the client, the local counsel may, as a matter of law, not be liable to the client. To hold local counsel responsible, for example, for failing to appeal an adverse decision in such a situation would mean local counsel must exceed his delegated authority, thereby usurping the lead counsel's prerogatives.[614]

The Texas Supreme Court has embraced the proposition that an attorney retained as local counsel is not responsible for legal tasks beyond those which he or she was hired to perform, stating: "We are not to be understood as saying that in each transaction where one law firm solicits another firm to file an answer that an agency is established to the point that the filing firm is responsible to the requesting firm for all later transactions involving that case."[615]

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[613] *See* Curb Records v. Adams & Reese L.L.P., 203 F.3d 828, No. 98-31360, 1999 WL 1240800, at *6 (5th Cir. Nov. 29, 1999) (per curiam) (not designated for publication) (holding under Louisiana law that where "it is clear to a reasonable attorney that substantial prejudice will occur to the client as a result of lead counsel's malfeasance or misfeasance, . . . the duty of care under Louisiana law requires local counsel to notify the client of lead counsel's action or inaction"); Macawber Eng'g, Inc. v. Robson & Miller, 47 F.3d 253, 257 (8th Cir. 1995); *see also* Grisson v. Watson, 704 S.W.2d 325, 327 (Tex. 1986) (holding that where one law firm solicits another to file an answer, the filing firm is not necessarily responsible to the other "for all later transactions involving that case"); Ortiz v. Barrett, 278 S.E.2d 833, 838 (Va. 1981) (holding that local counsel is responsible for "his assigned duties").

[614] *See Ortiz*, 278 S.E.2d at 839; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. e (AM. LAW INST. 2000) ("A firm is not ordinarily liable under this Section for the acts or omissions of a lawyer outside the firm who is working with firm lawyers as co-counsel or in a similar arrangement. Such a lawyer is usually an independent agent of the client over whom the firm has no control, not a servent or independent contractor.").

[615] Grissom v. Watson, 704 S.W.2d 325, 327 (Tex. 1986) (holding that when client's insurance company hired attorney to represent him, attorney filed answer through Odessa law firm and included Odessa address in transmittal letter, court mailed trial setting letter to Odessa law firm and no one appeared to represent client, with result that default judgment was obtained, that Odessa firm had agency relationship with attorney, thereby imputing knowledge of trial setting to attorney, and there was intentional or conscious indifference by insurance carrier not to appear at trial and motion for new trial properly denied). Notably, an out-of-state lawyer who hires in-state local counsel may thereby submit to the state's jurisdiction for suits relating to the representation. *See* Nawracaj v. Genesys Software Sys., Inc., 524 S.W.3d 746, 754 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

To hold otherwise would mean an attorney expressly hired to play a limited role in a matter is, contrary to the knowledge and agreement of the contracting parties, actually accepting a much greater responsibility. It is thus prudent for local counsel to define carefully their responsibilities in an engagement letter, documenting the intended scope of their work and services.

§ 14 Expert Testimony

In most legal malpractice cases, expert testimony is necessary to establish the standard of skill and care ordinarily exercised by attorneys because the prevailing legal standard is not within the common knowledge of lay persons.[616] Accordingly, in a summary judgment proceeding where the defendant-attorney produces an expert's opinion in his favor, the failure of the plaintiff to controvert that opinion may entitle the attorney to summary judgment.[617] An attorney being sued in a malpractice case is qualified to offer his own expert opinion to establish the standard of care in

[616] *See* Edwards v. Dunlop-Gates, 344 S.W.3d 424, 432 (Tex. App.—El Paso 2011, pet. denied) ("A plaintiff must generally present expert testimony to establish the breach and causation elements."); *Zenith Star Ins. Co.*, 150 S.W.3d at 530 ("[E]xpert testimony of an attorney is usually necessary to establish the standard of skill and care."); James V. Mazuca & Assocs. v. Schumann, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied) ("[T]he general rule requires expert testimony to establish the standard of care in a legal malpractice action"); *see also* Floyd v. Hefner, 556 F. Supp. 2d 617, 643 (S.D. Tex. 2008) ("[T]he general rule is that expert testimony is required . . . .").

[617] *See* Haddy v. Caldwell, 403 S.W.3d 544, 546 (Tex. App.—El Paso 2013, pet. denied) (affirming summary judgment for defendant attorney where plaintiff "offered no evidence from a legal expert explaining how [attorney] breached the standard of care"); *Zenith Star Ins. Co.*, 150 S.W.3d at 530–31 ("Once the defendant in a legal malpractice suit has submitted expert testimony on the standard of care, the plaintiff is then required to controvert the expert testimony with other expert testimony."); *see also Floyd*, 556 F. Supp. 2d at 660 ("On summary judgment, the defendant may prevail by producing uncontroverted expert testimony demonstrating that his challenged acts were within that standard of care."). But the expert's affidavit must be specific and satisfy all the requisites of Texas Rule of Civil Procedure 166a(c). *See* Anderson v. Snider, 808 S.W.2d 54, 55 (Tex. 1991) (per curiam) (holding attorney's affidavit in support of motion for summary judgment insufficient because it failed to "include the legal basis or reasoning for [his] opinion that he did not commit malpractice"); Franks v. Roades, 310 S.W.3d 615, 623 (Tex. App.—Corpus Christi 2010, no pet.) ("The expert attorney must do more than merely state his opinion and then conclude that the standard of care has not been met.").

his locale, to establish the reasonableness of his conduct in the underlying case, and to show he did not breach any duty of care to his client.[618]

Expert testimony can be used to establish that a judgment would have been collectible if the attorney had properly prosecuted the suit.[619] In most cases, expert testimony will be needed to establish a breach of fiduciary duty or a conflict of interest,[620] a breach of the applicable standard of care by an attorney's exercise of his tactical or legal judgment,[621] a breach by failing to explain to the client the significance of a contractual provision,[622]

[618] *See* Burrow v. Arce, 997 S.W.2d 229, 235 (Tex. 1999) ("An expert's opinion testimony can defeat a claim as a matter of law, even if the expert is an interested witness, such as the defendant."); Solomon v. Jones, No. 05-97-00225-CV, 2000 WL 136785, at *2 (Tex. App.—Dallas 2000, pet. denied) (not designated for publication) ("A defendant attorney's own affidavit can defeat a legal malpractice claim as a matter of law."); Jatoi v. Decker, Jones, McMackin, Hall & Bates, 955 S.W.2d 430, 434 (Tex. App.—Fort Worth 1997) (holding that affidavit from lawyer at defendant law firm was legally sufficient evidence that lawyer's firm complied with standard of care); Tijerina v. Wennermark, 700 S.W.2d 342, 347 (Tex. App.—San Antonio 1985, no writ), *overruled on other grounds*, Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989).

[619] *See, e.g.*, Kelley/Witherspoon, LLP v. Armstrong Int'l Servs., Inc., No. 05-14-00130-CV, 2015 WL 4524290, at *3 (Tex. App.—Dallas July 27, 2015, pet. denied) (mem. op.) (holding that expert testimony that judgment would be collectible was not conclusory); Schlosser v. Tropoli, 609 S.W.2d 255, 257 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (finding expert testimony—based, in part, on personal knowledge—that net assets of original defendant were sufficient to satisfy judgment and evidence of insurance to be competent evidence of collectibility).

[620] *See* Streber v. Hunter, 221 F.3d 701, 726 (5th Cir. 2000) (holding that "once [expert's] testimony established negligence and breach of fiduciary duties," lay testimony in that case was enough to prove causation); Floyd v. Hefner, 556 F. Supp. 2d 617, 643 (S.D. Tex. 2008) ("Expert testimony is also generally required to establish a fiduciary breach where the issues of confidentiality, loyalty in the context of conflicting interests or adverse representation or causation and damages are beyond common knowledge.").

[621] Alexander v. Turter & Assocs., Inc., 146 S.W.3d 113, 119 (Tex. 2004) ("[T]he wisdom and consequences of these kinds of tactical choices made during litigation are generally matters beyond the ken of most jurors . . . ."); Silvio v. Ostrom, No. 01-11-00293-CV, 2013 WL 6157358, at *7 (Tex. App.—Houston [1st Dist.] Nov. 21, 2013, no pet.) (mem. op.) (holding that expert testimony is required to challenge an attorney's "tactical decisions").

[622] Pierre v. Steinbach, 378 S.W.3d 529, 534 (Tex. App.—Dallas 2012, no pet.) (holding expert testimony needed to evaluate whether attorney breached duty of care by failing to explain consequences of making change to contract language); Gallagher v. Wilson, No. 02-09-376-CV, 2010 WL 3377787, at *5 (Tex. App.—Fort Worth Aug. 26, 2010, no pet.) (mem. op.) (holding expert testimony required when client alleged attorney breached duty of care by advising client to enter into settlement agreement without inserting language about settlement agreement into a separate contract).

or a breach by funneling through the husband all information about trust properties jointly owned by a husband and wife.[623]

Nevertheless, the rule requiring expert testimony to establish the applicable standard does not apply when the allegations of the plaintiff fall within the common understanding of lay persons.[624] Accordingly, instances of attorney error that are obvious to a lay person or established as a matter of law, do not require expert testimony.[625] Consequently, in *Oldham v. Sparks*, where the defendant-attorney failed to file suit timely with the result that the statute of limitations barred his client's claim, expert testimony was unnecessary.[626]

Expert testimony also may be unnecessary to establish the required standard of care where the client's explicit, legitimate instructions are directly violated.[627] For example, expert testimony was unnecessary where the attorney drafted a will and failed to follow the testator's instruction to name a specific person as the sole residual beneficiary because the

[623] *See* Barth v. Reagan, 564 N.E.2d 1196, 1201 (Ill. 1990). *Cf.* Gijbertus D.M. van Sommeren v. Gibson, 991 N.E.2d 1199, 1208 (Ohio Ct. App. 2013) (holding expert testimony is required in case alleging attorney had "representational conflict").

[624] *See, e.g.*, Edwards v. Dunlop-Gates, 344 S.W.3d 424, 433 (Tex. App.—El Paso 2011, pet. denied); James v. Mazuca & Assocs. v. Schumann, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied). Texas Rule of Evidence 702 states that "if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," then a "witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." TEX. R. EVID. 702. Therefore, in order for expert testimony to be admissible, the testimony must assist the trier of fact in determining the issues in question.

[625] *See Edwards*, 344 S.W.3d at 433 (observing that expert testimony not needed when lawyer lets limitations run); *James V. Mazuca & Assocs.*, 82 S.W.3d at 97 (stating that expert testimony unnecessary when attorney misses statute of limitations); Mosaga, S.A. v. Baker & Botts, 780 S.W.2d 3, 5 (Tex. App.—Eastland 1989, no writ) (holding that expert opinion was unnecessary to raise fact issue to defeat motion for summary judgment where agreement prepared by attorney violated statute).

[626] 28 Tex. 425, 428 (1866); *Edwards*, 344 S.W.3d at 433 (no expert testimony needed when attorney lets limitations run); *James V. Mazuca & Assocs*., 82 S.W.3d at 97 (same).

[627] *See* Carranza v. Fraas, 763 F. Supp. 2d 113, 122 (D.D.C. 2011); Global NAPs, Inc. v. Awiszus, 930 N.E.2d 1262, 1271–72 (Mass. 2010). *Cf.* Frullo v. Landenberger, 814 N.E.2d 1105, 1110 (Mass. App. Ct. 2004) (holding that although expert testimony is unnecessary to show attorney breached standard of care by disobeying client instructions, it was still needed to prove causation); *see also Edwards*, 344 S.W.3d at 433 (stating that an attorney can commit legal malpractice by, *inter alia*, disobeying a client's lawful instruction, and noting that expert testimony is not required if the attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge).

attorney's negligence was a matter of common knowledge.[628] Nor was expert testimony necessary where the attorney failed to make an adequate investigation of his client's medical malpractice claim before limitations ran.[629] The evidence fell within the area of common understanding of lay persons because the attorney not only failed to obtain a medical expert to testify against the doctor, but also he failed to obtain his client's x-rays or the doctor's office records.[630] The failure of a Texas lawyer to appear for a hearing on discovery sanctions, which resulted in "death penalty" sanctions striking the client-defendant's pleadings, also did not require expert testimony.[631]

§ 15 Defenses

An attorney must raise and submit any defense issues to a legal malpractice claim or they are waived.[632] Accordingly, in *Yarbrough v. Cooper*, where the former client sued the attorney for alleged legal malpractice in failing to provide the client with a tax shelter, the trial court held that the assertion that the client had released the attorney from any misconduct was an affirmative defense to the malpractice claim.[633] It was therefore incumbent upon the attorney to introduce evidence and to request

[628] Hamilton v. Needham, 519 A.2d 172, 175 (D.C. 1986); *see Frullo*, 814 N.E.2d at 1109 (holding evidence sufficient to show attorney breached duty by failing to assert claim and conduct discovery as instructed by client); Gallagher v. Wilson, No. 02-09-376-CV, 2010 WL 3377787, at *5 (Tex. App.—Fort Worth Aug. 26, 2010, no pet.) (not designated for publication) (noting that failing to timely respond to requests for admissions is more akin to letting limitations run, but noting that no evidence existed that attorney's failure to follow client's instructions in answering requests for admissions caused any harm).

[629] Brizak v. Needle, 571 A.2d 975, 982–83 (N.J. Super. Ct. App. Div. 1990); *see* Swain v. Alterman, No. L-3647-10, 2011 WL 6112126, at *5 (N.J. Super. Ct. App. Div. Dec. 9, 2011) (not designated for publication) ("Common knowledge legal malpractice actions include . . . failing to investigate a claim or commence an action within the statute of limitations . . . ."); Byrd v. Bowie, 933 So. 2d 899, 905 (Miss. 2006) (expert testimony unnecessary when attorney failed to designate expert by court-mandated deadline).

[630] *See Brizak*, 571 A.2d at 984.

[631] Okorafor v. Jeffreys, No. 01-07-00618-CV, 2009 WL 793750, at *9–10 (Tex. App.—Houston [1st Dist.] Mar. 26, 2009, no pet.).

[632] *See* Genesis Tax Loan Servs., Inc. v. Kothmann, 339 S.W.3d 104, 108 (Tex. 2011) ("Pleading an affirmative defense is required to raise a matter of avoidance . . . ."); Yarbrough v. Cooper, 559 S.W.2d 917, 920 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.); *see also* TEX. R. CIV. P. 94 (listing those affirmative defenses that must be pleaded).

[633] 559 S.W.2d at 920.

and obtain findings to support that defense. Because the attorney failed to do so, the appellate court affirmed the trial court's decision and held that the attorney had waived that defense to the malpractice claim.[634]

A. Error-in-Judgment Defense

Attorneys constantly make judgmental decisions about legal matters in which the law is either unsettled or subject to disagreement among other members of the profession. The error-in-judgment rule rests on the rationale that the law is not an exact science and, consequently, there is no one level of skill which exists that will remove all differences of opinions from the minds of lawyers.[635]

Although historically most jurisdictions embraced the error-in-judgment rule, courts have frequently imposed liability where the underlying foundation for the rule is absent. An attorney must exercise ordinary skill and knowledge in determining the applicable area of law, and the error-in-judgment rule therefore assumes attorneys are knowledgeable about general laws, statutes, and legal propositions that are well-defined.[636] The rule also assumes an attorney knows the relevant procedural rules and applicable statutes. Consequently, where an attorney lacks knowledge about fundamental principles of law in his or her area of practice, reliance on the error-in-judgment rule to preclude liability is misplaced.

While an attorney is not responsible for knowing all the law, the knowledge possessed by well-informed attorneys should include not only

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[634] *Id.* An independent ground of recovery or defense not conclusively established by the evidence is waived if no issue is given or requested. TEX. R. CIV. P. 279; *see also* Glens Falls Ins. Co. v. Peters, 386 S.W.2d 529, 531 (Tex. 1965) (failing to request issue on whether more than 50% of the property was damaged, the insured waived right to recover on the theory of constructive total loss); CNL Fin. Corp. v. Hewlett, 539 S.W.2d 176, 177 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.) (holding that guarantor waived its affirmative defense of no formal demand because no jury issue was requested).

[635] *See generally* 2 R. MALLEN & J. SMITH, LEGAL MALPRACTICE Ch. 19 (2018 ed.). *But see* Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) (holding that no subjective good faith defense exists for attorney negligence).

[636] *See* DeThorne v. Bakken, 539 N.W.2d 695, 697 (Wis. Ct. App. 1995) ("Judgment involves a reasoned process based upon the accumulation of all available pertinent facts."). While Texas courts now reject the good-faith defense, the courts that once espoused it explained that it applied only when the attorney acted "with the honest belief that his advice and acts are well-founded." Tijerina v. Wennermark, 700 S.W.2d 342, 344 (Tex. App.—San Antonio 1985, no writ); *see, e.g.*, Medrano v. Miller, 608 S.W.2d 781, 784 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.) (applying good faith defense where attorney was accused of erring as to "unsettled" law).

hornbook principles of law but also those additional principles that, even though not commonly known, may easily be found by standard research techniques. In other words, a client is entitled to the benefit of an informed judgment. When the issue is settled and can be identified through ordinary research and investigation techniques, an attorney cannot avoid liability by claiming the error was one of judgment.

Historically, an attorney in Texas was "not liable for an error in judgment if he act[ed] in good faith and with the honest belief that his advice and acts [were] well-founded and in the best interest of his client."[637] In *Cosgrove v. Grimes*, however, the Texas Supreme Court adopted a purely objective standard for evaluating attorney conduct and expressly disapproved the longstanding subjective good faith approach.[638] Nevertheless, the court approved narrowing the scope of the objective inquiry to "the information the attorney has at the time of the alleged act of negligence."[639] The mere fact that a reasonably prudent attorney could make a different judgment under the same or similar circumstances "is not an act of negligence even if the result is undesirable."[640] The instructions to the jury should therefore "set out the standard for negligence in terms which encompass the attorney's reasonableness in choosing one course of action over another."[641] Consequently, in the final analysis, the trier of fact will

[637] *Tijerina*, 700 S.W.2d at 344; Cook v. Irion, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ).

[638] 774 S.W.2d 662, 664–65 (Tex. 1989). The broadness of the *Cosgrove* decision has been criticized. *See* Lauren Beck, Note, *Cosgrove v. Grimes: Abrogation of the Subjective Good Faith Exception in Legal Malpractice Actions*, 42 BAYLOR L. REV. 601, 601 (1990). *But see* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1692 n.226 (1994) (acknowledging current trend of making error in judgment rule unavailable to attorneys accused of malpractice). To the extent Texas courts recognized an exception to attorney negligence based on the subjective good faith of the attorney, those cases were expressly disapproved in *Cosgrove*. *See, e.g.*, *Tijerina*, 700 S.W.2d 342, 344; *Medrano*, 608 S.W.2d at 784; State v. Baker, 539 S.W.2d 367, 375 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); Hicks v. State, 422 S.W.2d 539, 542 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.); *Cook*, 409 S.W.2d at 477.

[639] *Cosgrove*, 774 S.W.2d at 664; *see also* Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc., 779 S.W.2d 474, 477 (Tex. App.—El Paso 1989, writ denied) ("A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney, based on the information the attorney has at the time of the alleged act of negligence.").

[640] *Cosgrove*, 774 S.W.2d at 665.

[641] *Id.*

evaluate an attorney's judgment calls in accordance with the "reasonably prudent attorney" standard.[642]

B. Judicial Error Rule

The Texas Supreme Court adopted the "judicial error rule" in *Stanfield v. Neubaum*, which provides that a court's erroneous decision "can constitute a new and independent cause" of harm to an attorney's client, thus absolving the trial attorneys of liability for claims of professional negligence.[643] *Neubaum* is the court's first decision addressing the issue of judicial error in legal malpractice cases.

In *Neubaum*, the trial attorneys were sued for malpractice by their clients following the attorneys' representation of them in a trial that resulted in an almost $4 million usury judgment.[644] The usury case was brought by the Buck Glove Co. alleging that the Neubaums, through their agent, charged excessive interest in connection with a loan.[645] At trial, the Neubaums argued that Buck Glove had not submitted any evidence of agency and objected to an agency submission in the jury charge.[646] The trial court disagreed and instructed the jury on agency.[647] The jury found that the Neubaums, through the acts of their agent, had acted usuriously.[648]

Among other arguments, the Neubaums contended on appeal that the trial court erred by submitting to the jury a question on agency, and the court of appeals agreed, holding that there was legally insufficient evidence to support the agency finding.[649]

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[642] Simpson v. James, 903 F.2d 372, 377 (5th Cir. 1990) (upholding negligence finding where attorney represented both seller and buyer in sales transaction); *see also* Cooper v. Harris, 329 S.W.3d 898, 902–03 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (holding expert testimony needed to determine whether client would have fared better in care of "reasonably prudent attorney"); Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Keck, Mahin & Cate, 154 S.W.3d 714, 719 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) ("The jury must evaluate an attorney's conduct based on the information available at the time to determine if a reasonably prudent attorney could make the same decision in the same or similar circumstances.").

[643] Stanfield v. Neubaum (*Neubaum I*), 494 S.W.3d 90, 99 (Tex. 2016).

[644] *Id.* at 94–95.

[645] *Id.* at 94.

[646] *Id.*

[647] *Id.*

[648] *Id.*

[649] *Id.* at 94–95.

Following the reversal, the Neubaums filed a malpractice action against their trial lawyers to recover the fees they incurred in pursuing the appeal of the judgment.[650] In the malpractice action, the Neubaums argued that the attorneys were negligent in failing to present evidence on several defenses and in failing to designate an expert witness to explain to the jury how certain evidence constituted a Ponzi scheme.[651] The Neubaums did *not* allege that their lawyers were negligent in their handling of the agency issue.[652] Instead, they contended that the trial court's error would have been immaterial because a favorable judgment would have been rendered but for the lawyer's negligence.[653]

The trial court granted summary judgment in favor of the lawyers on the basis that the judicial error was the sole cause of the Neubaums' injury.[654] The court of appeals reversed and remanded in part.[655] The court of appeals held that the lawyers failed to "conclusively prove that (1) if a reasonably prudent attorney had represented the Neubaums in the [u]sury [l]awsuit, the Neubaums would not have obtained a more favorable result than the result they actually obtained; or (2) the [a]lleged [d]amages were caused by the erroneous rulings of the trial court in the [u]sury [l]awsuit rather than by any of the alleged negligence."[656] The appellate court did not consider, however, whether judicial error can constitute a superseding cause that breaks the causal chain and, as a matter of law, negates proximate cause.[657]

In an 8-0 decision, the Texas Supreme Court reversed and rendered. The court acknowledged that the issue presented was one of first impression and that the analysis therefore would be guided by "established negligence and proximate-cause principles."[658] The court carefully explored the difference between a concurring cause and a superseding cause, and emphasized that foreseeability is a key factor in distinguishing between a concurring and a

[650] *Id.* at 95.

[651] *Id.*

[652] *Id.*

[653] *Id.*

[654] *Id.*

[655] Neubaum v. Stanfield (*Neubaum II*), 465 S.W.3d 266, 268 (Tex. App.—Houston [14th Dist.] 2015), *rev'd*, *Neubaum I*, 494 S.W.3d 90 (Tex. 2016).

[656] *Id.* at 274.

[657] *See id.* at 277 n.14.

[658] *Neubaum I*, 494 S.W.3d at 97.

superseding cause.[659] Based on these general principles, the Supreme Court announced a new legal axiom in Texas:

> When a judicial error intervenes between an attorney's negligence and the plaintiff's injury, the error can constitute a new and independent cause that relieves the attorney of liability. To break the causal connection between an attorney's negligence and the plaintiff's harm, the judicial error must not be reasonably foreseeable.[660]

C. Contributory Negligence

The negligence of the client can be a defense to an action for legal malpractice.[661] Because Texas adheres to the comparative negligence concept,[662] a plaintiff's claim may, under appropriate circumstances, be barred in whole or in part upon a showing that his or her negligence proximately caused the resulting damages.[663]

For example, in *Keck, Mahin & Cate v. National Union Fire Insurance Co.*, an excess insurer asserted malpractice claims against its insured's trial counsel (by way of subrogation).[664] The Texas Supreme Court held that evidence regarding the excess insurer's role in the defense—such as whether it interfered with the defense or failed to appear at a deposition—could potentially be relevant to the excess insurer's comparative responsibility.[665]

Similarly, in *Corceller v. Brooks*, the plaintiff alleged that his attorney provided imprudent advice resulting in an injunction suit being filed against him; failed to answer timely the petition for an injunction and money

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[659] *Id.* at 98.

[660] *Id.* at 99.

[661] *See* Roberts v. Burkett, 802 S.W.2d 42, 45 (Tex. App.—Corpus Christi 1990, no writ); 3 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 22:2 (2018 ed.).

[662] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001–.017 (West 2018).

[663] Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 701 (Tex. 2000) (discussing whether evidence would be relevant to plaintiff's comparative fault in legal malpractice case); *Roberts*, 802 S.W.2d at 45 (holding that defendant failed to preserve alleged error when jury found clients were each 20% negligent but court did not reduce damages awarded); Sw. Bank v. Info. Support Concepts, Inc., 149 S.W.3d 104, 110 (Tex. 2004) (noting that under Chapter 33, "all causes of action based on tort, unless expressly excluded," were intended "to be subject to apportionment").

[664] 20 S.W.3d at 700.

[665] *Id.* at 701.

damages thereby causing a default money judgment to be taken; allowed a deficiency judgment to be taken against him in an unrelated matter; and failed to refund or account for monies advanced.[666] The court of appeals held that the plaintiff's negligent conduct which contributed to the issuance of the injunction and the entry of the default judgment could bar his claims.[667] Negligence by the client therefore may potentially bar his or her malpractice claim.

D. Limitation of Liability

Because of the fiduciary relationship between an attorney and his client, courts closely scrutinize contractual dealings between them.[668] In fact, there is a presumption of unfairness or invalidity attaching to such a contract, and the burden of proving its fairness is on the attorney.[669] As a defense to a legal malpractice action, attorneys may contend their clients have released them from liability claims. *Ames v. Putz*, for example, concerned a malpractice action against an attorney for failing to file a personal injury suit within the two-year limitation period, but the attorney alleged that his client had previously executed a release absolving him of any liability.[670] The plaintiff testified that she thought the instrument executed by her only

[666] 347 So. 2d 274, 276 (La. Ct. App. 1977).

[667] *See id.* at 278–79; *see also* Brown v. Slenker, 220 F.3d 411, 423–24 (5th Cir. 2000) (holding that contributory negligence is complete defense to legal malpractice action under Virginia law); Clark v. Rowe, 701 N.E.2d 624, 625, 628 (Mass. 1998) (holding client's claim was barred by jury's finding that 70% of the negligence was hers); Balames v. Ginn, 861 N.W.2d 684, 697–98 (Neb. 2015) (holding that client's negligence may be relevant to both contributory negligence and proximate causation); Gorski v. Smith, 812 A.2d 683, 703 (Pa. Super. Ct. 2002) (noting that client's withholding of essential information from attorney constitutes contributory negligence); Behrens v. Wedmore, 698 N.W.2d 555, 572 (S.D. 2005) (holding jury could conclude that clients' "conduct in negotiating the Initial Agreement without professional assistance was the sole proximate cause of their loss"); Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 457 S.E.2d 28, 32 (Va. 1995) (holding that attorney's actions could be imputed to client because attorney was officer and 50% shareholder of client, creating fact issue as to client's contributory negligence).

[668] *Keck, Mahin & Cate*, 20 S.W.3d at 699.

[669] *See id.*; Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964); Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet denied.) ("And where 'self-dealing' by the fiduciary is alleged, a 'presumption of unfairness' automatically arises and the burden is placed on the fiduciary to prove (a) that the questioned transaction was made in good faith, (b) for a fair consideration, and (c) after full and complete disclosure of all material information to the principal.").

[670] 495 S.W.2d 581, 582 (Tex. Civ. App.—Eastland 1973, writ ref'd).

released the attorney from any further obligation regarding the money he had collected for her from her insurance carrier.[671] Affirming the judgment for the plaintiff, the court held the extrinsic evidence admissible and supportive of the client's allegation that the release had been obtained by fraud and misrepresentation on the part of her attorney.[672] Consequently, any effort by an attorney to limit his or her liability to a client *after* the alleged malpractice likely will be viewed with considerable skepticism by Texas courts.

E. Collateral Estoppel

In an appropriate situation, collateral estoppel may serve as a defense to a legal malpractice action. Collateral estoppel bars the relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action.[673] Mutuality is not required for the doctrine to be applicable; rather, "it is only necessary that the party against whom the plea of collateral estoppel is being asserted be a party or in privity with a party in the prior litigation."[674]

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[671] *Id.* at 583.

[672] *Id.*; *see also Keck, Mahin & Cate*, 20 S.W.3d at 699 (holding law firm had no evidence that client was informed of all facts material to release, and law firm was thus not entitled to summary judgment on the release defense); Ulrickson v. Hibbs, No. 2-02-161-CV, 2003 WL 22514689, at *8 (Tex. App.—Fort Worth Nov. 6, 2003, no pet.) (mem. op.) (holding law firm failed to show release was fair and reasonable or that client was informed of all material facts); Yarbrough v. Cooper, 559 S.W.2d 917, 922 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (holding that a properly obtained and pled release will vitiate a fraud claim against attorney).

[673] *See* Tex. Dep't of Public Safety v. Petta, 44 S.W.3d 575, 579 (Tex. 2001); Eagle Props., Ltd. v. Scharbauer, 807 S.W.2d 714, 721 (Tex. 1990); Better Bus. Bureau of Metro. Hous. v. John Moore Servs., Inc., 500 S.W.3d 26, 44–45 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); Fiallos v. Pagan-Lewis Motors, Inc., 147 S.W.3d 578, 584 (Tex. App.—Corpus Christi 2004, pet. denied); Brown v. Bergman, Yonks & Stein, P.C., No. 05-00-01672-CV, 2001 WL 1168842, at *1–2 (Tex. App.—Dallas Oct. 4, 2001, no pet.) (not designated for publication). *But see* Ayre v. J.D. Bucky Allshouse, P.C., 942 S.W.2d 24, 27 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (holding that plaintiff was not collaterally estopped from asserting the negligence of her attorney because they were not adversaries).

[674] *Eagle Props.*, 807 S.W.2d at 721; *see also Petta*, 44 S.W.3d at 579; Sysco Food Servs., Inc. v. Trapnell, 890 S.W.2d 796, 801 (Tex. 1994); MGA Ins. Co. v. Charles R. Chesnutt, P.C., 358 S.W.3d 808, 817 (Tex. App.—Dallas 2012, no pet.); Saqui v. Pride Int'l, Inc., No. 14-10-00540-CV, 2011 WL 5056162, at *3 (Tex. App.—Houston [14th Dist.] Oct. 25, 2011, no pet.) (mem. op.); Stromberger v. Law Offices of Windle Turley, P.C., No. 05-06-00841-CV, 2007 WL 2994643, at *4 (Tex. App.—Dallas Oct. 16, 2007, no pet.) (mem. op.) ("When asserted against a party who

The absence of a strict mutuality requirement means attorneys can much more easily invoke the defense of collateral estoppel. After all, defendants in malpractice cases are not usually parties to the underlying suit, so imposing an "adversary" requirement to collateral estoppel would significantly limit the defense's availability.[675]

Accordingly, when a client who was convicted of tax evasion sued the attorneys who represented him in the transaction giving rise to the tax offense, the attorneys successfully raised collateral estoppel as a defense to the malpractice claims.[676] The criminal case had already adjudicated whether the client "participated in the corporate transaction knowingly and willfully, and not out of justifiable reliance on [the attorneys'] advice."[677] Thus, the client could not maintain a malpractice suit against them.[678]

Similarly, in *Brown v. Bergmann, Yonks & Stein, P.C.*, clients sued their attorneys for malpractice because the attorneys allowed the clients' case to be dismissed for want of prosecution.[679] The attorneys, however, argued that in the underlying case, the clients had been able to get the trial judge to reinstate their case after it was dismissed—after which the clients lost on the merits.[680] Thus, the attorneys argued the prior case disproved an essential element of the malpractice claim—that the clients "would have prevailed on the underlying cause of action" but for the attorneys' negligence in letting the case be dismissed.[681] The court of appeals agreed that collateral estoppel applied to bar the clients' claims.[682]

was actually a party in the first action, the doctrine of collateral estoppel bars relitigation of fact issues that were fully and fairly litigated and that were essential to the prior judgment."); Tex. Capital Sec. Mgmt., Inc. v. Sandefer, 80 S.W.3d 260, 264 (Tex. App.—Texarkana 2002, pet. struck).

[675] In *Ayre v. J.D. Bucky Allshouse, P.C.*, for example, the court of appeals held collateral estoppel did not apply in this legal malpractice case because the attorney was not his client's "adversary" in the underlying litigation. 942 S.W.2d at 27.

[676] Dover v. Baker, Brown, Sharman & Parker, 859 S.W.2d 441, 449 (Tex. App.—Houston [1st Dist.] 1993, no pet.).

[677] *Id.*

[678] *Id.* at 450.

[679] Brown v. Bergman, Yongs & Stien, P.C., No. 05-00-01672-CV, 2001 WL 1168842, at *2 (Tex. App.—Dallas Oct. 4, 2001, no pet.) (not designated for publication).

[680] *Id.*

[681] *Id.*

[682] *Id.*

Of course, collateral estoppel does not apply when the previous litigation resolved issues distinct from the legal malpractice case.[683] For example, if a court enforces a Rule 11 settlement agreement, collateral estoppel does not necessarily prevent the client from later suing her attorney for faulty representation in arriving at the settlement. The mere fact that a court "enforced [a] Rule 11 settlement agreement" does not mean that issues regarding the lawyer's conduct have already been litigated.[684]

The doctrine of collateral estoppel is often applied in the criminal context where a client who pled guilty to a criminal charge may be estopped from bringing a legal malpractice action because his plea of guilty would prevent him from establishing his innocence.[685] In addition, a criminal defendant asserting the defense of inadequate assistance of counsel, and who receives an evidentiary hearing, may be estopped from later accusing his attorney of malpractice: "[W]here a full and fair determination has been made in a previous criminal action that the client received the effective assistance of counsel, the defendant-attorney in a subsequent civil malpractice action brought by the same client may defensively assert collateral estoppel as a bar."[686]

F. Settlement

Generally, if a client complains of the attorney's conduct in a prior suit and the client voluntarily settles that prior suit, the settlement does not bar the malpractice claim.[687] As the Texas Supreme Court has recognized, an attorney's malpractice may force the client to "agree[] to a less favorable settlement."[688] Consequently, the settlement of the underlying case is

[683] *See* Spera v. Fleming, Hovenkamp & Grayson, P.C., 25 S.W.3d 863, 870 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

[684] Hoover v. Larkin, No. 14-00-00427-CV, 2001 WL 1046266, at *10 (Tex. App.—Houston [14th Dist.] Sept. 13, 2001, pet. denied) (not designated for publication).

[685] *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–98 (Tex. 1995); *see also* Garcia v. Ray, 556 S.W.2d 870, 872 (Tex. Civ. App.—Corpus Christi 1977, writ dism'd).

[686] Knoblauch v. Kenyon, 415 N.W.2d 286, 292 (Mich. Ct. App. 1987); *see also* Alberici v. Tinari, 542 A.2d 127, 133 (Pa. Super. Ct. 1988).

[687] *See* Underkofler v. Vanasek, 53 S.W.3d 343, 346 (Tex. 2001); Nowak v. Pellis, 248 S.W.3d 736, 741 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

[688] *Underkofler*, 53 S.W.3d at 346; *see Nowak*, 248 S.W.3d at 741 (holding that one-satisfaction rule did not bar client's malpractice suit after client settled underlying case).

usually not a complete defense because it merely impacts the amount of damages.[689]

There are occasions, however, where the settlement may completely satisfy the client's claims in the underlying case, meaning that the attorney's alleged negligence did not cause any actual damages. For example, in *Perkins v. Barrera*, the plaintiff filed a malpractice action against the attorney who represented her in a divorce action to recover one-half of the military retirement benefits received by her former husband from the date of the divorce until the date the settlement agreement was reached regarding the future disbursements of the benefits.[690] The trial court granted summary judgment for the attorney.[691] The court of civil appeals held that the judgment entered in the prior action by which the wife obtained the right to receive a share of the military retirement benefits was a bar to a subsequent malpractice action against the attorney for the wife's share of such benefits.[692] The court emphasized facts demonstrating the wife voluntarily accepted a lesser settlement than she was entitled to, meaning she could not blame her attorney for the consequences.[693] Following the principle that there can be but one satisfaction for one injury, the court reasoned that the plaintiff had compromised and settled the earlier suit with her ex-husband and therefore had, in effect, been paid in full.[694] Critically, however, this rule is only a complete defense when "the settlement credit entirely sets-off the maximum amount" of the defendant lawyer's liability to the plaintiff.[695]

Settlements do not ordinarily give rise to a collateral estoppel defense. For that doctrine to be applicable, questions of law or of fact must be put in issue and determined by a court. When those elements are present, however,

[689] *See* 3 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 22:72 (2018 ed.).

[690] 607 S.W.2d 3, 4 (Tex. Civ. App.—Tyler 1980, no writ).

[691] *Id.*

[692] *Id.* at 7.

[693] *Id.* at 5–7.

[694] *Id.* at 6–7 (indicating also that had client alleged that community interest in military retirement benefits was insufficient to make former wife whole, and had client sought any consequential damages based on attorney's alleged failure to inform, client would have been able to maintain such an action).

[695] Nowak v. Pellis, 248 S.W.3d 736, 741 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *see also* Sky View at Las Palmas, LLC v. Mendez, No. 13-15-00019-CV, 2017 WL 219122, at *2 (Tex. App.—Corpus Christi Jan. 19, 2017, pet. granted) (mem. op.) (explaining one-satisfaction rule).

the same matter cannot be litigated in a subsequent suit between the same parties or their privies.[696]

G. Contribution or Indemnity

In Texas, the rights of contribution and indemnity are usually derivative of the plaintiff's cause of action, and therefore, neither contribution nor indemnity is ordinarily recoverable from a third party against whom the plaintiff has no cause of action.[697] Nevertheless, an attorney sued for legal malpractice under certain situations may have a right to contribution from a successor attorney who also is negligent.[698] Cross-actions against successor counsel for contribution or equitable indemnity are usually based on the theory that a successor counsel exacerbated the client's damages. For example, in *Schauer v. Joyce*, an attorney represented a woman who was seeking a divorce, and the attorney obtained a default judgment which provided for alimony.[699] The court eventually vacated the default judgment because an affidavit falsely stated that the husband had not appeared.[700] The woman discharged her attorney and retained another attorney to represent her in the divorce action.[701] Subsequently, the woman brought a malpractice

[696] *See* Tex. Dep't of Pub. Safety v. Petta, 44 S.W.3d 575, 579 (Tex. 2001) (defining collateral estoppel); Haesly v. Whitten, 580 S.W.2d 104, 106 (Tex. Civ. App.—Waco 1979, no writ) (referring to res judicata).

[697] *E.g.*, Shoemake v. Fogel, Ltd., 826 S.W.2d 933, 935 (Tex. 1992); City of Houston v. Ranjel, 407 S.W.3d 880, 892 (Tex. App.—Houston [14th Dist.] 2013, no pet.); Equitable Recovery, L.P. v. Health Ins. Brokers of Tex., L.P., 235 S.W.3d 376, 387 (Tex. App.—Dallas 2007, pet. dism'd); J.M.K. 6, Inc. v. Gregg & Gregg, P.C., 192 S.W.3d 189, 202 (Tex. App.—Houston [14th Dist.] 2006, no pet.); Omega Contracting, Inc. v. Torres, 191 S.W.3d 828, 837 (Tex. App.—Fort Worth 2006, no pet.); Amoco Chem. Corp. v. Malone Serv. Co., 712 S.W.2d 611, 613 (Tex. App.—Houston [1st Dist.] 1986, no writ); *see* Jaster v. Comet II Constr., Inc., 438 S.W.3d 556, 570 (Tex. 2014) (distinguishing between "those who seek contribution and indemnity and those who seek affirmative relief rather than derivative relief").

[698] Chapter 33 of the Texas Civil Practice and Remedies Code provides a general right to contribution when one defendant "who is jointly and severally liable . . . pays a percentage of the damages" greater "than his percentage of responsibility." TEX. CIV. PRAC. & REM. CODE § 33.015; *In re* Smith, 366 S.W.3d 282, 285 (Tex. App.—Dallas 2012, orig. proceeding) (concluding that Chapter 33 applied to malpractice claim); *see* Hall v. White, Getgey & Meyer Co., No. SA97CA0320NN, 2001 WL 1910546, at *9–10 (W.D. Tex. Aug. 16, 2001) (holding that because predecessor counsel settled with client, successor counsel had no right to contribution under Chapter 33 from predecessor in malpractice case).

[699] Schauer v. Joyce, 429 N.E.2d 83, 83 (N.Y. 1981).

[700] *Id.* at 83.

[701] *Id.* at 84.

claim against her first attorney seeking the lost alimony as damages. The attorney in turn sought contribution from the woman's second attorney, contending that the plaintiff would not have sustained damages if the second attorney had acted properly.[702] In allowing the attorney's claim for contribution, the court rejected the contention that privity principles were involved, reasoning that the only question was whether both attorneys owed a duty to the client, and whether a breach of these duties contributed to the client's injury.[703] The court then concluded that each attorney owed a duty to the client, and therefore, the action for contribution was permissible.[704]

There is, however, authority that contribution claims may be inappropriate.[705] In *Stone v. Satriana*, for example, a former client, a police officer, sued her former lawyers for malpractice, claiming that their negligence caused a judgment against her in a federal 42 U.S.C. § 1983 action arising out of her investigation of a victim's death.[706] The former lawyers sought to designate her current lawyers as "nonparties at fault" under Colorado law, arguing that their advice that the client not appeal the § 1983 judgment was the cause of the client's injuries.[707] The Colorado Supreme Court reasoned that there is no legal duty for a legal malpractice plaintiff's counsel to ameliorate the damage done by predecessor counsel.[708] Accordingly, that court held that absent a breach of a legal duty, the designation of current counsel as "nonparty at fault" is improper.[709] Likewise, where an attorney who was sued for negligence because he failed

[702] *Id.*

[703] *Id.*

[704] *Id.* at 84–85.

[705] *See* Forensis Grp., Inc. v. Frantz, Townsend & Foldenauer, 29 Cal. Rptr. 3d 622, 630 (Cal. Ct. App. 2005) (case-by-case determination); Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker, 98 Cal. Rptr. 2d 419, 424 (Cal. Ct. App. 2000); Holland v. Thacher, 245 Cal. Rptr. 247, 254 (Cal. Ct. App. 1988); Gibson, Dunn & Crutcher v. Superior Ct., 156 Cal. Rptr. 326, 331 (Cal. Ct. App. 1982); Held v. Arant, 134 Cal. Rptr. 422, 424 (Cal. Ct. App. 1977).

[706] 41 P.3d 705, 707 (Colo. 2002); *see also* Shealy v. Lunsford, 355 F. Supp. 2d 820, 828–29 (M.D.N.C. 2005) (holding successor attorney could not seek contribution from original attorney who allowed default judgment to be entered); Mirch v. Frank, 295 F. Supp. 2d 1180, 1184–85 (D. Nev. 2003) (holding original attorney cannot seek contribution from successor attorney but may reduce damages by successor's share of liability); Gauthier v. Kearns, 780 A.2d 1016, 1023 (Conn. Super. Ct. 2001) (noting that successor counsel would have to obtain clients' permission to disclose his communications with them to defend against prior counsel's claims were he to be joined to the suit).

[707] *Stone*, 41 P.3d at 707.

[708] *Id.* at 712.

[709] *Id.*

to file timely a medical malpractice suit sought to obtain contribution or indemnity from the doctor and hospital that allegedly committed the malpractice, the court held that contribution or indemnity was inappropriate.[710]

H. Unclean Hands; *In Pari Delicto*

The equitable doctrines of unclean hands or *in pari delicto* may serve as an obstacle to recovery for an aggrieved client suing his or her attorney.[711] Where a client has engaged in fraudulent conduct, courts have ruled that the judicial process is not available to provide a recovery against the attorney.[712] The continued viability of this doctrine in legal malpractice cases, however, is unclear under Texas' comparative negligence statute. The Texas Supreme Court has held that under that statute, "the common law unlawful acts doctrine is not available as an affirmative defense in personal injury and wrongful death cases," though it expressly declined to

[710] *See* Threlkeld v. Haskins Law Firm, 922 F.2d 265, 267–69 (5th Cir. 1991) (applying Louisiana law); *see also* Mitchell v. Valerio, 858 P.2d 822, 23–24 (Idaho Ct. App. 1993) (holding "attorney who is sued by client for failing to commence an action in a timely manner" does not have "an equitable right to indemnity from the party or parties against whom the action was to be brought"); Cherry Hill Manor Assocs. v. Faugno, 861 A.2d 123, 130 (N.J. 2004) (holding that where one admittedly negligent attorney sought contribution from previous attorneys whose "allegedly tortious acts occurred before" his own, contribution was unavailable); Lovino, Inc. v. Lavallee Law Offices, 946 N.Y.S.2d 875, 876 (N.Y. App. Div. 2012) (rejecting indemnification claim because although two attorneys "both allegedly violated duties to the plaintiffs in the main action, they did not violate the same duty or share responsibility for the same injury"); 3 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 22:75 (2018 ed.) ("As a basic proposition, an attorney cannot seek indemnity or contribution in a legal malpractice action from the person that he or she failed to sue.").

[711] *See* Dugger v. Arredondo, 408 S.W.3d 825, 829–30 (Tex. 2013) (stating that the unlawful acts doctrine "has most recently arisen in medical and legal malpractice cases"); Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 46 (2008).

[712] *See, e.g.*, Gen. Car & Truck Leasing Sys., Inc. v. Lane & Waterman, 557 N.W.2d 274, 283 (Iowa 1996); Butler v. Mooers, 771 A.2d 1034, 1037 (Maine 2001) (holding that because client pled guilty to knowingly and willingly defrauding bank, client was collaterally estopped from claiming attorney negligently advised client that his activities were legal); Pantely v. Garris, Garris & Garris, P.C., 447 N.W.2d 864, 869 (Mich. Ct. App. 1989) (holding that client's cause of action based on improper advice to misrepresent her residency in divorce case was barred by doctrine of *in pari delicto* because client had fraudulently misrepresented that fact under oath); Sharpe v. Turley, 191 S.W.3d 362, 364, 369 (Tex. App.—Dallas 2006, pet. denied) (holding that because client unlawfully obtained documents, client's fraud claim against attorney for taking the documents was barred).

address whether the defense still applies "to civil defendants bringing legal malpractice actions."[713]

Assuming the defense is still viable, several examples illustrate its application. A legal malpractice action by a client who retained an attorney to implement a plan designed to defraud medical creditors and then obtain payments of expected medical expenses through public aid or Medicare was barred,[714] as was a bankruptcy trustee's claim against the debtor's attorneys where the debtor acted to defraud creditors.[715] The rationale was that a court will not allow a party to profit from his own fraud by recovering damages.

Some courts have applied these doctrines to bar a client's malpractice claim irrespective of the participation or negligence of the attorney.[716] Thus, in *Blain v. The Doctor's Co*., the court held that the doctrine barred a legal malpractice action based on the allegation that the attorney advised his

[713] *Dugger*, 408 S.W.3d at 833, 836.

[714] *See* Makela v. Roach, 492 N.E.2d 191, 195 (Ill. App. Ct. 1986).

[715] *In re* Gosman, 382 B.R. 826, 838 (S.D. Fla. 2007) (holding bankruptcy trustee could not sue debtor's attorneys because trustee stood in debtor's shoes and debtor "acted with actual intent to defraud while [attorney] was only negligent").

[716] *See* Robins v. Lasky, 462 N.E.2d 774, 779 (Ill. App. Ct. 1984) (stating that client may not maintain legal malpractice action against attorney when attorney allegedly advised client to move from jurisdiction to evade being served with process); Mettes v. Quinn, 411 N.E.2d 549, 551 (Ill. App. Ct. 1980) (explaining that where client alleged that attorney advised her to engage in conduct which prevented her from benefiting from her fraud, legal malpractice claim was not permitted because court will not aid party who seeks to profit from fraud); *Pantely*, 447 N.W.2d at 867; Tillman v. Shofner, 90 P.3d 582, 585, 587 (Okla. Civ. App. 2004) (holding that when both attorney and client pled guilty to conspiring to commit bankruptcy fraud, client could not sue attorney for negligence with respect to the criminal activities); Heyman v. Gable, Gotwals, Mock, Schwabe, Kihle, Gaberino, 994 P.2d 92, 94 (Okla. Civ. App. 1999) (holding that where clients defrauded others into entering contract, clients could not "benefit from their own confirmed fraud" by suing attorneys for negligently drafting contract); Feld & Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot, 458 A.2d 545, 548–49, 552 (Pa. Super. Ct. 1983) (stating that clients who allegedly committed perjury, falsified exhibits, and offered potential witness bribe on advice of and with assistance of attorneys were precluded from recovery); Quick v. Samp, 697 N.W.2d 741, 747–48 (S.D. 2005) (holding that when client participated in forgery with attorney, client could not sue attorney for negligence or fraud); Saks v. Sawtelle, Goode, Davidson & Troilo, 880 S.W.2d 466, 470 (Tex. App.—San Antonio 1994, writ denied) (holding that even if attorney misrepresented the legality of transaction to clients, the clients' malpractice claim was barred because they were found guilty of willfully committing that crime); Evans v. Cameron, 360 N.W.2d 25, 28–29 (Wis. 1985) (holding that a client who alleged she lied under oath based on advice of her attorney may not maintain legal malpractice action against her attorney).

client to lie at his deposition.[717] The court reasoned that the client's own misconduct was the direct cause of the harm for which he sought to recover and the attorney did not gain a personal benefit from the misconduct.[718]

Similarly, in *Pantely v. Garris, Garris & Garris, P.C.*, where the plaintiff had fraudulently misrepresented the duration of her residence in a divorce action, supposedly at the request of her attorney, the court of appeals acknowledged the plaintiff's admission of perjury.[719] The court then assumed arguendo that the attorney had counselled perjury, but nevertheless held that the plaintiff's action was barred by the doctrine of *in pari delicto*.[720] The underlying rationale for the court's conclusion was that "[s]uit is barred not because the defendant is right, but rather because the plaintiff, being equally wrong, has forfeited any claim to the aid of the court."[721]

The *Pantely* court brushed aside the plaintiff's argument that she was not equally at fault or that her unbalanced emotional state during the divorce somehow made the attorney's relative wrongdoing any greater.[722]

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[717] Blain v. The Doctor's Company, 272 Cal. Rptr. 250, 258 (Cal. Ct. App. 1990). Other courts have also held that the unclean hands doctrine precludes a malpractice action based on the contention that an attorney advised a client to lie under oath. *See* Turner v. Anderson, 704 So. 2d 748, 751 (Fla. Dist. Ct. App. 1998) (holding client could not sue attorney for malpractice after client followed attorney's advice to testify falsely at arbitration); *Feld & Sons*, 458 A.2d at 548, 554; *Quick*, 697 N.W.2d at 747–48; *Evans*, 360 N.W.2d at 28. *But see* Reneker v. Offill, No. 3:08-CV-1394-D, 2010 WL 1541350, at *7–8 (N.D. Tex. Apr. 19, 2010) (holding that law firm was not entitled to Rule 12(b)(6) dismissal based on its *in pari delicto* defense where face of pleadings does not show client "knowingly and willingly" violated securities laws); McKinley v. Weidner, 698 P.2d 983, 984, 986 (Or. Ct. App. 1985) (stating that *in pari delicto* does not bar suit alleging that the client, following his attorney's advice, tendered and then dishonored a check in a ploy to recover property from a third party; complaint did not show that parties were of equal fault).

[718] *Blain*, 272 Cal. Rptr. at 258–59; *see also Turner*, 704 So. 2d at 751 (observing that client acted "with full recognition of the illegality of what he was doing" and client's "guilt is not far less than that of counsel"); *Quick*, 697 N.W.2d at 745–46 (stating that doctrine of *in pari delicto* applies "even when lesser degrees of fault are involved," but exceptions exist for "undue influence and great inequality of condition" between attorney and client).

[719] 447 N.W.2d at 867.

[720] *See id.* at 868.

[721] *Id.* at 867; *see Heyman*, 994 P.2d at 94 ("It would be contrary to public policy to allow the Clients here to benefit from their own confirmed fraud and recover a monetary judgment from the Firm to indemnify them for their fraud.").

[722] 447 N.W.2d at 868; *see also* Tillman v. Shofner, 90 P.3d 582, 585 (Okla. Civ. App. 2004) ("The fact that [client] received a lesser sentence [than counsel] under the Federal Sentencing Guidelines is not dispositive . . . .").

The court similarly rejected plaintiff's argument that the public policy favoring the integrity of the Bar should displace the doctrine, observing that this policy is adequately served by the threat of attorney disciplinary action.[723] This rationale explains why a Texas court held that a malpractice claim was barred when the clients knowingly defrauded a bank—even though the clients alleged their attorneys misrepresented the legality of the transaction.[724]

I. Other Defenses

An attorney cannot use his own conduct as a basis for excusing his negligence. Thus, in *Schlosser v. Tropoli*, where the plaintiffs brought suit alleging their attorney was negligent in failing to prosecute a suit in which he had been retained to represent the plaintiff, and in allowing the suit to be dismissed for want of prosecution, the court entered judgment for the plaintiffs.[725] The court of civil appeals recognized that the attorney failed to join an indispensable party in the suit which was dismissed; therefore the original suit would not have been successful.[726] The court nevertheless concluded that it would not allow the attorney to "excuse one instance of negligence, because of earlier negligence on the part of the attorney."[727] The court therefore affirmed judgment against the attorney.[728] Furthermore, an attorney is not relieved of responsibility for his negligence merely because the client hires another attorney, and the second attorney negligently fails to cure the results of the first attorney's misconduct.[729]

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[723] *Pantely*, 447 N.W.2d at 868–69; *see Tillman*, 90 P.3d at 587 ("[T]he attorney's misconduct is amply discouraged by the threats of criminal sanctions and disciplinary proceedings.").

[724] Saks v. Sawtelle, Goode, Davidson & Troilo, 880 S.W.2d 466, 470 (Tex. App.—San Antonio 1994, writ denied).

[725] 609 S.W.2d 255, 256 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.); *see also* Cox v. McKernan, No. 11-CV-5980 (JMA), 2013 WL 2020536, at *9 (E.D.N.Y. May 14, 2013) (holding that in legal-malpractice suit, attorney has burden of proving client would have lost underlying suit based on an affirmative defense "not predicated on [attorney's] own negligence").

[726] *See Schlosser*, 609 S.W.2d at 259.

[727] *Id.*

[728] *Id.*

[729] *See* Stone v. Satriana, 41 P.3d 705, 712 (Colo. 2002) ("[T]here is no legal duty for a legal malpractice plaintiff's counsel to ameliorate the injury effected by predecessor counsel."); Cline v. Watkins, 135 Cal. Rptr. 838, 841–42 (Cal. Ct. App. 1977) ("[A] negligent lawyer [should] not be relieved because he is replaced by another."). *Cf.* Shealy v. Lunsford, 355 F. Supp. 2d 820, 829 (M.D.N.C. 2005) (holding successor attorney could not seek contribution from original attorney who allowed default judgment to be entered).

J. Personal Jurisdiction

A non-resident law firm's occasional representation of clients in Texas generally does not fall within the "doing business," or "other acts that may constitute doing business" portions of the Texas long-arm statute.[730] Moreover, the mere fact that a nonresident law firm has entered into a contract with a Texas client ordinarily is insufficient to subject it to personal jurisdiction in a Texas court.[731]

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[730] TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2018); *see also* Trinity Indus., Inc. v. Myers & Assocs., Ltd., 41 F.3d 229, 230 (5th Cir. 1995) ("The bare existence of an attorney-client relationship is not sufficient."); Gray, Ritter & Graham, PC v. Goldman Phipps PLLC, 511 S.W.3d 639, 657 (Tex. App.—Corpus Christi 2015, pet. denied) ("[A] nonresident attorney's act of entering into an attorney-client relationship with a Texas resident, standing alone, does not provide the minimum contacts necessary to support personal jurisdiction over the nonresident attorney."); Lisitsa v. Flit, 419 S.W.3d 672, 680 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) ("[T]he fact that an attorney has a client in Texas does not give rise to personal jurisdiction in Texas."); Myers v. Emery, 697 S.W.2d 26, 30 (Tex. App.—Dallas 1985, no writ).

[731] *See* Mitchell v. Freese & Goss, PLLC, No. 05-15-00868-CV, 2016 WL 3923924, at *5 (Tex. App.—Dallas July 15, 2016, pet. denied) ("Merely contracting with a Texas resident is insufficient to establish the minimum contacts necessary to support the exercise of specific personal jurisdiction over the nonresident defendant."); *Gray, Ritter & Graham, PC*, 511 S.W.3d at 658 ("[A] nonresident attorney's act of contracting with and accepting payment from Texas residents for services performed elsewhere does not support specific jurisdiction over a nonresident attorney."); *Lisitsa*, 419 S.W.3d at 680 ("The mere act of contracting with a Texas resident does not give rise to specific jurisdiction in Texas: performance must be due in Texas."); Gordon & Doner, P.A. v. Joros, 287 S.W.3d 325, 329, 332 (Tex. App.—Fort Worth 2009, no pet.) (holding that out-of-state law firm's joint-representation agreement with Texas attorney regarding out-of-state litigation did not create personal jurisdiction over out-of-state attorney); Proskauer Rose LLP v. Pelican Trading, Inc., No. 14-08-00283-CV, 2009 WL 242993, at *4 (Tex. App.—Houston [14th Dist.] Feb. 3, 2009, no pet.) ("[N]either the mere existence of an attorney-client relationship between a resident client and an out-of-state attorney nor the routine correspondence and interactions attendant to that relationship are enough to confer personal jurisdiction."); Weldon-Francke v. Fisher, 237 S.W.3d 789, 796 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("[C]ontracting with and accepting payment from Texas residents for services performed in New Hampshire is insufficient to support specific jurisdiction."); Matthews v. Proler, 788 S.W.2d 172, 174–75 (Tex. App.—Houston [14th Dist.] 1990, no writ) (holding that nonresident client who entered employment contract with Texas attorney in Texas was not subject to personal jurisdiction in Texas in attorney's breach of contract action absent showing that contract was to be performed in Texas). However, entering into a contract with a Texas resident which is performable by the defendant partly in Texas is usually sufficient to subject a nonresident to the jurisdiction of a Texas court. *See* U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d, 760, 762–63 (Tex. 1977); Cartlidge v. Hernandez, 9 S.W.3d 341, 348–49 & n.7 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding that Nevada attorney conducted business in Texas by mailing letter and retainer agreement to Texas client, resulting in specific jurisdiction in Texas).

But even if a non-resident attorney has contacts with Texas on behalf of a client, such contacts may not satisfy the "purposeful availment" requirement of the "due process" test.[732] This is because specific jurisdiction rests on "contacts that the 'defendant *himself*' creates with the forum State."[733] In other words, the analysis "looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."[734] The mere fact that one knows an injury will be felt in a specific forum does not mean that forum has specific jurisdiction; "an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State."[735]

Thus, the normal incidents of a law firm's legal representation of a client such as attending meetings in the forum necessary to the legal representation, making phone calls, sending letters to the forum, and the like usually do not, by themselves, give rise to specific jurisdiction.[736] For example, when a California attorney's representation "was limited to [a] California lawsuit, was not the result of [his] seeking clients in Texas . . . , and did not involve any contacts with Texas other than communications about the California lawsuit and payment of fees," there was not specific jurisdiction.[737] Simply put, the customary activities commensurate with representing out-of-state clients are "minimal and fortuitous" and are not the result of a law firm's "purposefully conducted activities within the

[732] *See* Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014) (explaining requirements for specific jurisdiction).

[733] *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

[734] *Id.*

[735] *Id.* at 1125.

[736] *See* Furtek & Assocs., L.L.C. v. Maxus Healthcare Partners, LLC, No. 02-15-00309-CV, 2016 WL 1600850, at *5 (Tex. App.—Fort Worth Apr. 21, 2016, no pet.) (mem. op.) ("Texas courts have consistently held that telephone calls, emails, and mail between a nonresident defendant and a Texas resident are insufficient minimum contacts to establish specific jurisdiction."); *Gray, Ritter & Graham, PC*, 511 S.W.3d at 657 (holding that "routine correspondence and interactions" between an out-of-state attorney and in-state client are not "sufficient to confer specific personal jurisdiction over a nonresident attorney").

[737] Bergenholtz v. Cannata, 200 S.W.3d 287, 295 (Tex. App.—Dallas 2006, no pet.); *see* Rolnick v. Sight's My Line, Inc., No. 03-15-00335-CV, 2015 WL 9436697, at *5 (Tex. App.—Austin Dec. 22, 2015, pet. denied) (mem. op.) (holding that because "crux of the alleged malpractice is not that [Florida attorney] and the other law firms filed a UCC-1 in Texas but, rather, that they *failed* to file a UCC-1 in Delaware," there was no specific jurisdiction over Florida attorney).

[s]tate."[738] Thus, when a nonresident law firm (1) advertised in Martindale-Hubbell; (2) received checks for payment mailed from Texas and drawn on Texas banks; (3) sent mail to the Texas client concerning the lawsuit; (4) placed long distance telephone calls to the Texas client; (5) had two members of the firm who were licensed to practice law in Texas; (6) one of the law firm's partners owned mineral interests in Texas; and (7) provided legal services to other Texas corporations and individuals, there was still no personal jurisdiction.[739]

The minimum contacts analysis for out-of-state attorneys generally focuses on whether the attorneys "have engaged in purposeful contact with Texas," such as by seeking Texas clients or affirmatively promoting business in Texas.[740] Importantly, the inquiry hinges on "where the attorneys performed the legal work at issue," not where the effect of the alleged malpractice will be felt.[741] Accordingly, when an attorney "traveled to Texas to investigate" claims, "interviewed witnesses in Texas, filed

[738] Myers v. Emery, 697 S.W.2d 26, 32 (Tex. App.—Dallas 1985, no writ); *see Furtek & Assocs.*, 2016 WL 1600850, at *5–6 (holding that mere fact that out-of-state attorney traveled to Texas for other matters or was paid with check drawn on Texas bank were fortuitous contacts); Lisitsa v. Flit, 419 S.W.3d 672, 680–81 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding that when California attorney's client moved to Texas, the "fortuity of where [client] was located" when alleged tort occurred was irrelevant).

[739] *See Myers*, 697 S.W.3d at 32; *see also* Star Tech., Inc. v. Tultex Corp., 844 F. Supp. 295, 298 (N.D. Tex. 1993) (holding that a nonresident attorney's "sporadic contacts" with Texas for limited purpose of representing clients will not subject him to general jurisdiction in Texas; nonresident attorney's two trips to Texas are irrelevant to plaintiff's cause of action and insufficient for specific jurisdiction); Geo-Chevron Ortiz Ranch #2 v. Woodworth, No. 04-06-00412-CV, 2007 WL 671340, at *3–4 (Tex. App.—San Antonio Mar. 7, 2007, pet. denied) (mem. op.) (holding that nonresident attorney representing Texas client in Georgia litigation was not subject to suit in Texas merely because of phone calls and two litigation-related trips to Texas).

[740] *See Gray, Ritter & Graham, PC*, 511 S.W.3d at 658; Ahrens & DeAngeli, P.L.L.C. v. Flinn, 318 S.W.3d 474, 484 (Tex. App.—Dallas 2010, pet. denied); *see also* Proskauer Rose LLP, No. 14-08-00283-CV, 2009 WL 242993, at *4 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (mem. op.) (holding that when one law firm introduced Texas client to New York law firm, there was no specific jurisdiction in Texas).

[741] Abilene Diagnostic Clinic, PLLC v. Paley, Rothman, Goldstein, Rosenberg, Eig & Cooper, Chartered, 364 S.W.3d 359, 365–66 (Tex. App.—Eastland 2012, no pet.); *see Rolnick*, 2015 WL 9436697, at *3 (holding that where "the underlying case involves a legal-malpractice action, the focus for personal-jurisdiction purposes should be on where the attorneys performed the legal work at issue").

pleadings and documents in Texas, obtained subpoenas from the NLRB in Texas, and made phone calls to Texas," there was specific jurisdiction.[742]

As for general jurisdiction, the United States Supreme Court recently clarified that a foreign defendant must have contacts with the forum state that "are so constant and pervasive 'as to render [it] essentially at home in the forum State.'"[743] The principal inquiry is the location of an individual's domicile or a business' place of incorporation or principal place of business.[744] Only in exceptional circumstances will anyone be subject to general jurisdiction anywhere else.[745]

Thus, a Pennsylvania law firm with no offices in Texas that had never represented Texas residents in litigation in Texas was not subject to general jurisdiction in Texas.[746] Nor did Texas have general jurisdiction over a former Texas resident with an inactive Texas law license; he had "not maintained a Texas residency, practice, business contacts, property, or bank account."[747]

[742] Mountain States Emp'rs Council, Inc. v. Cobb Mech. Contractors, Inc., No. 2-07-462-CV, 2008 WL 2639711, at *7–10 (Tex. App.—Fort Worth July 3, 2008, no pet.); *see also* Trinity Indus., Inc. v. Myers & Assocs., Ltd., 41 F.3d 229, 230 (5th Cir. 1995) (holding specific jurisdiction existed where nonresident attorneys represented Texas company, appeared in Texas courts for the matter, regularly communicated with those in Texas, and had occasional meetings in Texas). But, when an Indiana attorney gave a Texas client legal advice about how Texas law would impact the collection of a judgment against them in Indiana, there still was no specific jurisdiction in Texas. Markette v. X-Ray X-Press Corp., 240 S.W.3d 464, 468–69 (Tex. App.—Houston [14th Dist.] 2007, no pet.). The attorney's legal judgment was "the focus" of the malpractice litigation, and it was exercised in Indiana. The mere fact that the consequences were felt in Texas did not create jurisdiction. *Id.* at 469.

[743] Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

[744] *Id.* at 760–61.

[745] *Id.* at 761 n.19.

[746] Profl'l Ass'n of Golf Officials v. Phillips Campbell & Phillips, L.L.P., No. 02-12-00426-CV, 2013 WL 6869862, at *6 (Tex. App.—Fort Worth Dec. 27, 2013, pet. denied) (mem. op.); *see also* Proskauer Rose LLP v. Pelican Trading, Inc., No. 14-08-00283-CV, 2009 WL 242993, at *2 (Tex. App.—Houston [14th Dist.] Feb. 3, 2009, no pet.) (holding that there is no general jurisdiction where law firm "does not practice in Texas; has no registered agent, offices, property, or employees in Texas; and does not advertise, solicit, or promote its services in Texas").

[747] Companion Prop. & Cas. Ins. Co. v. Palermo, 723 F.3d 557, 560 (5th Cir. 2013) (holding that law firm's limited business in Texas did not give rise to general jurisdiction when it had no personnel or offices in the state); Geo-Chevron Ortiz Ranch #2 v. Woodworth, No. 04-06-00412-CV, 2007 WL 671340, at *5 (Tex. App.—San Antonio Mar. 7, 2007, pet. denied) (mem. op.).

In contrast, a court held the exercise of general jurisdiction over a Colorado attorney was proper because (1) the attorney grew up in Texas; (2) went to law school in Texas; (3) was licensed to practice law in Texas; (4) had previously lived and practiced law in Texas from 1971 until 1984, when he moved to Colorado; and (5) since 1984, he held himself out to be a licensed Texas attorney, and actively handled at least 15 lawsuits in Texas courts.[748] Plainly, such pervasive contacts gave rise to general jurisdiction.[749] It is unclear, however, whether this conclusion remains correct under the United States Supreme Court's stricter standard for general jurisdiction, requiring the defendant to be "essentiallty at home in the forum state."[750]

A substantial body of case law from other jurisdictions also holds that a nonresident law firm's attenuated and sporadic activity in a forum on behalf of its forum clients, by itself, fails to meet the "purposeful availment" requirement.[751] The rationale of these holdings comports with the realities

[748] Nikolai v. Strate, 922 S.W.2d 229, 237–39 (Tex. App.—Fort Worth 1996, writ denied).

[749] *Daimler*, 134 S. Ct. at 749; *see* Gray, Ritter & Graham, PC v. Goldman Phipps PLLC, 511 S.W.3d 639, 657 (Tex. App.—Corpus Christi 2015, pet. denied) (holding that although "nonresident attorney who has only sporadic contacts with Texas will not be subject to general jurisdiction in Texas," the "systematic representation of Texas residents may suffice to establish general jurisdiction over a nonresident attorney"). *But see* Fowler v. Litman, No. 05-07-01056-CV, 2008 WL 2815086, at *3 (Tex. App.—Dallas July 23, 2008, pet. denied) (mem. op.) ("We hold that Litman's representation of fifty Texas clients over twenty-plus years does not constitute substantial, systematic, and continuous contacts necessary to establish general jurisdiction.").

[750] *See Daimler*, 134 S. Ct. at 751 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)); *see also* Cassandra Burke Robertson, *Personal Jurisdiction in Legal Malpractice Litigation*, 6 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 15–17 (2016) (asking whether "[u]nder the new at-home test . . . the acquisition of a license to practice law render[s] the attorney at home in the forum").

[751] *See, e.g.*, Newsome v. Gallacher, 722 F.3d 1257, 1262 (10th Cir. 2013) ("Given the law firm's out-of-state character and that it performed all of its relevant services out-of-state on an out-of-state transaction, it did not cultivate sufficient contacts with Oklahoma to justify personal jurisdiction there."); Rice v. Karsch, 154 F. App'x. 454, 460–64 (6th Cir. 2005) (holding that out-of-state attorney's alleged negligent and fraudulent phone calls and communications to Tennessee did not give rise to specific jurisdiction there); Porter v. Berall, 293 F.3d 1073, 1077 (8th Cir. 2002) ("The alleged negligence of the defendants in failing to inform the plaintiffs of the change in Connecticut law is not sufficiently related to an effect in Missouri to constitute a relationship between the cause of action and the contacts."); HR Props. of Delaware LLC v. Adams & Reese LLP, No. 11 C 8638, 2013 WL 951121, at *10 (N.D. Ill. Mar. 12, 2013) ("Merely establishing or maintaining an attorney-client relationship with a resident of the forum state is not enough to establish personal jurisdiction over an out-of-state defendant in a legal malpractice case."); Salisbury Cove Assocs., Inc. v. Indcon Design (1995), Ltd., 211 F. Supp. 2d 184, 195 (D. Me. 2002) ("[W]here a defendant attorney,

of the modern practice of law. Accompanying clients to states outside a law firm's home base for meetings, depositions, hearings and the like is a common practice in this day of rapid communications and transportation. Indeed, the necessity of interstate travel with clients by attorneys licensed by various states requires that restraint be exercised by courts in the application of long-arm statutes.[752]

solicited by a forum-based client, represents the client in a non-forum state and, in connection with that attorney-client relationship, accepts payment from a forum-based bank, makes telephone calls, and sends letters to the client, purposeful availment does not exist."); Biederman v. Schnader, Harrison, Siegal & Lewis, 765 F. Supp. 1057, 1061 (D. Kan. 1991) (finding no jurisdiction over nonresident law firm despite the fact that law firm represented forum client, made brief visits to forum during discovery, made phone calls and sent letters to forum, and received client's checks); Am. Life & Cas. Ins. Co. v. First Am. Title Co. of Utah, 772 F. Supp. 574, 578–79 (D. Utah 1991) ("Attorneys are often asked to perform services for their local clients which services may have some impact in another jurisdiction. To require an attorney to submit to personal jurisdiction in a foreign jurisdiction each time the attorney communicates instructions on behalf of a client does not comport with fundamental fairness."); *Ex parte* Dill, Carr, Stonbraker & Hutchings, P.C., 866 So. 2d 519, 529 (Ala. 2003) ("In the context of the attorney-client relationship, a lawyer's *out-of-state* activities, undertaken on behalf o[f] an in-state client—however substantial—are immaterial to a minimum-contacts analysis."); Edmunds v. Superior Ct. (*Ronson*), 29 Cal. Rptr. 2d 281, 289–90 (Cal. Ct. App. 1994) (holding that attorney's travel to forum for client's deposition in forum did not satisfy this requirement); Fulbright & Jaworski v. Eighth Jud. Dist. Ct., 342 P.3d 997, 999 (Nev. 2015) (holding that "a Texas-based law firm's representation of a Nevada client in a Texas matter" does not by itself give rise to specific jurisdiction in Nevada); Jacobs v. 201 Stephenson Corp., 30 N.Y.S.3d 134, 135–36 (N.Y. App. Div. 2016) (holding Georgia law firm's representation of New York clients in out-of-state real estate transactions did not give rise to specific jurisdiction in New York).

[752] Most cases that have found the exercise of personal jurisdiction over a nonresident law firm or attorney to be consistent with due process have involved instances where there was a clear nexus between the plaintiff's cause of action and the attorney's forum activity. *See, e.g.*, Walk Haydel & Assocs., Inc. v. Coastal Power Prod. Co., 517 F.3d 235, 243–45 (5th Cir. 2008) (holding specific jurisdiction arose in Louisiana over out-of-state firm that failed to disclose conflict-of-interest during meeting in Louisiana or in correspondence sent to Louisiana); Moncrief v. Clark, 189 Cal. Rptr. 3d 864, 869 (Cal. Ct. App. 2015) (holding that Arizona attorney's representations made with "sole purpose of facilitating" a sale between his client and a California company gave rise to personal jurisdiction in California); Ores v. Kennedy, 578 N.E.2d 1139, 1145 (Ill. App. Ct. 1991) (holding that third party plaintiffs' legal malpractice action arose out of nonresident attorney's forum contacts because "essence" of third-party complaint was "nature or quality" of the attorney's representation of plaintiff and his communications with plaintiff); Addison Ins. Co. v. Knight, Hoppe, Kurnik & Knight, L.L.C., 734 N.W.2d 473, 477–78 (Iowa 2007) (holding Illinois law firm was subject to suit in Iowa because attorneys had long-lasting relationship with client that relocated from Illinois to Iowa and the alleged malpractice arose out of communications directed to client in Iowa); Baker & McKenzie, LLP v. Evans, 123 So. 3d 387, 406–07 (Miss. 2013) (holding out-of-state firm's contacts with Mississippi gave rise to specific jurisdiction there because firm represented client during inquiries by Mississippi Secretary of State and undertook responsibilities of representation under

The majority view is that "even though a client may feel the effects of the lawyer's misdeeds in the client's home forum, the client cannot sue the lawyer there on that account alone."[753] Some courts, however, have held that even if an attorney did not deliberately seek the forum resident's representation, the attorney still deliberately availed herself of the forum state's benefits by voluntarily assuming the obligation of representing the forum state client.[754] Others state that something more—such as deliberately seeking the representation or advancing business in the state—is required.[755] And still others suggest that soliciting a client in another state does not in and of itself give rise to personal jurisdiction there.[756]

Several courts have set forth a general rule that the mere use of the mail or telephone in consulting with the forum client does not amount to purposeful activity, invoking the benefits and protections of the state on the receiving end of such communications.[757] An exception arises where the

Mississippi law); Original Talk Radio Network, Inc. v. Alioto, No. 1:13-cv-00759-PA, 2013 WL 4084247, at *6 (D. Or. Aug. 13, 2013) (holding Oregon court had personal jurisdiction over California attorney where clients hired attorney based on his assertions that case would be filed in Oregon, and where attorney took steps toward admission *pro hac vice*).

[753] *Newsome*, 722 F.3d at 1280 (examining jurisdictions); *see* Fulbright & Jaworski v. Eighth Jud. Dist. Ct., 342 P.3d 997, 1003 (Nev. 2015).

[754] *See* Keefe v. Kirschenbaum & Kirschenbaum, P.C., 40 P.3d 1267, 1272–73 (Colo. 2002) (holding that New York attorney's representation of Colorado client in New York matter, including communications and demands for payment, gave rise to personal jurisdiction in Colorado). More recently, Texas courts seem to have moved toward the majority approach. Lisitsa v. Flit, 419 S.W.3d 672, 680 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) ("[T]he fact that an attorney has a client in Texas does not give rise to personal jurisdiction in Texas."). *But see* Cartlidge v. Hernandez, 9 S.W.3d 341, 348–49 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding Nevada attorney representing Texas client in Nevada litigation was subject to suit in Texas because attorney mailed agreements to Texas client and directed communications there).

[755] *E.g.*, Gray, Ritter & Graham, PC v. Goldman Phipps PLLC, 511 S.W.3d 639, 658 (Tex. App.—Corpus Christi 2015, pet. denied) ("Generally, in order to show that nonresident attorneys have engaged in purposeful contact with Texas, the record must indicate that the nonresident attorneys have sought clients in Texas or otherwise have affirmatively promoted their businesses in Texas."); Ahrens & DeAngeli, P.L.L.C. v. Flinn, 318 S.W.3d 474, 484 (Tex. App.—Dallas 2010, pet. denied) ("[T]he nonresident attorney must take affirmative action to promote business within the forum state.").

[756] *E.g.*, FDIC v. Malmo, 939 F.2d 535, 537 (8th Cir. 1991) (holding that when attorney's sole contact with forum state was letter to financial instution offering to represent it, this did not give rise to jurisdiction in institution's forum state).

[757] *See, e.g.*, *Newsome*, 722 F.3d at 1280 (disagreeing with view that "normal communications that make up an active attorney-client relationship are the sort of repeated, purposeful contacts with the client's home forum sufficient to establish personal jurisdiction"); Companion Prop. & Cas. Ins.

basis of the malpractice suit is the advice rendered during the communications with the forum resident. For example, in *Wein Air Alaska, Inc. v. Brandt*, the plaintiff alleged her attorney made phone calls and wrote letters to the client in Texas that contained "fraudulent misrepresentation and promises and whose contents failed to disclose material information."[758] The Fifth Circuit held that "[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment."[759]

Courts have traditionally found the purposeful availment determination less problematic when intentional misconduct by the attorney is alleged and the misconduct was directed toward the client in the forum.[760] The Fifth Circuit, in *Trinity Industries*, went so far as to assert "a lawyer accused of violating his or her professional obligations to a client is answerable not only where the alleged breach occurred but also where the professional obligations attached."[761] It must be remembered, however, that the United States Supreme Court has cautioned that mere knowledge that the *effect* of a tort will be felt in a particular jurisdiction is not enough to confer personal jurisdiction there.[762] "The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."[763]

Co. v. Palermo, 723 F.3d 557, 560–61 (5th Cir. 2013) (holding that mere fact that third-party claims administrator in Texas retained out-of-state law firm to handle out-of-state matter did not subject law firm to suit in Texas); *Fulbright & Jaworski*, 342 P.3d at 1004.

[758] 195 F.3d 208, 212 (5th Cir. 1999).

[759] *Id.* at 213.

[760] *See* Trinity Indus., Inc. v. Myers & Assocs., Ltd., 41 F.3d 229, 231 (5th Cir. 1995); *Gray, Ritter & Graham, PC*, 511 S.W.3d at 668 (holding specific jurisdiction exists where out-of-state attorneys "sought out and chose to accept leadership roles on the executive committee of the MDL and thereby systematically undertook to represent hundreds of Texas clients in the MDL"); Tempest Broad. Corp. v. Imlay, 150 S.W.3d 861, 872 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding specific jurisdiction existed where nonclient sued out-of-state law firm for fraud and tortious interference with contract).

[761] 41 F.3d at 232; *see Companion Prop. & Cas. Ins. Co.*, 723 F.3d at 561 (holding personal jurisdiction would be more plausible "where the malpractice occurred (Louisiana) or where the professional obligations attached (South Carolina)").

[762] Walden v. Fiore, 134 S. Ct. 1115, 1125 (2014).

[763] *Id.*

§ 16 Limitations / Statute of Limitations

It is well established that in Texas a cause of action for legal malpractice is normally a tort and is therefore governed by the two-year statute of limitations.[764] However, the Texas Supreme Court has recognized two doctrines that may delay accrual or toll limitations: (1) the discovery rule and (2) fraudulent concealment.[765] In *Willis v. Maverick*, the Texas Supreme Court concluded that the discovery rule applies to determine when a legal malpractice action accrues.[766] The discovery rule is the legal principle which, when applicable, provides that limitations run from the date the plaintiff discovers or should have discovered the nature of the injury, in the exercise of reasonable care and diligence.[767] The basis for the rule is as follows:

> [W]e believe that any burden placed upon an attorney by application of the discovery rule is less onerous than the injustice of denying relief to unknowing victims . . . . Accordingly, we hold that the statute of limitations for legal malpractice actions does not begin to run until the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action.[768]

Reliance on the statute of limitations is an affirmative defense.[769] The attorney in a legal malpractice case therefore bears the burden to plead,

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[764] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 2018); Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988); *see also* Isaacs v. Schleier, 356 S.W.3d 548, 557 (Tex. App.—Texarkana 2011, pet. denied) (stating "as long as the crux of the complaint is that the plaintiff's attorney did not provide adequate legal representation, the claim is one for legal malpractice" and therefore subject to two-year statute of limitations).

[765] Valdez v. Hollenbeck, 465 S.W.3d 217, 229 (Tex. 2015); Shell Oil Co. v. Ross, 356 S.W.3d 924, 927 (Tex. 2011).

[766] *Willis*, 760 S.W.2d at 644; *see also Isaacs*, 356 S.W.3d at 560.

[767] *See Willis*, 760 S.W.2d at 644; *see also Valdez*, 465 S.W.3d at 229; *Shell Oil Co.*, 356 S.W.3d at 927, 929–30; *Isaacs*, 356 S.W.3d at 560.

[768] *Willis*, 760 S.W.2d at 646 (citations omitted); *see also* Apex Towing Co. v. Tolin, 41 S.W.3d 118, 120–21 (Tex. 2001); Burns v. Thomas, 786 S.W.2d 266, 267 (Tex. 1990); Estate of Jobe v. Berry, 428 S.W.3d 888, 901–02 (Tex. App.—Texarkana 2014, no pet.); Trousdale v. Henry, 261 S.W.3d 221, 234 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

[769] *See* TEX. R. CIV. P. 94.

prove, and secure findings to sustain a plea of limitations.[770] However, because the discovery rule is a matter in avoidance, to overcome a prima facie limitations defense the client must plead the discovery rule, support it with evidence to prevent limitations, and secure favorable factual findings.[771] However, at the summary judgment stage, if the client pleads the discovery rule, then the defendant bears the burden of negating it as a matter of law.[772]

When, however, the plaintiff fails to plead and prove discovery facts, the "legal injury" rule determines when the client's cause of action accrues.[773] Under the legal injury rule, a cause of action accrues with an invasion of the plaintiff's legally protected interest, "provided some legally cognizable injury however slight, has resulted from the invasion or would necessarily do so."[774]

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[770] *See* Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517 (Tex. 1988) (applying discovery rule to fraud); Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto & Friend, LLP, 404 S.W.3d 75, 84 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Isaacs*, 356 S.W.3d at 556; *Trousdale*, 261 S.W.3d at 234.

[771] *See* Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 223 & n.3 (Tex. 1999); *Woods*, 769 S.W.2d at 518; *Willis*, 760 S.W.2d at 647; Williard Law Firm, L.P. v. Sewell, 464 S.W.3d 747, 752 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Haase*, 404 S.W.3d at 84–85; Treuil v. Treuil, 311 S.W.3d 114, 120 (Tex. App.—Beaumont 2010, no pet.); Girsh v. St. John, 218 S.W.3d 921, 928 (Tex. App.—Beaumont 2007, no pet.).

[772] *See* Via Net v. TIG Ins. Co., 211 S.W.3d 310, 313 (Tex. 2006) (per curiam); *Woods*, 769 S.W.2d at 518 n.2; *Isaacs*, 356 S.W.3d at 561.

[773] *See* Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 156 (Tex. 1991) (noting accrual based on either the time of legal injury or else the discovery rule); *Haase*, 404 S.W.3d at 84; Estate of Whitsett v. Junell, 218 S.W.3d 765, 768 (Tex. App.—Houston [1st Dist.] 2007, no pet.); Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 636 (Tex. App.—Dallas 2000, pet. denied); Hall v. Stephenson, 919 S.W.2d 454, 465 (Tex. App.—Fort Worth 1996, writ denied); Black v. Willis, 758 S.W.2d 809, 816 (Tex. App.—Dallas 1988, no writ).

[774] Zidell v. Bird, 692 S.W.2d 550, 555, 558 (Tex. App.—Austin 1985, no writ) (explaining that because attorney owed duty to prepare properly certain documents by specified closing date and failed to do so, plaintiff's cause of action accrued on closing date); *see also* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 786 (Tex. 2006) (holding that though "the primary damages at issue . . . did not occur until after the decendent's death, the lawyer's alleged negligence occurred while the decedent was alive"); *Estate of Whitsett*, 218 S.W.3d at 768 (holding that legal malpractice claim accrues "when the client sustains a legal injury, or, in cases governed by the discovery rule, when the client discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of the claim"); *Tate*, 24 S.W.3d at 636 ("Under the legal injury rule, a cause of action sounding in tort generally accrues and the statute of limitations begins to run when the tort is completed, that is, when the act is committed and the damage is suffered."); *Black*, 758 S.W.2d at 816.

A cause of action for legal malpractice arises when a legal duty is breached, even though economic damages may not be sustained until a later date.[775] The determination of when a cause of action for legal malpractice arises is a judicial one.[776] Accordingly, a cause of action for legal malpractice accrues when the client acts to his detriment on the attorney's advice, not when the advice is judicially determined to be incorrect.[777]

A cause of action for legal malpractice could therefore accrue when the attorney's conduct creates a risk of harm to the client (or when the client discovers the risk), rather than when the harm is finally established or is an inevitable consequence of the conduct.[778]

Nevertheless, where the client becomes aware of a potential malpractice claim against his or her attorney while the attorney is still representing the client in ongoing litigation, there is a risk that the client may be forced into adopting inherently inconsistent litigation positions in the underlying case and in the malpractice case. Consequently, in *Hughes v. Mahaney & Higgins*, the Texas Supreme Court determined that "[w]here 'a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his

[775] *See* Murphy v. Campbell, 964 S.W.2d 265, 270–71 (Tex. 1997) ("A person suffers legal injury from faulty professional advice when the advice is taken."); Weaver & Tidwell, L.L.P. v. Guarantee Co. of N. Am. USA, 427 S.W.3d 559, 567 (Tex. App.—Dallas 2014, pet. denied); Edwards v. Dunlop-Gates, 344 S.W.3d 424, 429 (Tex. App.—El Paso 2011, pet. denied); Murphy v. Mullin, Hoard & Brown, L.L.P., 168 S.W.3d 288, 291 (Tex. App.—Dallas 2005, no pet.); Haas v. George, 71 S.W.3d 904, 913 (Tex. App.—Texarkana 2002, no pet.).

[776] *See Black*, 758 S.W.2d at 815.

[777] *See* Estate of Jobe v. Berry, 428 S.W.3d 888, 902 (Tex. App.—Texarkana 2014, no pet.) ("A cause of action accrues on a fact-specific basis when the client discovers a risk of harm to his or her economic interests."); Eiland v. Turpin, Smith, Dyer, Saxe & McDonald, 64 S.W.3d 155, 158 (Tex. App.—El Paso 2001, no pet.) ("In a legal malpractice case, the attorney's conduct must raise only a risk of harm to the client's legally protected interest for the tort to accrue."); Hall v. Stephenson, 919 S.W.2d 454, 465 (Tex. App.—Fort Worth 1996, writ denied); *Black*, 758 S.W.2d at 816 ("The attorney's conduct must raise only a risk of harm to the client's legally protected interest; the harm need not be finally established or an inevitable consequence of the conduct."); Cox v. Rosser, 579 S.W.2d 73, 76 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.) (explaining that the failure to include in a deed an express lien to protect the client, thereby allowing another lien to obtain superiority, resulted in cause of action accruing when other lien attained superiority).

[778] *Zidell*, 692 S.W.2d at 556–57; *see also Estate of Jobe*, 428 S.W.3d at 902; Brents v. Haynes & Boone, L.L.P., 53 S.W.3d 911, 914–15 (Tex. App.—Dallas 2001, pet. denied).

right.'"[779] The court also reasoned that "limitations are tolled for the second cause of action because the viability of the second cause of action depends on the outcome of the first."[780] Accordingly, in such situations, "the statute of limitations on a malpractice claim against that attorney is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded."[781]

Application of the discovery rule "has been permitted in those cases where the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable."[782] Thus, in a legal malpractice case:

> [f]iduciaries are presumed to possess superior knowledge, meaning the injured party, the client, is presumed to possess less information than the fiduciary. Consequently, . . . it may be said that the nature of the injury is presumed to be inherently undiscoverable, although a person owed a fiduciary duty has some responsibility to ascertain when an injury occurs.[783]

"Unlike the discovery rule's categorical approach, fraudulent concealment is a fact-specific equitable doctrine that tolls limitations until the fraud is discovered or could have been discovered with reasonable diligence."[784] The Texas Supreme Court has explained the nature of those cases in which limitations will be tolled as follows:

> Accrual of a cause of action is deferred in two types of cases. In one type, those involving allegations of fraud or fraudulent concealment, accrual is deferred because a

[779] 821 S.W.2d 154, 157 (Tex. 1991); *see also* Sanchez v. Hastings, 898 S.W.2d 287, 288 (Tex. 1995) (per curiam) (holding that limitations tolled until litigation concluded against other tortfeasors liable for indivisible injury); Gulf Coast Inv. Corp. v. Brown, 821 S.W.2d 159, 160 (Tex. 1991) (per curiam) (holding that limitations for malpractice related to non-judicial foreclosure sale of real property tolled until resolution of wrongful foreclosure action).

[780] *Hughes*, 821 S.W.2d at 157.

[781] Apex Towing Co. v. Tolin, 41 S.W.3d 118, 119 (Tex. 2001). This rule, however, does not apply to DTPA claims against an attorney. Underkofler v. Vanasek, 53 S.W.3d 343, 347 (Tex. 2001).

[782] Comput. Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 456 (Tex. 1994).

[783] *Id.* (citation omitted).

[784] Valdez v. Hollenbeck, 465 S.W.3d 217, 229 (Tex. 2015) (citing Shell Oil Co. v. Ross, 356 S.W.3d 924, 927 (Tex. 2011)).

> person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run. The other type, in which the discovery rule applies, comprises those cases in which "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable."[785]

Thus, in instances where an attorney possesses knowledge superior to that of the client, thereby creating the presumption of inherent discoverability, and where the client's alleged injury is indisputable, thereby making an attorney's misconduct objectively verifiable, commencement of the applicable limitations period is delayed.[786]

The attorney-client relationship imposes on the attorney a duty to disclose to his client facts material to his representation.[787] Breach of this duty "is tantamount to concealment,"[788] delaying commencement of limitations until "the client discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of a cause of action."[789]

§ 17 Waiver of Attorney-Client Privilege

Where a client attacks his attorney's performance or an attorney sues his client to recover his fee, the attorney-client privilege is deemed to have been waived by the client.[790] This exception is justified by notions of

[785] S.V. v. R.V., 933 S.W.2d 1, 6 (Tex. 1996) (citation omitted) (quoting *Altai*, 918 S.W.2d at 456); *see also* BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 65–67 (Tex. 2011).

[786] *See S.V.*, 933 S.W.2d at 7; *Altai*, 918 S.W.2d at 456.

[787] *See supra* Chapter IV, § 2.

[788] Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988); Haas v. George, 71 S.W.3d 904, 913 (Tex. App.—Texarkana 2002, no pet.); Gibson v. Ellis, 58 S.W.3d 818, 824 (Tex. App.—Dallas 2001, no pet.).

[789] Apex Towing Co. v. Tolin, 41 S.W.3d 118, 121 (Tex. 2001).

[790] *See* TEX. R. EVID. 503(d)(3); Harrelson v. United States, 967 F. Supp. 909, 915 (W.D. Tex. 1997) (concerning ineffective-assistance-of-counsel claim); West v. Solito, 563 S.W.2d 240, 245 n.3 (Tex. 1978) (orig. proceeding) (stating that where attorney's professional conduct is attacked by client, privilege is waived so far as necessary to defend attorney's character); Joseph v. State, 3 S.W.3d 627, 637 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ("It is well settled that a client waives the attorney-client privilege when litigating a claim against his attorney for breach of a legal duty."); Vinson & Elkins v. Moran, 946 S.W.2d 381, 394 (Tex. App.—Houston [14th Dist.] 1997, no writ); Smith v. Guerre, 159 S.W. 417, 419–20 (Tex. Civ. App.—Amarillo 1913, no writ) (holding that attorney is no longer bound by his obligation of secrecy when his clients charge him with fraud

fairness,[791] and the "practical necessity that if effective legal service is to be encouraged the privilege must not stand in the way of the lawyer's just enforcement of his rights to be paid a fee and to protect his reputation."[792] Indeed, where a Texas attorney is falsely accused by a client, the ethics rules may permit (and in rare circumstances require) the attorney to disclose the truth in respect to the false accusation.[793]

§ 18 Vicarious Liability: Partnerships and Professional Corporations

A partnership is liable for any "loss or injury to a person . . . caused by or incurred as a result of a wrongful act or omission or other actionable conduct of a partner" acting "in the ordinary course of business of the partnership" or "with the authority of the partnership."[794] All partners are "jointly and severally liable for all obligations" of the partnership.[795] General partners in a limited partnership have the same liabilities.[796]

or other unprofessional conduct); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(5).

[791] *See Smith*, 159 S.W. at 419 ("It would be a harsh rule to permit testimony by the client, or his heir, in a cause, spread upon the public records, of this character, and not to permit the attorney to explain.").

[792] GEORGE E. DIX ET AL., 1 MCCORMICK ON EVIDENCE § 91.1 (Kenneth S. Broun ed., 7th ed. 2013); *see* Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974) ("Surely a client is not free to make various allegations of misconduct and incompetence while the attorney's lips are sealed by invocation of the attorney-client privilege. Such an incongruous result would be inconsistent with the object and purpose of the attorney-client privilege and a patent perversion of the rule."); Laughner v. United States, 373 F.2d 326, 327 (5th Cir. 1967); Ginsberg v. Fifth Ct. of Appeals, 686 S.W.2d 105, 108 (Tex. 1985) (orig. proceeding).

[793] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)–(f) & cmts. 3, 15, 18; *see also* STATE BAR OF TEX., OPINION OF THE COMM. ON INTERPRETATION OF THE CANONS OF ETHICS (1947), *reprinted in* 10 TEX. B.J. 334 (1947) (designated as Op. 9 and further reprinted in *Opinions of State Bar of Texas Committee on Interpretation of the Canons of Ethics*, 18 BAYLOR L. REV. 195, 196–97 (1996)).

[794] TEX. BUS. ORGS. CODE ANN. § 152.303(a) (West 2018).

[795] *Id.* § 152.304; *see also* Varosa Energy, Ltd. v. Tripplehorn, No. 01-12-00287-CV, 2014 WL 1004250, at *5 (Tex. App.—Houston [1st Dist.] Mar. 13, 2014, no pet.) (mem. op.) (applying partnership law while discussing joint venture and holding that because contract was "not a debt or obligation of the joint venture," it was not an an obligation that other joint venturers were liable for); Texaco, Inc. v. Wolfe, 601 S.W.2d 737, 741 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

[796] *See* TEX. BUS. ORGS. CODE ANN. § 153.152 (West 2018); Leonard v. Brewer, No. 01-12-01057-CV, 2013 WL 6199572, at *1 (Tex. App.—Houston Nov. 26, 2013, no pet.) (mem. op.).

However, a partner in a registered limited liability partnership[797] generally is not liable for "any obligation of the partnership incurred while the partnership is a limited liability partnership."[798] This rule does not impact any liability imposed on a party by other law or contract, or the "liability of a partnership to pay its obligations from partnership property."[799]

The act of a partner, carrying on in the ordinary course of the partnership's business, binds the partnership unless the partner has no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge he has no such authority.[800] Conversely, an act of a partner "that is not apparently for carrying on in the ordinary course" will bind "the partnership only if authorized by the other partners."[801] For example, the fact that an attorney is both a partner of a law firm and a general partner of a separate real estate partnership does not automatically mean the attorney's actions for the real estate partnership "constituted legal services within the course and scope of the law firm's business."[802]

A partnership is liable for the loss incurred by a person as a result of "a wrongful act or omission or other actionable conduct of a partner acting . . . in the ordinary course of business of the partnership [or] with the authority of the partnership."[803] A partnership is also liable for the misapplication of money or property by a partner.[804] Thus, in *Cook v. Brundidge, Fountain, Elliott & Churchill*, the Texas Supreme Court reversed a summary judgment for the defendant law firm, holding that fact issues existed as to

[797] *See* TEX. BUS. ORGS. CODE ANN. § 152.802 (West 2018) (setting out registration requirements).

[798] *Id.* § 152.801(a).

[799] *Id.* § 152.801(d).

[800] *Id.* § 152.302(a); *see* Kitchell v. Aspen Expl., Inc., 562 F. Supp. 2d 843, 848 (E.D. Tex. 2007) ("It is axiomatic that an agent's behavior serves to bind a disclosed principal in both tort and contract."); *see also* Jones v. Found. Surgery Affiliates of Brazoria Cnty., 403 S.W.3d 306, 313 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (describing how partner in limited liability partnership may bind the partnership); Lemon v. Hagood, No. 08-1500309-CV, 2017 WL 3167488, at *11 (Tex. App.—El Paso July 26, 2017, pet. filed) (not designated for publication) (holding that attorney's "act bound the partnership").

[801] TEX. BUS. ORGS. CODE ANN. § 152.302(b) (West 2018).

[802] DeYoung v. Beirne, Maynard, & Parsons, L.L.P., No. 01-13-00365-CV, 2014 WL 1058201, at *4 (Tex. App.—Houston [1st Dist.] Mar. 8, 2014, no pet.) (not designated for publication).

[803] TEX. BUS. ORGS. CODE ANN. § 152.303(a) (West 2018).

[804] *See id.* § 152.303(b).

whether an attorney for the firm who allegedly misapplied a client's money in a business transaction was carrying on in the usual way the business of the partnership or whether he was acting within the scope of apparent authority.[805] Summary judgment was set aside even though the law firm had established the attorney, a partner, was not authorized by the firm to act as an investment counselor or a securities or real estate broker or agent.[806] Additionally, evidence existed that the attorney accepted a check paid to him "as Attorney for" the client.[807] Furthermore, the client had testified at no time did the attorney indicate that he was acting in any capacity other than an attorney or separate from his law firm.[808]

Although a partner is jointly and severally liable for the partnership's obligations, a judgment against the partnership does not itself amount to a judgment against a partner.[809] Indeed, Texas law "generally requires time to collect the debt from the partnership first . . . before a creditor may proceed against a partner and his assets."[810] Thus, for limitations purposes, "the cause of action against a partner does not accrue until a creditor can proceed against a partner's assets" and the waiting period is passed.[811] In other words, "the only obligation for which a partner is really responsible is to make good on the judgment against the partnership, and generally only after the partnership fails to do so."[812]

In some states, a partnership may not be liable for punitive damages where a partner converts a client's funds to his own use.[813] The rationale is that punitive damages are intended to punish the wrongdoer; where a partnership itself had no role in the wrongdoing, such damages would be inappropriate.[814] But in other states, partners may be jointly liable for

[805] 533 S.W.2d 751, 759 (Tex. 1976); *see also* Castillo v. First City Bancorporation of Tex., Inc., 43 F.3d 953, 963 (5th Cir. 1994) (holding fact question existed regarding whether attorney "was acting in the ordinary course of business" of partnership). *Cf.* Doctors Hosp. at Renaissance, Ltd. v. Andrade, 493 S.W.3d 545, 546 (Tex. 2016) (discussing whether doctor was acting within ordinary course of partnership's business or with the partnership's authority).

[806] *See Cook*, 533 S.W.2d at 754.

[807] *Id.*

[808] *See id.*

[809] Am. Star Energy & Minerals Corp. v. Stowers, 457 S.W.3d 427, 429–30 (Tex. 2015).

[810] *Id.* at 430.

[811] *Id.* at 431.

[812] *Id.*

[813] *See, e.g.*, Husted v. McCloud, 450 N.E.2d 491, 494–95 (Ind. 1983); Kansallis Fin. Ltd. v. Fern, 659 N.E.2d 731, 739 n.13 (Mass. 1996); Duncan v. Henington, 835 P.2d 816, 819 (N.M. 1992).

[814] *See Kansallis Fin. Ltd.*, 659 N.E.2d at 737–39; Clark v. Pearce, 15 S.W. 787, 788–89 (Tex.

exemplary damages.[815] In other words, there is a split of authority over whether partners may be vicariously liable for punitive damages.[816]

However, as the Texas Supreme Court has emphasized, "an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant."[817] In other words, the jury must specifically assess punitive damages against a particular defendant before that defendant is liable for them.[818] Further, citation against a partner authorizes "a judgment against the partnership and the partner actually served," but (at least in suits for breach of contract) not against partners who have not been served.[819]

Even where a partner proposes to perform some act *not* in the ordinary course of the partnership's business, consent by the other partners may constitute his authority to act for the partnership.[820] Accordingly, *Lujan v. Gordon* held that a law firm may be liable for aiding and abetting the

1891) (observing that though one partner was responsible for actual damages caused by another partner's actions in the scope of the partnership business, the first partner was not jointly liable for exemplary damages unless he participated in the malicious act or "adopted and ratified his partner's acts"). Texas courts have adopted the Restatement (Second) of Torts' approach to whether a corporation is liable for punitive damages due to an agent's gross negligence. *See* Mobil Oil Corp. v. Ellender, 968 S.W.2d 917, 921–22 (Tex. 1998) (citing Section 909 of the Restatement and holding that a "corporation is liable for punitive damages if it authorizes or ratifies an agent's gross negligence or if it is grossly negligent in hiring an unfit agent"); *see also* U-Haul Int'l, Inc. v. Waldrip, 380 S.W.3d 118, 140 (Tex. 2012) (citing Section 909 of the Restatement).

[815] Winant v. Bostic, 5 F.3d 767, 775 (4th Cir. 1993) (stating that one partner's liability for punitive damages is imputable to another); Act II Jewelry, LLC v. Zhu, No. 2:09-cv-407, 2010 WL 2521340, at *9–10 (E.D. Va. June 7, 2010) (not designated for publication); Shetka v. Kueppers, Von Feldt & Salmen, 454 N.W.2d 916, 918 (Minn. 1990) (noting that partners may be vicariously liable for punitive damages); Termeer v. Interstate Motors, Inc., 634 S.W.2d 12, 14 (Tex. App.—Beaumont 1982, no writ) (holding a partner in an automobile repair shop liable for treble damage award under Deceptive Trade Practices Act).

[816] Bergeson v. Dilworth, No. 90-3170, 1992 WL 64887, at *4–5 (10th Cir. March 30, 1992) (unpublished table decision) (noting the split); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. f, reporter's note (AM. LAW INST. 2000) (comparing cases).

[817] Horizon Health Corp. v. Acadia Healthcare Co., Inc., 520 S.W.3d 848, 881 (Tex. 2017) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 41.006).

[818] *Id.* at 881–82.

[819] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.022, 31.003 (West 2018); *see also* Hoeffner, Bilek & Eidmann, L.L.P. v. Guerra, No. 13-01-503-CV, 2004 WL 1171044, at *11 (Tex. App.—Corpus Christi May 27, 2004, pet. denied) (not designated for publication).

[820] *See* Kelsey-Seybold Clinic v. Maclay, 466 S.W.2d 716, 719–20 (Tex. 1971), *superseded by statute as stated in* Helena Labs. Corp. v. Snyder, 886 S.W.2d 767, 768 (Tex. 1994) (per curiam).

malicious prosecution of a case filed by a partner of the law firm.[821] The court reasoned that basic agency law applied and a question of fact was raised for jury determination.[822] Moreover, if a partner acts within the scope of his apparent authority when he receives a client's money or property, the partnership must make good the client's loss attributable to the partner's misapplication of the funds.[823] Even a partner's negligence in borrowing money from a client may subject the partnership to liability.[824]

Following the above principles, a Texas court held an attorney and his law firm were jointly and severally liable for payment of court reporter fees.[825] Others have found multiple law firms were jointly and severally liable for damages caused by their fraud,[826] or were jointly and severally liable for prejudgment and post-judgment interest on a restitution claim by an opposing party in an arbitration proceeding.[827] Also, the mere dissolution of a law firm partnership "does not affect each partner's liability to a third person for partnership obligations that existed prior to the dissolution of the partnership."[828]

Texas law allows for the incorporation of an individual or group of individuals for the purpose of providing professional services, including legal services.[829] Nothing in the relevant statute removes or diminishes any cause of action of the client which arises because of the errors, omissions, negligence, incompetence or malfeasance of the attorney.[830] The

[821] 138 Cal. Rptr. 654, 655–56 (Cal. Ct. App. 1977).

[822] *See id.*

[823] *See* Cook v. Brundidge, Fountain, Elliott & Churchill, 533 S.W.2d 751, 758–59 (Tex. 1976); *see also* Castillo v. First City Bancorporation of Tex., Inc., 43 F.3d 953, 963 (5th Cir. 1994).

[824] *See* Phillips v. Carson, 731 P.2d 820, 836 (Kan. 1987); Roach v. Mead, 709 P.2d 246, 248 (Or. Ct. App. 1985), *aff'd*, 722 P.2d 1229 (1986).

[825] Cole v. Gwendolyn Parker, Inc., No. 05-13-01655-CV, 2015 WL 4626750, at *4–5 (Tex. App.—Dallas Aug. 4, 2015, no pet.) (not designated for publication) (applying specific provision of Texas Government Code imposing joint and several liability for these fees).

[826] Onyung v. Onyung, No. 01-10-00519-CV, 2013 WL 3875548, at *11 (Tex. App.—Houston [1st Dist.] July 25, 2013, pet. denied) (not designated for publication).

[827] Ponderosa Pine Energy, LLC v. Illinova Generating Co., No. 05-15-00339-CV, 2016 WL 3902559, at *10 (Tex. App.—Dallas July 14, 2016, no pet.) (not designated for publication).

[828] *See* Boulle v. Nacol, Wortham & Assocs., P.C., No. 05-01-00744-CV, 2002 WL 188476, at *3 (Tex. App.—Dallas Feb. 7, 2002, no pet.) (not designated for publication).

[829] *See* TEX. BUS. ORGS. CODE ANN. § 301.003(3) (West 2018) (defining professional corporation).

[830] *See id.* §§ 301.010, 303.002 (defining liabilities of professional entities and their shareholders).

corporation is jointly and severally liable for any malpractice on the part of any officer or employee committed while providing a professional service or during the course of employment.[831] Owners, employees, and agents of a professional corporation, however, are not subject to the same vicarious liability as the corporation itself,[832] and shareholders are "subject to no greater liability than a shareholder of a for-profit corporation."[833]

CHAPTER V: INSURANCE DEFENSE

§ 1 Generally

Liability insurers often retain defense counsel to defend claims against their insureds which might, if those claims are successful, require the insurer to indemnify the insureds. Traditionally, this arrangement created a tripartite attorney-client relationship, in which both insurer and insured are, to some extent, clients of defense counsel.[834] But is the insurer properly regarded as a client?[835] This question and related ones have been exhaustively analyzed.[836]

Most cases in which insurer-appointed defense counsel are involved present no problem because of the existence and adequacy of insurance coverage. However, where there is a coverage question or other matter on which the interests of the insurer and the insured diverge, potential problems arise.

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[831] *See id.* § 301.010(a).

[832] *Id.* § 301.010(b).

[833] *Id.* § 303.002.

[834] *See, e.g.*, Unauthorized Practice of Law Comm'n v. Am. Home Assurance Co., 261 S.W.3d 24, 39 (Tex. 2008) (noting the "tripartite insurer-insured-defense attorney relationship"); 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:3 (2018 ed.); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134 cmt. f (2000).

[835] *Compare, e.g.*, Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511, 512 (1991) (arguing for insured as sole client), *with* Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1591 (1994) (arguing for insurer and insured as dual clients).

[836] For an excellent discussion of the legal doctrines underlying the tripartite relationship, see Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1591 (1994). *See also* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 350 (2001); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 264 (1995).

Insurance defense counsel routinely represents two clients: the insurer and the insured.[837] In all cases, the "lawyer *must* represent the insured and protect his interests from compromise by the insurer."[838] Whether defense counsel also represents the insurer "is a matter of contract between them."[839] The insurance contract generally gives the insurer the right and the duty to defend suits against the insured.[840] This unique relationship creates substantial and far-reaching ethical obligations and problems for the defense attorney.[841] Although an insured plainly has standing to sue defense counsel for breach of the attorney's ethical obligations and for malpractice, it is less clear whether insurers would have a cause of action against defense counsel.[842] An excess liability insurance insurer, however, would have a

[837] *See* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE §§ 30:1–30:8 (2018 ed.) (discussing dual representation in insurance defense matters); *Unauthorized Practice of Law Comm'n*, 261 S.W.3d at 27, 42, 53 ("Under the policy . . . the insurance company's obligation to defend the insured provides that the attorney to represent the insured is to be selected, employed and paid by the insurance company. Nevertheless, such attorney becomes the attorney of record and the legal representative of the insured, and as such he owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured." (citing Emp'rs Cas. Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973))).

[838] *Unauthorized Practice of Law Comm'n*, 261 S.W.3d at 42.

[839] *Id.*

[840] *See, e.g.*, *Tilley*, 496 S.W.2d at 558.

[841] *Id.* ("Representation of 'an insurer and his insured' is mentioned among typically recurring situations involving potentially differing interests." (citation omitted)); Tex. Farmers Ins. Co. v. Kurosky, No. 02-13-00169-CV, 2015 WL 4043278, at *5–6 (Tex. App.—Fort Worth July 2, 2015, no pet.) (mem. op.) (holding attorney retained by insurer was agent of client); Auto. Underwriters' Ins. Co. v. Long, 63 S.W.2d 356, 358–59 (Tex. 1933) ("When counsel were employed by the company they became Long's unqualified attorneys of record, and as such they owed him the duty to conscientiously represent him, and if the point was reached where his interests and those of the company conflicted, he should have been so informed and given the opportunity to protect himself.").

[842] *Compare* Safeway Managing Gen. Agency v. Clark & Gamble, 985 S.W.2d 166, 168 (Tex. App.—San Antonio 1998, no pet.) (holding that insurer lacks standing to sue attorneys it hired to represent insureds based on attorney-client relationship, because "[i]n Texas, the law is well settled that no attorney-client relationship exists between an insurance carrier and the attorney it hires to defend one of the carrier's insureds" (citing Bradt v. West, 892 S.W.2d 56, 77 (Tex. App.—Houston [1st Dist.] 1994, writ denied))), *with* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134 cmt. f (2000) ("Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief for financial loss proximately caused by professional negligence or other wrongful act of the lawyer."); *id.* § 51 cmt. g ("[A] Lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer."). As one

cause of action against trial counsel retained by the primary carrier.[843] The rationale for such an action is that "recognizing an equitable subrogation action by the excess carrier would not . . . interfere with the relationship between the attorney and the client nor result in additional conflicts of interest."[844] Furthermore, "no new or additional burdens are imposed on the attorney" and "subrogation permits the insurer only to enforce existing duties of defense counsel to the insured."[845]

Dual representation is equally beneficial to the insured and the insurer since they usually share the same goals against a common adversary—the plaintiff. On the other hand, it is defense counsel's obligation to recognize when the benefit to *both* the insured and the insurer ceases. Notwithstanding the benefits to the insured and the insurer in this arrangement, a standard of singular loyalty to the insured is preferable because it seemingly eliminates the dilemmas created by the representation of dual interests.[846] Nevertheless, in the final analysis, the advice to be

commentator has observed, Texas law on this point was not as "well settled" as the *Safeway Managing* court assumed. *See* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:3 (2018 ed.) (noting that authorities cited by *Safeway Managing* actually support a dual-client analysis).

[843] *See* Royal Ins. Co. of Am. v. Caliber One Indem. Co., 465 F.3d 614, 617 (5th Cir. 2006); Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 700 (Tex. 2000); Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480, 482–85 (Tex. 1992) (addressing a question of "first impression" in Texas, and stating that an excess carrier as a matter of equitable subrogation may maintain any action that the insured may have against the primary carrier for mishandling the claim, as well as against defense counsel). *But see* Essex Ins. Co. v. Tyler, 309 F. Supp. 2d 1270, 1274 (D. Colo. 2004) (declining to recognize equitable subrogation claim against insured's attorneys by excess insurer); Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves, 709 F. Supp. 44, 50 (D. Conn. 1989) (refusing to recognize equitable subrogation claim brought by excess insurer against insured's counsel); Querrey & Harrow, Ltd. v. Transcon. Ins. Co., 885 N.E.2d 1235, 1236 (Ind. 2008) (holding that "an excess insurer may not bring an action for legal malpractice against the insured's attorneys").

[844] *Am. Centennial Ins. Co.*, 843 S.W.2d at 484.

[845] *Id.*

[846] *See In re* XL Specialty Ins. Co., 373 S.W.3d 46, 54–55 (Tex. 2012) ("[W]e have never held that an insurance defense lawyer *cannot* represent both the insurer and the insured, only that the lawyer *must* represent the insured and protect his interests from compromise by the insurer." (quoting Unauthorized Practice of Law Comm'n v. Am. Home Assurance Co., 261 S.W.3d 24, 42 (Tex. 2008))); *Unauthorized Practice of Law Comm'n*, 261 S.W.3d at 27 ("[T]he insured's lawyer owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured and must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions." (internal quotation marks omitted)); *Kurosky*, 2015 WL 4043278, at *5 (citing Bradt v. West, 892 S.W.2d 56, 77 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (reasoning that there is no attorney-client relationship between the insurer and the attorney hired by

given to clients in dual representation situations and the questions of if and when to withdraw become judgment calls for defense counsel to make within the guidelines of applicable common-law duties and the Texas Disciplinary Rules of Professional Conduct.

Because defense counsel in such situations may have ethical obligations to two parties, defense counsel must confront the problem of conflicting interests when the insured faces liability in excess of the coverage,[847] when, in certain situations, the insured wishes to proceed to trial despite the insurer's desire to limit its liability through settlement, or if counsel represents multiple insureds.[848] Counsel also faces an ethical dilemma when he discovers the insured is colluding with a third party in the prosecution of a spurious claim for which the insurer will ultimately be liable. Similarly, when defense counsel becomes aware of questionable future conduct of the insured or insurer, such as conduct which might give rise to court-imposed sanctions or which could constitute fraud or bad faith, this knowledge, in turn, may impact certain ethical responsibilities of the attorney.

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the insurer to represent the insured); *see also* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 350 (2001) (discussing debate over nature of relationship between insurer and defense counsel); Robert B. Gilbreath, *Caught in a Crossfire Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH L. REV. 139, 158 (1996); Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511, 512 (1991) (arguing that "the insured should be deemed to be the only client of defense counsel in every case"); Debra A. Winiarski, *Walking the Fine Line: A Defense Counsel's Perspective*, 28 TORT & INS. L.J. 596, 597 (1993) (arguing that the "better view . . . is that [defense counsel's] only actual client is the insured").

[847] *See Unauthorized Practice of Law Comm'n*, 261 S.W.3d at 40 ("The most common conflict between an insurer and an insured is whether a claim is within policy limits and the coverage provided."); *see generally* Ranger Cty. Mut. Ins. Co. v. Guin, 704 S.W.2d 813 (Tex. App.—Texarkana 1985) (stating that an insurer was negligent for failing to fully advise insured about a settlement offer), *aff'd*, 723 S.W.2d 656 (Tex. 1987).

[848] *See Unauthorized Practice of Law Comm'n*, 261 S.W.3d at 38–39 (noting that insurer's and insured's interests may differ when "the consequences of the manner in which the defense is rendered affect them differently"); J.W. Hill & Sons, Inc. v. Wilson, 399 S.W.2d 152, 154 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.) (permitting attorney to undertake the representation of employer and employee having conflicting interests was error). *Cf.* Marquis Acquisitions, Inc. v. Steadfast Ins. Co., 409 S.W.3d 808, 814 (Tex. App.—Dallas 2013, no pet.) (holding that insurer is not required "to immediately hire separate counsel for insured defendants based on insured's unspecified and unsubstantiated allegations of a conflict of interest").

§ 2 Duty to Abstain From Representation of Conflicting Interests

The Texas Disciplinary Rules of Professional Conduct require counsel to refuse to accept or continue employment if such representation would involve a "substantially related" matter that would be materially and directly adverse to the interests of another client, or if such representation would become limited by the attorney's responsibilities to another client.[849] Dual representation is not equivalent to the representation of conflicting interests, and a mere diversity of interests on its own between two clients may not create conflicting interests.[850] To preclude dual representation, there "must be more than a mere possibility of conflicting interests."[851] Nevertheless, if a serious question of conflicting interests arises, the better course is to resolve all doubts against the propriety of the representation.[852]

Conflicting interests impair counsel's obligation of undivided loyalty, a standard which forbids the subordination of the interest of one client to that of another.[853] Even the representation of conflicting interests in good faith

[849] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(b), 1.15(a)(1); *In re* B.L.D., 113 S.W.3d 340, 346 (Tex. 2003) ("Generally, ethical rules prohibit an attorney from jointly representing clients when the clients' interests are adverse to each other.").

[850] *See* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:53 (2018 ed.). *But see* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 cmt. 6 (explaining the meaning of directly adverse in Rule 1.06).

[851] *See* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:53 (2018 ed.).

[852] *Cf.* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 cmt. 6 ("[A] lawyer should realize that a business rivalry or personal differences between two clients or potential clients may be so important to one or both that one or the other would consider it contrary to its interests to have the same lawyer as its rival even in unrelated matters; and in those situations a wise lawyer would forego the dual representation."); United States v. Aleman, No. Crim. EP-04-CR-1509 K, 2004 WL 1834602, at *1 (W.D. Tex. Aug. 12, 2004) ("Any doubts as to the propriety of an attorney's appearing in a case shall be resolve[d] in favor of disqualification."); 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:28 (2018 ed.) ("Despite ethical permissibility [of representation by insurer's staff counsel], a policy of non-representation whenever there is any coverage issue may be preferable.").

[853] *See, e.g.*, Gregory v. Porter & Hedges, LLP, 398 S.W.3d 881, 886 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) ("[A]n attorney who breaches her fiduciary duty to a client has not provided the bargained-for-loyalty on which the right to compensation is based."); *Ex parte* Meltzer, 180 S.W.2d 252, 256 (Tex. App.—Fort Worth 2005, no pet.) (holding that working under a conflict of interest may be a breach of "the duty of loyalty, perhaps the most basic of counsel's duties"); *J.W. Hill & Sons, Inc.*, 399 S.W.2d at 154 (holding that in an action against owners of pick-up truck, a foreman and a driver for damages sustained when plaintiffs' automobile collided with truck, trial court's refusal to allow attorneys for owners of truck to withdraw as attorneys for foreman who

will ordinarily constitute a breach of fiduciary duty, despite the lack of intent or malice, so long as the lawyer obtained an improper benefit by not disclosing the asserted "conflict."[854]

Defense counsel, with duties of loyalty running to more than one party in a conflict of interests situation, has several choices. Texas Disciplinary Rule 1.06 directs one of three actions: decline employment;[855] withdraw from employment;[856] or continue representation if it is obvious that each client is ensured adequate representation after full disclosure and client consent.[857]

contended he was in the course of his employment during events that led up to the collision, while the owners of the truck contended to the contrary, was reversible error).

[854] *See* Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C., 284 S.W.3d 416, 436–37 (Tex. App.—Austin 2009, no pet.) (holding that lawyers' failure to disclose conflict of interest did not support claim for breach of fiduciary duty, as opposed to negligence, because the gist of client's complaint was that lawyers inadequately "failed to advise, inform, or communicate" with them, not that lawyers obtained an improper benefit by failing to disclose conflict); *accord* Murphy v. Gruber, 241 S.W.3d 689, 698–99 (Tex. App.—Dallas 2007, pet. denied); Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 196–97 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (collecting authorities and explaining that an intent is irrelevant to whether attorneys breach their fiduciary duties by failing to disclose conflicts of interest); W.C. Turnbow Petrol. Corp. v. Fulton, 199 S.W.2d 263, 264–65 (Tex. Civ. App.—Texarkana 1946, writ ref'd n.r.e.) (An attorney "cannot act both for his client and one whose interest is adverse to or conflicting with that of his client in the same general matter, however slight such adverse interest may be, nor is it material that the intention and motive of the attorney may have been honest" (internal quotation marks omitted)); Woodruff v. Tomlin, 616 F.2d 924, 938 (6th Cir. 1980) (Weick, J., concurring) ("It is not the law . . . as asserted by Tomlin's counsel, that an attorney who is honest and acts in good faith is exempt from liability to his client in a legal malpractice action for damages sustained by the client as a result of the conflicts of interest . . . .").

[855] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(a) ("A lawyer shall not represent opposing parties to the same litigation.").

[856] *Id.* R. 1.06(e) ("[I]f multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules."); *see In re* Taylor, 67 S.W.3d 530, 533–34 (Tex. App.—Waco 2002, no pet.) (holding that law firm was disqualified from representing any of multiple parties to agreement where attorney represented them all in preparing the agreement); *In re* Posadas USA, Inc., 100 S.W.3d 254, 257 (Tex. App.—San Antonio 2001, no pet.) (holding counsel was required to withdraw based on conflict).

[857] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(2) ("A lawyer may represent a client . . . if . . . each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."); *see In re* Sassin, 511 S.W.3d 121, 126 (Tex. App.—El Paso 2014, no pet.) ("A conflict does not itself preclude an attorney hired and paid by the

If defense counsel does not act to avoid a potential conflict of interests, the trial court may act on its own.[858] A judge has "an independent responsibility to assure that attorneys appearing" before the court do not represent adverse interests.[859] The rationale for this authority is that the court must strive to preserve the integrity of the legal system.[860] For example, Texas courts, holding that the policy interest in preserving the integrity of the legal system supersedes the parties' consent to improper representation, have explained:

> To have an attorney standing in open court before a jury and the public, who have a right to be present, attempting to represent conflicting interests creates a situation which should never occur under our adversary system of trying cases. Such a situation discredits the legal profession, and lowers the dignity of the court. It should never be permitted, even if agreeable to the adverse parties.[861]

A major problem arises in a dual representation situation when defense counsel fails to acknowledge a conflict and favors, for example, an insurer because of a longstanding relationship and the understandable desire for a future relationship. Human nature suggests counsel in such a situation may be tempted to lean toward the insurer, who may furnish additional legal work, at the expense of the present interests of the insured. Such favoritism, however, can ultimately harm counsel and the insurer because, in appropriate circumstances, it causes waiver or estoppel of the insurer's policy defenses.[862]

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insurance company from representing the insured so long as the insured consents to that representation.").

[858] 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:53 (2018 ed.).

[859] *Id.*; *see In re Posadas USA, Inc.*, 100 S.W.3d at 257 (citing J.W. Hill & Sons, Inc. v. Wilson, 399 S.W.2d 152, 154 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.)).

[860] *See* TEX. CODE JUD. CONDUCT, Canon 1, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2013) ("A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved.").

[861] *In re* Seven-O Corp., 289 S.W.3d 384, 391 n.6 (Tex. App.—Waco 2009, no pet.) (quoting *J.W. Hill & Sons, Inc.*, 399 S.W.2d at 154); *In re Posadas USA, Inc.*, 100 S.W.3d at 258.

[862] *E.g.*, Emp'rs Cas. Co. v. Tilley, 496 S.W.2d 552, 561 (Tex. 1973) (estopping insurer from denying coverage); *see* Ulico Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 775 (Tex. 2008) ("[I]f an insurer's actions prejudice its insured, the insurer may be estopped from denying benefits that would be payable under its policy as if the risk had been covered . . . ."); Canal Indem. Co. v.

§ 3 Duty to Obtain Informed Consent and to Disclose Possible Conflict of Interests

An attorney cannot continue dual representation in a conflict situation without the informed consent of each client and, even then, only if competent representation of each interest is still possible.[863] In the leading case of *Employers Casualty Co. v. Tilley*, the Texas Supreme Court concluded: "if a conflict arises between the interests of the insurer and the insured, the attorney owes a duty to the insured to immediately advise him of the conflict."[864]

If the conflict is known at the outset of the attorney-client relationship, disclosure of the conflict must take place immediately.[865] If the conflict develops after defense counsel's employment, counsel must fully explain the conflict to both clients once the conflict of interests becomes

Palmview Fast Freight Transp., 750 F. Supp. 2d 743, 754 (N.D. Tex. 2010) ("A reasonable jury could find that Vela's reliance on his insurer-appointed counsel was to his detriment."); YMCA of Metro. Fort Worth v. Commercial Standard Ins. Co., 552 S.W.2d 497, 504 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) ("Commercial Standard was estopped from denying coverage or liability and therefore owed YMCA a defense unencumbered by any reservation of rights."); Emp'rs Cas. Co. v. Scott Elec. Co., 513 S.W.2d 642, 648 (Tex. Civ. App.—Corpus Christi 1974, no writ) (holding that insurer was estopped from denying coverage and liable for judgment against insured); 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:53 (2018 ed.). However, "waiver and estoppel may operate to avoid a forfeiture of a policy, but they have consistently been denied operative force to change, re-write and enlarge the risks covered by a policy." Tex. Farmers Ins. Co. v. McGuire, 744 S.W.2d 601, 603 (Tex. 1988) (citing Great Am. Reserve Ins. Co. v. Mitchell, 335 S.W.2d 707 (Tex. Civ. App.—San Antonio 1960, writ ref'd)). Thus, in *McGuire*, the Texas Supreme Court distinguished between the insurer's forfeiture of an existing right under the policy and the creation of a new right under the policy, stating:

> In *Tilley*, the insurer was estopped by the actions of its attorney from asserting that the insured had forfeited policy coverage because of late notice. The case at hand does not involve a forfeiture; instead, it involves a question of risk coverage under the contract. Because Texas Farmers' action cannot estop it from relying on the limitations of risk coverage set forth in the contract, it is not responsible for the judgment against McGuire.

Id.; *see also Ulico Cas. Co.*, 262 S.W.3d at 775 ("[T]he doctrines of waiver and estoppel cannot be used to re-write the contract of insurance and provide contractual coverage for risks not insured.").

[863] *See infra* Chapter VI, §§ 9–10; TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(2).

[864] *Tilley*, 496 S.W.2d at 558; *see also Ulico Cas. Co.*, 262 S.W.3d at 773; Reed v. State Farm Fire & Cas. Co., No. 09-94-316-CV, 1996 WL 355170, at *7 (Tex. App.—Beaumont June 27, 1996, writ denied) (not designated for publication).

[865] *See Tilley*, 496 S.W.2d at 558.

apparent.[866] Furthermore, disclosure should be made as soon as the conflict is discovered, even if during the trial of the action.[867] Counsel must promptly and fully explain to each client the existence, nature, implications and possible adverse consequences of the common representation and the advantages involved.[868] The test by which counsel will be judged is whether he or she advised the insured of all facts and circumstances which, in the judgment of an attorney of ordinary skill and knowledge, were necessary to enable the client to make a free and intelligent decision regarding the effect of the conflict.[869]

Where the insurer provides a defense subject to a reservation of rights, the reservation of rights serves as a notice to the insured of either an existing conflict or the "possibility that . . . a conflict may arise in the future."[870] However, the explanatory reservation of rights letter sent by the insurer to the insured does not absolve defense counsel from the obligation

[866] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(1)–(2); *see also Tilley*, 496 S.W.2d at 558 (citing former Ethical Consideration EC 5–16); Hahn v. Whiting Petrol. Corp., 171 S.W.3d 307, 310 (Tex. App.—Corpus Christi 2005, no pet.); *In re Posadas USA, Inc.*, 100 S.W.3d at 257.

[867] *See In re Posadas USA, Inc.*, 100 S.W.3d at 257 (holding trial court abused its discretion by denying motions to withdraw representation and to continue trial setting, which were filed just five days before trial set to begin); J.W. Hill & Sons, Inc. v. Wilson, 399 S.W.2d 152, 154 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.) ("Regardless of whether the motion to withdraw is tardily made, or made at such a time that if granted it would cause a continuance of the suit, and even if the attorney making the motion to withdraw is at fault in helping to create the situation, it is reversible error to not permit him to withdraw as attorney for one of the parties when he discovers that he is in a position of representing litigants who have a real and serious conflict of interest in the lawsuit.").

[868] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(2); *In re* B.L.D., 113 S.W.3d 340, 346 n.5 (Tex. 2003) (discussing waiver for joint representation); Haase v. Herberger, 44 S.W.3d 267, 270 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (same).

[869] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(2) & cmts. 7–8; *see also In re* Cerberus Capital Mgmt., L.P., 164 S.W.3d 379, 382–83 & n.12 (Tex. 2005) (per curiam); *Tilley*, 496 S.W.2d at 552; YMCA of Metro. Fort Worth v. Commercial Standard Ins. Co., 552 S.W.2d 497, 503 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

[870] Unauthorized Practice of Law Comm'n v. Am. Home Assurance Co., 261 S.W.3d 24, 40 (Tex. 2008); Reed v. State Farm Fire & Cas. Co., No. 09-94-316-CV, 1996 WL 355170, at *4 (Tex. App.—Beaumont June 27, 1996, writ denied) (not designated for publication) ("The reservation of rights served as a notice . . . of the potential conflict of interest."); *see* N. Cty. Mut. Ins. Co. v. Davalos, 140 S.W.3d 685, 689 (Tex. 2004) ("In the typical coverage dispute, an insurer will issue a reservation of rights letter, which creates a potential conflict of interest."); State Farm Lloyds v. C.M.W., 53 S.W.3d 877, 886–87 (Tex. App.—Dallas 2001, pet. denied) (observing that insured was aware of conflict after insurer sent reservation of rights letter).

to disclose a conflict.[871] Defense counsel also should explain to the insured any differences of interests with the insurer.[872] Thus, in a situation involving either a reservation of rights or a denial of coverage, defense "counsel must know and understand the coverage issue" so he or she will be able to "explain to the insured whether and in what manner [the] coverage issue[] could affect the defense."[873] Defense counsel's failure to satisfy these obligations can subject him to an action by the insured for any losses proximately caused by the lack of disclosure.[874]

§ 4 Independent Counsel

Where an actual conflict of interests arises, courts have often required the insurer to hire independent defense counsel for the insured at its expense.[875] The right to independent counsel means an attorney of the

[871] *See, e.g.*, *YMCA of Metro. Fort Worth*, 552 S.W.2d at 503–04. This flows from defense counsel's duty of "unqualified loyalty" to the insured and obligation to protect the insured's "interests from compromise by the insurer." *See Unauthorized Practice of Law Comm'n*, 261 S.W.3d at 41–42 & n.75; *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(2) (identifying counsel's obligation to obtain client's informed consent if attorney plans to continue representing client despite conflict).

[872] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(1)–(2); *Unauthorized Practice of Law Comm'n*, 261 S.W.3d at 27; *see also* Duke v. Hoch, 468 F.2d 973, 979 (5th Cir. 1972); *Tilley*, 496 S.W.2d at 558; *YMCA of Metro. Fort Worth*, 552 S.W.2d at 503.

[873] *See* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:71 (2018 ed.).

[874] *See* Rogers v. Zanetti, 518 S.W.3d 394, 401 (Tex. 2017) (discussing proximate causation standard for legal malpractice cases); Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) (setting out standards for exerting legal malpractice claim); Trousdale v. Henry, 261 S.W.3d 221, 237–38 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (same); Wright v. Lewis, 777 S.W.2d 520, 522 (Tex. App.—Corpus Christi 1989, writ denied) (stating that client "must show that the inaction of the attorney in failing to disclose material information was the proximate cause of some injury to him" to prevail on malpractice claim).

[875] *See* Fed. Ins. Co. v. Singing River Health Sys., 850 F.3d 187, 195 (5th Cir. 2017) (discussing "the commonly accepted rule that where a conflict of interest exists, the insurer must pay for the insured's separate counsel"); Rx.com Inc. v. Hartford Fire Ins. Co., 426 F. Supp. 2d 546, 559 (S.D. Tex. 2006) (discussing when insured may "choose independent counsel and require the insurer to reimburse the expenses"); *Davalos*, 140 S.W.3d at 690 (holding that insured "lost his right to recover the costs of [his] defense" by rejecting "the insurer's defense without a sufficient conflict"); Emp'rs Cas. Co. v. Scott Elec. Co., 513 S.W.2d 642, 648 (Tex. Civ. App.—Corpus Christi 1974, no writ) (holding that where there is a conflict of interest between insurer and insured, insurer and defense counsel owe insured responsibility to immediately notify him of the conflict and allow him to protect himself by obtaining his own counsel); Steel Erection Co. v. Travelers Indem. Co., 392 S.W.2d 713, 716 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.). *But see* Downhole Navigator, L.L.C. v. Nautilus Ins. Co., 686 F.3d 325, 329–30 (5th Cir. 2012) (rejecting argument that insurer would lose

insured's selection.[876] In *Northern County Mutual Insurance Co. v. Davalos*, the Texas Supreme Court explained that not "[e]very disagreement about how the defense should be conducted" is a conflict that justifies the insured's refusal of the insurer's offered defense.[877] Rather, disputes over "the existence or scope of coverage" will justify this refusal, along with "any defense conditioned on an unreasonable, extra-contractual demand that threatens the insured's independent legal rights."[878] *Davalos* recognizes that an insurer's issuance of a reservation of rights can "create[] a potential conflict of interest."[879] The reservation of rights, however, "does not, by itself, create a conflict between the insured and insurer; it only recognizes the possibility that such a conflict may arise in the future."[880] Instead, the test to apply is whether "the facts to be adjudicated in the [underlying] lawsuit are the same facts upon which coverage depends."[881]

The insurer has to pay only the reasonable expenses of independent counsel.[882] Reasonable expenses do not include services relating to attempting to compel the insurer to furnish a full defense.[883]

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right to control defense due to potential conflict of interest); Allstate Cty. Mut. Ins. Co. v. Wootton, 494 S.W.3d 825, 837 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Davalos* and holding insureds are not entitled to independent counsel simply because there is a potential conflict of interest); Am. Emp'rs Ins. Co. v. El Paso Valley Cotton Ass'n, 392 S.W.2d 569, 576–77 (Tex. Civ. App.—El Paso 1965, writ ref'd n.r.e.) (finding that because of insurer's offer to defend insureds, because of its actual negotiation of settlement with third party plaintiff, and because it carefully pointed out that insured would be responsible for costs of an independent counsel, insureds were not entitled to recover attorney's fees).

[876] *See* Graper v. Mid-Continent Cas. Co., 756 F.3d 388, 392 (5th Cir. 2014) ("If a conflict of interest actually exists it may be disqualifiable, giving the insured the privilege of rejecting this limited representation and hiring a lawyer of its own choosing and looking to the insurer for the payment of the attorney's fees." (internal quotations omitted)); *Steel Erection Co.*, 392 S.W.2d at 716; *see also Singing River Health Sys.*, 850 F.3d at 195.

[877] *Davalos*, 140 S.W.3d at 689; *Wootton*, 494 S.W.3d at 837 ("A conflict of interest exists that prevents the insurer from insisting on its contractual right to control the defense when the insurer has reserved its rights and the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends.").

[878] *Davalos*, 140 S.W.3d at 689.

[879] *Id.*

[880] Unauthorized Practice of Law Comm'n v. Am. Home Assurance Co., 261 S.W.3d 24, 40 (Tex. 2008).

[881] *Davalos*, 140 S.W.3d at 689; *see also Graper*, 756 F.3d at 392 (applying the "same facts" conflicts test from *Davalos*).

[882] *See* Steel Erection Co. v. Travelers Indem. Co., 392 S.W.2d 713, 716 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

§ 5 Multiple Insureds

Defense counsel's representation of two insureds gives rise to three attorney-client relationships, leading to a proportionately higher risk of conflicting interests.[884] Where the two insureds have adverse interests, "usually the only resolution is to obtain separate and independent counsel for each."[885] If the interests of the insureds differ but are not directly adverse, then joint representation is permissible provided the clients give informed consent after full disclosure.[886]

It is common for defense counsel to represent multiple defendants. But a conflict of interests can destroy defense counsel's ability to continue to represent these multiple parties. Courts have characterized such conduct as equivalent to representing an adversary in litigation, a situation which obviously cannot be permitted.[887] In determining the existence of a conflict of interests, the issue is whether or not a disputed issue could determine which of the insureds will be liable.[888] A conflict of interests can arise, for

[883] *Id.* ("The sum of $945.00 represents the amount of attorney's fees expended by Higdon and Steel in attempting to compel Travelers to furnish them a defense of the Sullivan suit. Travelers is not in any way responsible for these attorney's fees, and the trial court properly refused judgment for this sum."). *Cf.* Traders & Gen. Ins. Co. v. Hicks Rubber Co., 169 S.W.2d 142, 147–48 (Tex. 1943) (In personal injury action, insured was protected by two public liability policies, each containing an "other insurance" clause; and the insured relied upon attorneys furnished by insurers in defending that action. After judgment was rendered against insured, insurers refused to pay the judgment. The court held that the amount insured was required to expend for attorneys' fees in action against insurance companies after judgment in personal injury action had become final, could not be recovered by insured as a "necessary and lawful expense" in personal injury action.).

[884] *See* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:73 (2018 ed.).

[885] *Id.*; *see also* J.W. Hill & Sons, Inc. v. Wilson, 399 S.W.2d 152, 154 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.).

[886] 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:73 (2018 ed.); *see* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(1)–(2) (establishing the rules for obtaining clients' informed consent of conflict); *In re* B.L.D., 113 S.W.3d 340, 346 n.5 (Tex. 2003) (observing that "clients may waive conflicts of interest and retain a single attorney to jointly represent them in trial by" giving informed consent).

[887] *See* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:73 (2018 ed.); *see also In re B.L.D.*, 113 S.W.3d at 346–47 (A lawyer in a civil case may not "represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter . . . ."); *J.W. Hill & Sons, Inc.*, 399 S.W.2d at 154 ("To have an attorney standing in open court before a jury and the public, who have a right to be present, attempting to represent conflicting interests creates a situation which should never occur under our adversary system of trying cases.").

[888] 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:73 (2018 ed.).

example, in a damage suit against a company where an issue is whether the employee involved was acting in the course and scope of his employment.[889] In this situation, in the absence of a resolution of the conflict, the employee is entitled to independent counsel.[890] As a practical matter, defense counsel should advise all insureds to seek independent counsel in cases involving multiple insureds with irreconcilable conflicts of interests.[891]

§ 6 Coverage Reservation

Where the insurer raises a coverage issue, the insured ordinarily should have the right to select independent counsel and the right to control the defense.[892] The first communication relating to a coverage problem from the insurer to the insured is frequently a reservation of rights letter.[893] If a coverage issue has been raised, defense counsel should advise the insured that he has a right to be defended by an attorney of his own choice.[894] It is inappropriate for defense counsel in such a situation to induce the insured to sign a reservation of rights or non-waiver agreement for the benefit of the insurer.[895] Likewise, defense counsel is prohibited from developing

[889] *See J. W. Hill & Sons, Inc.*, 399 S.W.2d at 153; *see also In re* Posadas USA, Inc., 100 S.W.3d 254, 257–58 (Tex. App.—San Antonio 2001, no pet.) (affirming propriety of attorney's withdrawal from multiple representation where conflict developed between clients/co-defendants hotel and hotel employee).

[890] *See J.W. Hill & Sons, Inc.*, 399 S.W.2d at 153.

[891] *See* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE §§ 30:55, 32:34 (2018 ed.) (discussing general propriety of advising insured to seek independent counsel, as well as importance of independent counsel in cases with aggregate settlements).

[892] *See* N. Cty. Mut. Ins. Co. v. Davalos, 140 S.W.3d 685, 689 (Tex. 2004) ("[W]hen the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends, the conflict of interest will prevent the insurer from conducting the defense."); Taylor v. Allstate Ins. Co., 356 S.W.3d 92, 101 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); Steel Erection Co. v. Travelers Indem. Co., 392 S.W.2d 713, 716 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

[893] *See, e.g.*, U.S. Fire Ins. Co. v. Deering Mgmt. Grp., Inc., 946 F. Supp. 1271, 1274 (N.D. Tex. 1996); Emp'rs Cas. Co. v. Tilley, 496 S.W.2d 552, 559 (Tex. 1973); YMCA of Metro. Fort Worth v. Commercial Standard Ins. Co., 552 S.W.2d 497, 503 (Tex. Civ. App.—Fort Worth, 1977, writ ref'd n.r.e.); Emp'rs Cas. Co. v. Scott Elec. Co., 513 S.W.2d 642, 647 (Tex. Civ. App.—Corpus Christi 1974, no writ).

[894] *See Steel Erection Co.*, 392 S.W.2d at 716.

[895] *See Tilley*, 496 S.W.2d at 559; Auto. Underwriters' Ins. Co. v. Long, 63 S.W.2d 356, 358–59 (Tex. Comm'n App. 1933, opinion adopted); *see also* Ulico Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 786 (Tex. 2008) ("It goes without saying that an attorney defending an insured has the obligation to fully disclose to the insured conflicts of interest, whether because of the attorney's

evidence or advising the insurer on the disputed coverage questions,[896] or arguing that the insured's conduct constituted non-compliance with a provision of the insurance policy, such as late notice, to establish the applicability of a policy exclusion.[897] Further, it is equally improper for the attorney who is defending the insured to bring a declaratory judgment action against the insured seeking a coverage determination or to defend the insurer in a coverage action brought by the insured while simultaneously defending the underlying case.[898] Additionally, the insurer's attorney should not take a statement from the insured until the insured is informed that this particular attorney will not be defending his interests.[899] If defense counsel obtains information from the insured relating to coverage and thereafter shares it with the insurer, such conduct could constitute an abuse of the attorney's obligation not to disclose confidential communications, which can prejudice the insured's coverage.[900] Thus, defense counsel cannot develop any evidence to assist the insurer in avoiding its contractual obligations to the insured.[901]

relationship with the insurer or otherwise."); Unauthorized Practice of Law Comm'n v. Am. Home Assurance Co., 261 S.W.3d 24, 27 (Tex. 2008) (noting defense counsel's duty to "protect the interests of the insured if those interests would be compromised by the insurer's instructions").

[896] *Tilley*, 496 S.W.2d at 557 ("[T]he development of evidence and briefing against insured on the coverage question was sought and paid for by insurer, without insured being informed of the conflict of services being performed by his attorney."); *see* Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118, 137 (Tex. 2010) (discussing *Tilley* and explaining that prejudice existed there because counsel was "simultaneously defending Tilley and gathering coverage information favorable to Employers"); *Ulico Cas. Co.*, 262 S.W.3d at 785–86 (noting that in *Tilley* the defense counsel failed to notify insured that counsel was "obtaining and furnishing evidence to [insurer] that was detrimental" to the insured's interests).

[897] *See Tilley*, 496 S.W.2d at 556; *see also Gilbert Tex. Constr., L.P.*, 327 S.W.3d at 137 (comparing *Tilley* to facts where notice provision was not at stake); *Ulico Cas. Co.*, 262 S.W.3d at 785–86 (similar); Tex. Farmers Ins. Co. v. Kurosky, No. 02-13-00169-CV, 2015 WL 4043278, at *6 (Tex. App.—Fort Worth July 2, 2015, no pet.) (mem. op.).

[898] *See* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:57 (2018 ed.).

[899] *See* Emp'rs Cas. Co. v. Scott Elec. Co., 513 S.W.2d 642, 647–48 (Tex. Civ. App.—Corpus Christi 1974, no writ).

[900] *See Tilley*, 496 S.W.2d at 560; *Scott Elec. Co.*, 513 S.W.2d at 647–48; *see also* Sentry Ins. v. Just Right Prods., No. 4:14-cv-30-O, 2015 WL 10819157, at *9 n.5 (N.D. Tex. Jan. 7, 2015). *But see Ulico Cas. Co.*, 262 S.W.3d at 780 (holding that the doctrine of estoppel cannot be used to create a right of coverage that did not exist in the terms of the policy).

[901] *See Tilley*, 496 S.W.2d at 560–61; *Gilbert Tex. Constr., L.P.*, 327 S.W.3d at 137; *Ulico Cas. Co.*, 262 S.W.3d at 785–86; *Scott Elec. Co.*, 513 S.W.2d at 647–48; 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:57 (2018 ed.).

§ 7 Collusion by Insured

The representation of conflicting interests also becomes apparent when defense counsel learns that the insured may be attempting to defraud the insurer. Historically, collusion or fraud by the insured did not give defense counsel a right to breach his fiduciary obligation of confidentiality.[902] Even today, the many duties and ethical obligations of defense counsel underscore the duty to preserve the insured's confidentiality.[903] The obligation of confidentiality remains one of the cornerstones of the attorney-client relationship. In fact, a breach of that obligation by defense counsel may not only result in disciplinary action, but also potential malpractice liability or claims for breach of fiduciary duty.[904] A breach of

[902] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Walker, 382 F.2d 548, 552 (7th Cir. 1967) ("On October 16, 1965, his counsel, selected by State Farm to defend Dorothy Walker's suit for $50,000 damages, was apprised by Walker that his earlier version of the accident was untrue and that actually the accident occurred because he lost control of his car in passing a Cadillac just ahead. At that point, Walker's counsel should have refused to participate further in view of the conflict of interest between Walker and State Farm. Instead he participated in the ensuing depositions of the Walkers, even took an ex parte sworn statement from Mr. Walker in order to advise State Farm what action it should take, and later used the statement against Walker in the District Court. This action appears to contravene an Indiana attorney's duty 'at every peril to himself, to preserve the secrets of his client.'"); Moritz v. Med. Protective Co., 428 F. Supp. 865, 873 n.8 (W.D. Wis. 1977) ("It appears that if an insured imparts to the lawyer information which would or might provide a basis for denying policy coverage such as fraud in obtaining the policy the lawyer is bound not to disclose the information to the insurer, and to withdraw from representation of both the insurer and the insured."); Gass v. Carducci, 185 N.E.2d 285, 291 (Ill. App. Ct. 1962) (holding that "the defendant's attorneys could not use the defendant's depositions or her insurance coverage as the basis of an argument (wholly speculative in the record before us) that defendant and plaintiff were acting collusively"); Montanez v. Irizarry-Rodriguez, 641 A.2d 1079, 1080 (N.J. Super. Ct. App. Div. 1994) (holding that defense counsel appointed by insurer could not impeach insured's credibility).

[903] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b) ("[A] lawyer shall not knowingly . . . [r]eveal confidential information of a client or a former client . . . ."); MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (AM. BAR ASS'N 2016) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."); *In re* Cerberus Capital Mgmt., L.P., 164 S.W.3d 379, 382 (Tex. 2005) (per curiam) ("Rule 1.05 prohibits the use of a former client's confidential information to that client's disadvantage, unless the client consents or the information has become generally known.").

[904] *See* Kennedy v. Gulf Coast Cancer & Diagnostic Ctr. at Se., Inc., 326 S.W.3d 352, 360 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (stating that "[a]n attorney who uses a client's confidential information for his own interest and against the client's interest to the client's detriment may be liable for breach of fiduciary duty"); Brown v. Green, 302 S.W.3d 1, 8 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("An attorney can breach his or her fiduciary duty to a

the duty of confidentiality by defense counsel may also expose the attorney to exemplary damages.[905]

An insured owes a duty to the insurer to cooperate in the defense of the controversy or litigation, and the affirmative duty to make a full, frank, and fair disclosure of all facts relating to the incident for which the insurer may be liable.[906] The insured also has the duty to refrain from any fraudulent or collusive act that could prejudice the insurer in the defense or settlement of a claim against the insurer.[907] Thus, despite the defense attorney's obligations to preserve the confidences of the insured, knowledge of

client by, among other things . . . misusing client confidences . . . ."); Murphy v. Gruber, 241 S.W.3d 689, 693 (Tex. App.—Dallas 2007, pet. denied) (observing that lawyer's breach of fiduciary duty can occur when lawyer improperly uses client confidences); Capital City Church of Christ v. Novak, No. 03-04-00750-CV, 2007 WL 1501095, at *1 (Tex. App.—Austin May 23, 2007, no pet.) (same); Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("Breach of fiduciary duty by an attorney most often involves [among other things] the attorney's . . . improper use of client confidences . . . .").

[905] *See, e.g.*, McCullough v. Scarbrough, Medlin & Assocs., 435 S.W.3d 871, 916 (Tex. App.—Dallas 2014, pet. denied) (observing that exemplary damages are available for breach-of-fiduciary duty claim); Hooks v. Hooks, No. 2-03-263-CV, 2004 WL 1635838, at *2 (Tex. App.—Fort Worth July 22, 2004, no pet.) ("Exemplary damages for breach of the confidential relationship are proper when the breach is intentional or the fiduciary has engaged in self-dealing."); Brosseau v. Ranzau, 81 S.W.3d 381, 396 (Tex. App.—Beaumont 2002, pet. denied) ("A defendant's intentional breach of fiduciary duty is a tort for which a plaintiff may recover punitive damages.").

[906] *See, e.g.*, Cox Operating, L.L.C. v. St. Paul Surplus Lines Ins. Co., No. H-07-2724, 2011 WL 7121183, at *4 n.46, *6 (S.D. Tex. Oct. 21, 2011); Frazier v. Glens Falls Indem. Co., 278 S.W.2d 388, 390, 392 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.).

[907] *See Frazier*, 278 S.W.2d at 392 (stating that insured is obliged to refrain from any fraudulent or collusive act which might operate as a means of prejudice to the insurance company in its defense or settlement of a claim made against the insured); U.S. Cas. Co. v. Schlein, 338 F.2d 169, 174 (5th Cir. 1964) (explaining that under Texas law, an insurer claiming breach of cooperation clause by insured must prove that insured's breach prejudiced insurer); Am. States Ins. Co. v. Hanson Ind., 873 F. Supp. 17, 29 (S.D. Tex. 1995) (showing that an insured's notice of suit, given fourteen months after suit was filed, prejudiced insurer); Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170, 174 (Tex. 1995) (finding that insured's failure to notify insurer of suit prejudiced insurer's defense of claim); Liberty Mut. Ins. Co. v. Cruz, 883 S.W.2d 164, 165 (Tex. 1993) (holding that insured's failure to notify the insurer of a suit against her relieves insurer of liability when lack of notice prejudices insurer); Members Ins. Co. v. Branscum, 803 S.W.2d 462, 467 (Tex. App.—Dallas 1991, writ dism'd w.o.j.) (holding that pursuant to Texas State Board of Insurance Amendatory Endorsement, insurer must show prejudice to itself by failure of insured to cooperate); Kimble v. Aetna Cas. & Sur. Co., 767 S.W.2d 846, 851 (Tex. App.—Amarillo 1989, writ denied) (stating that insured's notice to insurer after default judgment prejudiced insurer); Ratcliff v. Nat'l Cty. Mut. Fire Ins. Co., 735 S.W.2d 955, 955 (Tex. App.—Dallas 1987, no writ) (stating that insured's notice to insurer after default judgment prejudiced insurer).

collusion by the insured may place defense counsel in a situation where he must take action to "dissuade the client from committing the . . . fraud."[908] An attorney cannot engage in a fraudulent act[909] or assist the client in such conduct.[910] Accordingly, the failure by defense counsel to take reasonable steps to dissuade the client's fraudulent act[911] or to disclose the true facts to the court when "necessary to avoid assisting a criminal or fraudulent act"[912] may subject the attorney to disciplinary action.

An attorney should be especially cautious when negotiating a settlement agreement that arguably may raise serious issues of public policy. For example, in *State Farm Fire & Casualty Co. v. Gandy*, the Texas Supreme Court held that a defendant's assignment of his claims against his insurer to a plaintiff as part of a settlement was invalid.[913] Likening the settlement arrangement presented in *Gandy* to Mary Carter agreements that had previously been declared void in Texas as against public policy,[914] the court explained that a defendant's assignment is invalid if:

> (1) it is made prior to an adjudication of plaintiff's claim against defendant in a fully adversarial trial, (2) defendant's insurer has tendered a defense, and (3) either (a) defendant's insurer has accepted coverage, or (b) defendant's insurer has made a good faith effort to adjudicate coverage issues prior to the adjudication of plaintiff's claim.[915]

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[908] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(d) ("When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.").

[909] *See id.* R. 8.04(a)(3).

[910] *See id.* R. 1.02(c).

[911] *See id.* R. 1.02(d).

[912] *See id.* R. 3.03(a)(2).

[913] 925 S.W.2d 696, 713 (Tex. 1996); *see also* Evanston Ins. Co. v. Atofina Petrochemicals, Inc., 256 S.W.3d 660, 673 (Tex. 2008) (explaining that *Gandy* invalidated assignments which made "evaluating the merits of a plaintiff's claim difficult by prolonging disputes and distorting trial litigation motives").

[914] *See Gandy*, 925 S.W.2d at 710. The Supreme Court observed in *Gandy* that "the court of appeals did not exaggerate when it called Gandy's agreed judgment against Pearce 'a sham,' or when it stated that the judgment 'perpetrates a fraud' and 'an untruth.'" *Id.* at 713.

[915] *Id.* at 714.

Because items (1), (2), and (3)(b) were present in *Gandy*, and the settlement actually prolonged and distorted the litigation instead of resolving it, the assignment was void.[916] The court also expressly disapproved dicta in two cases and, speaking prospectively, made clear that "in no event, however, is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant's insurer or admissible as evidence of damages in an action against defendant's insurer by plaintiff as defendant's assignee."[917]

Twenty years after *Gandy*, in *Great American Insurance Co. v. Hamel*, the Texas Supreme Court more precisely defined the circumstances under which an insurance company that wrongfully fails to defend an insured may be bound by a judgment against the insured in a subsequent suit brought by the underlying plaintiff as the insured's assignee.[918] The court re-affirmed that grounds for invalidating an assignment are narrow, but even when an assignment is valid, the court made it clear that a judgment will not be enforced unless it resulted from a "fully adversarial trial."[919] *Great American* is therefore significant for: (1) defining the term "fully adversarial trial"; (2) explaining what sort of evidence is sufficient to establish the existence (or lack of) adversity; and (3) confirming that, when liability issues are not decided in a "fully adversarial trial," parties may properly litigate those issues in a subsequent coverage suit.[920] With respect to clarifying what constitutes a "fully adversarial trial," the court made clear that "[w]hen the parties reach an agreement before trial or settlement that

[916] *Id.*; *see also* Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 821 (Tex. 1997) (stating that whether insurer was bound by the amount of the underlying judgment against an insured, who had assigned any claims he might have had against insurer to the plaintiff in exchange for the plaintiff's promise not to execute against any of the insured's assets except any coverage afforded by the insurance policy, was "controlled by" *Gandy*). *But see Evanston Ins. Co.*, 256 S.W.3d at 673 (clarifying that "*Gandy*'s holding was explicit and narrow, applying only to a specific set of assignments with special attributes" indicating a likelihood that the assignments would prolong the dispute and distort trial litigation motives, and that "[b]y its own terms, *Gandy*'s invalidation applies only to cases that present its five unique elements").

[917] *Gandy*, 925 S.W.2d at 714 (disapproving dicta in Emp'rs Cas. Co. v. Block, 744 S.W.2d 940, 943 (Tex. 1988) and U.S. Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949, 954 (5th Cir. 1990)). The court did not address "whether an assignment is invalid when any element of the [above stated] rule is lacking, such as when an insurer has not tendered a defense of its insured." *Id.* at 719.

[918] 525 S.W.3d 655, 663 (Tex. 2017).

[919] *Id.*

[920] *Id.* at 666–67, 669.

deprives one of the parties of its incentive to oppose the other, the proceeding is no longer adversarial. Stated another way, proceedings lose their adversarial nature when, by agreement, one party has no stake in the outcome and thus no meaningful incentive to defend itself."[921]

§ 8 Settlement

The risk of conflicting interests arises frequently in settlement negotiations. It is well established that in negotiating a settlement of an action against the insured, the insurer must act in good faith towards the insured.[922]

The possibility of conflicting interests in settlement negotiations can pose major ethical problems for defense counsel. What if the insurer instructs defense counsel not to settle a claim against the insured and defense counsel believes the refusal to settle is unreasonable and may result in a judgment in excess of the applicable policy limits, or constitute bad faith by the insurer? Should defense counsel advise the insured of such a belief? If defense counsel does so, is he violating an ethical obligation to the insurer? If defense counsel doesn't disclose his belief to the insured, is he violating an ethical obligation to the insured? If defense counsel merely removes himself from the settlement process after forming such a belief, is he breaching any ethical responsibilities and, if so, to whom?

Defense counsel in a dual representation has the obligation of undivided loyalty to the insured.[923] Where a conflict of interests situation arises, such as where the insured has financial exposure in excess of policy limits and

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[921] *Id.* at 667.

[922] *See* USAA Tex. Lloyds Co. v. Menchaca, No. 14-0721, 2017 WL 1311752, at *3 (Tex. Apr. 7, 2017) (noting insurer's common-law duty to "deal fairly and in good faith" with insureds); City of Midland v. O'Bryant, 18 S.W.3d 209, 215 (Tex. 2000) (same); Republic Ins. Co. v. Stoker, 903 S.W.2d 338, 340 (Tex. 1995) (identifying insurer's "duty to deal fairly and in good faith with its insured in the processing and payment of claims"); Tex. Farmers Ins. Co. v. Soriano, 881 S.W.2d 312, 314 (Tex. 1994) ("[I]nsurers may be liable for negligently failing to settle within policy limits claims made against their insureds."); Arnold v. Nat'l Cty. Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) ("Arnold raises the issue of whether there is a duty on the part of insurers to deal fairly and in good faith with their insureds. We hold that such a duty of good faith and fair dealing exists."). An insurer may also be liable for damages under the DTPA. *See* Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 608 (Tex. App.—Tyler 1984, writ ref'd n.r.e.) (holding that an insurer violated Section 16, Article 21.21 of the Texas Insurance Code and Section 17.46 of the Texas Deceptive Trade Practices Act because it refused to settle claim against its insured).

[923] Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 276 (1995).

the insurer's refusal to settle the suit is unreasonable, defense counsel must inform the insured of that refusal, the circumstances surrounding that refusal, and the possible adverse consequences to the insured of that decision not to settle.[924] Only then can the insured make an informed decision regarding the effect of the conflict. The failure of defense counsel to make such a disclosure to the insured will unquestionably expose him or her to malpractice liability.

In *Allstate Insurance Company v. Kelly*, where the insured alleged that the insurer improperly refused to settle a case against him, the court of appeals affirmed jury findings of negligence, gross negligence, and false, misleading and deceptive acts on the part of the insurer.[925] In so holding, the court explained:

> The record shows without dispute that neither [defense counsel hired by Allstate], [Allstate's claim representative] nor any other authorized representative of Allstate contacted the Alves to inform them of the settlement offer and of Allstate's rejection of the offer and the reasons for rejection until February, 1979. [Defense counsel] admitted on cross-examination that he was aware that Kelly's claim "was worth more than $50,000." He also testified that there was a probability that a trial of the Kelly personal injury suit would result in the rendition of an excess judgment. In fact, [defense counsel] recommended to [Allstate's claim representative] by letter dated October 11, 1978, that Allstate tender its policy limits into court and continue the defense of the case.[926]

[924] Lucian T. Pera, *The Ethics of Joint Representation*, 40 LITIG. J. 45, 50–51 (2013).

[925] 680 S.W.2d at 599. Despite evidence that the insurer represented to the insured that it was unnecessary for him to hire his own lawyer, the court held that there was no evidence to support the jury's finding such a representation was false and misleading. *Id.* at 599–600. The court's rationale was that there was no evidence to indicate that defense counsel had failed to provide competent legal services to the insured. *See id.* at 608–09; *see also* Phillips v. Bramlett, 288 S.W.3d 876, 879 (Tex. 2009) (discussing insurers' common law duty "to settle third-party claims against their insureds when reasonably prudent to do so").

[926] *Kelly*, 680 S.W.2d at 600; *see also Bramlett*, 288 S.W.3d at 879 (stating that "[f]or the duty [to settle] to arise, there must be coverage for the third-party's claim, a settlement demand within policy limits, and reasonable terms 'such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment'" (quoting Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 849 (Tex. 1994))).

Because defense counsel was not a party to the suit, the court only discussed the insurer's obligation to inform the insured of information identifying the conflicting interests. Nevertheless, the court's discussion of the insurer's shortcomings raises ethical considerations that are equally applicable to defense counsel.

It is fundamental that defense counsel must promptly notify the insured of any pending settlement negotiations that might affect adversely the insured's interests.[927] This is because an attorney "owes a client a duty to inform the client of matters material to the representation."[928] "A fact is material if it would likely affect the conduct of a reasonable person concerning the transaction in question."[929] "Materiality thus centers on whether a reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in question."[930]

Nevertheless, defense counsel may not be liable to a third party for conspiring with an insurer to cause it to violate its statutory obligations to settle a claim. For example, in *Allstate Insurance Co. v. Watson*, the Texas Supreme Court held that a third-party claimant who was injured in a car accident did not have a cause of action under the Insurance Code against the other parties' insurer for her injuries.[931] This is because "allowing third-party claimants standing to sue an insurer for unfair claims settlement

[927] *See* Montfort v. Jeter, 567 S.W.2d 498, 499 (Tex. 1978) (upholding trial judge's judgment against the attorney awarding the client actual and punitive damages where plaintiff brought legal malpractice claim against his attorney alleging the latter agreed to the judgment against him without his consent, and the jury agreed); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a)(2) ("[A] lawyer shall abide by a client's decisions . . . whether to accept an offer of settlement of a matter, except as otherwise authorized by law . . . ."); Nath v. Tex. Children's Hosp., 446 S.W.3d 355, 367 n.15 (Tex. 2014) ("An attorney owes a client a duty to inform the client of matters material to the representation, provided such matters are within the scope of representation."); Young v. Dwayne R. Day, P.C., No. 01-16-00325-CV, 2017 WL 2117542, at *7–8 (Tex. App.—Houston [1st Dist.] May 16, 2017, no pet.) (reversing trial court's grant of summary judgment regarding claim that counsel failed to inform clients of $200,000 settlement offer that client's assert they would have accepted).

[928] Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 160 (Tex. 2004) (citing Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988)).

[929] Hannon, Inc. v. Scott, No. 02–10–00012–CV, 2011 WL 1833106, at *6 (Tex. App.—Fort Worth May 12, 2011, pet. denied) (mem. op.) (citing Miller v. Kennedy & Minshew, P.C., 142 S.W.3d 325, 345 (Tex. App.—Fort Worth 2003, pet. denied)).

[930] *Id.* (citing Burleson State Bank v. Plunkett, 27 S.W.3d 605, 613 (Tex. App.—Waco 2000, pet. denied)).

[931] 876 S.W.2d 145, 146 (Tex. 1994).

practices would directly conflict with the well-established duties insurers owe their insureds."[932] That same rationale would appear to apply to defense counsel as well.

§ 9 Conflicting Interests—Texas Rule of Civil Procedure 13, Texas Civil Practice & Remedies Code Chapters 9 and 10, and Federal Rule of Civil Procedure 11

Texas Rule of Civil Procedure 13 ("Rule 13"), Texas Civil Practice & Remedies Code Chapters 9 and 10 ("Frivolous Pleading Statute"), and Federal Rule of Civil Procedure 11 ("Federal Rule 11") provide that the signature of an attorney or a party on a pleading constitutes a certificate that to the best of his knowledge, information, and belief, formed after reasonable inquiry, the pleading is not groundless and brought in bad faith or for purposes of harassment.[933] If a party or his attorney violates these obligations, the court may impose appropriate sanctions including the striking of a pleading, the dismissal of a party, or an award of attorney's fees and costs to the injured party. Consequently, because of these serious and undesirable results, counsel has a duty to make a reasonable examination of the merits and motives behind a client's claim or defense before signing a pleading and filing it with the court.

An attorney must not bring or defend a proceeding, or assert or controvert an issue, unless he or she reasonably believes there is a basis for doing so which is not frivolous.[934] Furthermore, during litigation an attorney must not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.[935] A failure to honor these principles may subject the client or the attorney, or both, to sanctions under Rule 13,[936] the Frivolous Pleading Statute,[937] or when applicable, Federal Rule 11.[938]

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[932] Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 384 (Tex. 2000).

[933] *See* FED. R. CIV. P. 11; TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.011, 9.012, 10.001 (West 2017); TEX. R. CIV. P. 13.

[934] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01.

[935] *See id.* R. 3.02; *see also* TEX. R. CIV. P. 13 (requiring attorneys to certify "they have read the pleading, motion, or other paper," and "to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment").

[936] TEX. R. CIV. P. 13; *see also* Nath v. Tex. Children's Hosp., 446 S.W.3d 355, 362–63 (Tex. 2014) (stating that "Rule 13 provides that pleadings that are groundless and in bad faith, intended to harass, or false when made are also sanctionable," but it "does not permit sanctions on the issue of

groundlessness alone"); Callaway v. Martin, No. 02-16-00181-CV, 2017 WL 2290160, at *1–2, *10 (Tex. App.—Fort Worth May 25, 2017, no pet.) (affirming Rule 13 sanctions totaling over $100,000 for groundless pleadings filed "in bad faith or with the intent to harass"); Pajooh v. Abedi, Nos. 14-16-00336-CV & 14-16-00351-CV, 2017 WL 1430601, at *5–6 (Tex. App.—Houston [14th Dist.] Apr. 18, 2017, no pet.) (affirming Rule 13 sanctions for filing groundless claims in bad faith and for harassment); Allison v. Conglomerate Gas II L.P., No. 02-13-00205-CV, 2015 WL 5106448, at *7 (Tex. App.—Fort Worth Aug. 31, 2015, no pet.) (affirming Rule 13 sanctions order); *In re* J.A., 482 S.W.3d 141, 142–43, 148–50 (Tex. App.—El Paso 2015, no pet.) (affirming Rule 13 sanctions for groundless and bad faith motion to modify in suit affecting parent-child relationship); Schexnider v. Scott & White Mem'l Hosp., 953 S.W.2d 439, 441–42 (Tex. App.—Austin 1997, no writ) (affirming Rule 13 sanctions in amount of $25,000 against attorney for signing petition in bad faith and for purposes of harassment); Delgado v. Methodist Hosp., 936 S.W.2d 479, 487–88 (Tex. App.—Houston [14th Dist.] 1996, no writ) (affirming Rule 13 sanctions against plaintiff for frivolous claim); Meek v. Bishop, Peterson & Sharp, P.C., 919 S.W.2d 805, 809–10 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (holding that Rule 13 sanction against trial counsel, client and appellate counsel was proper based on filing of motion in bad faith and without supporting documentation); Hawkins v. Estate of Volkmann, 898 S.W.2d 334, 346 (Tex. App.—San Antonio 1994, writ denied) (involving situation where attorney was sanctioned $148,000 for prosecuting will contest "in bad faith," sanctioning the attorney was not in error, but remand was necessary to reduce amount of sanction to account for the attorney's "reasonable behavior" during certain portions of the litigation); D.A. Buckner Constr., Inc. v. Hobson, 793 S.W.2d 74, 76 (Tex. App.—Houston [14th Dist.] 1990, no writ) (involving situation where trial court sanctioned party to pay $500 to real party in interest for failing to replead a counterclaim, the court of appeals held: "rule 13 allows for the imposition of sanctions on the court's own motion but requires that 'good cause' for such penalty be stated in the sanction order . . . . Further, Rule 13 requires that the notice and hearing procedures of TEX. R. CIV. P. 215(2)(b) be followed").

[937] Chapters 9 and 10 of the Texas Civil Practice and Remedies Code set certain standards for pleadings and sanctions for failing them. Specifically, Section 10.001 provides that:

> The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:
>
> (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

> (4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

TEX. CIV. PRAC. & REM. CODE ANN. § 10.001 (West 2017). Sanctions for failing to follow these standards may include: "(1) a directive to the violator to perform, or refrain from performing, an act; (2) an order to pay a penalty into court; and (3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees." *Id.* § 10.004(c). The court must "provide a party who is the subject of a motion for sanctions" under this Chapter "notice of the allegations and a reasonable opportunity to respond to the allegations." *Id.* § 10.003.

Chapter 9 has similar provisions, *see id.* §§ 9.011, 9.012, but "its application is limited to proceedings in which neither Rule 13 nor Chapter 10 applies." Nath v. Tex. Children's Hosp., 446 S.W.3d 355, 362 n.6 (Tex. 2014); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 9.012(h). As a result, Chapter 9 "has largely been subsumed by subsequent revisions to the code." *Nath*, 446 S.W.3d at 362 n.6.

[938] FED. R. CIV. P. 11(b) states:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

FED. R. CIV. P. 11(b). A violation of this rule will lead to an appropriate sanction, which may include payment of reasonable expenses including attorneys' fees. *See id.* R. 11(c)(4); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 43–45 (1991) (holding that court may rely on its inherent authority to prevent abuse of the judicial process by awarding attorney's fees as sanctions); Carter v. ALK Holdings, Inc., 605 F.3d 1319, 1323 (Fed. Cir. 2010) ("Under the Eleventh Circuit's jurisprudence, Rule 11 sanctions should only be imposed in limited circumstances where the frivolous nature of the claims-at-issue is unequivocal."); Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 151 (4th Cir. 2002) (stating that "the primary purpose of [Rule 11] sanctions against counsel is not to compensate the prevailing party, but to 'deter future litigation abuse'"); Truck Treads, Inc. v. Armstrong Rubber Co., 868 F.2d 1472, 1474–75 (5th Cir. 1989) (affirming sanction of $12,630.62);

Both the federal and state sanctions rules give courts the option of imposing sanctions, but sanctions are not always mandatory.[939] Counsel may also be obligated to review and reevaluate his or her position as the litigation develops and to withdraw an allegation—or at the least not reallege it—upon discovering it is not adequately supported by fact or law.[940]

What if the insured or insurer instructs defense counsel to resort to tactics that will frustrate the plaintiff's case but at the same time will unnecessarily tax an already overburdened court system? Suppose the insured insists defense counsel employ a "scorched earth" defense the

Chapman & Cole v. Itel Container Int'l B.V., 865 F.2d 676, 683–87 (5th Cir. 1989) (affirming sanction of $20,000 for filing groundless RICO counterclaim); Carrieri v. Liberty Life Ins. Co., No. 09-12071-RWZ, 2012 WL 664746, at *5 (D. Mass. Feb. 28, 2012) (stating that Rule 11(b) does not mandate a finding of bad faith but still requires "a showing of at least culpable carelessness"); *In re* Creditors Serv. Corp., 207 B.R. 567, 571 (Bankr. S.D. Ohio 1997) ("Sanctions must be assessed where no evidence supports the attorney's claim for relief."). *But see* Eon-Net LP v. Flagstar Bancorp, 249 F. App'x 189, 195 (Fed. Cir. 2007) ("[A]n attorney may not be sanctioned solely for failing to conduct a reasonable inquiry as long as the complaint is well-founded."); *In re* Keegan Mgmt. Co., Sec. Litig., 78 F.3d 431, 434 (9th Cir. 1996) (holding that "[a]n attorney may not be sanctioned for a complaint that is not well-founded, so long as she conducted a reasonable inquiry," nor may she be sanctioned for filing well-founded complaint where reasonable inquiry was not conducted).

[939] *See* FED. R. CIV. P. 11; TEX. CIV. PRAC. & REM. CODE ANN. § 10.004(a) (West 2017). Texas Rule 13 says that "upon motion or upon its own initiative," a court "shall impose an appropriate sanction" for violations, but some courts have merely noted that they "may impose" such sanctions. TEX. R. CIV. P. 13; *see, e.g.*, Crawford v. Nguyen & Chen, LLP, No. 01-16-00274-CV, 2017 WL 1738096, at *4 (Tex. App.—Houston [1st Dist.] May 4, 2017, no pet.).

[940] Texas courts generally hold that Rule 13 sanctions "are based on the signing and filing of pleadings in violation of the duties imposed by" Rule 13, "not on the continued effectiveness of the sanctionable pleading." *E.g.*, Mann v. Kendall Homes Builders Constr. Partners I, Ltd., 464 S.W.3d 84, 91 (Tex. App.—Houston [14th Dist.] 2015, no pet.); Robson v. Gilbreath, 267 S.W.3d 401, 411 n.9 (Tex. App.—Austin 2008, pet. denied); Messina v. Messina, No. 01-07-00277-CV, 2008 WL 2854191, at *4 (Tex. App.—Houston [1st Dist.] July 24, 2008, pet. denied). The Fifth Circuit has reached a similar conclusion. *See* Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc) ("While sympathizing with the concerns that prompted previous panels in our Circuit to hold to the contrary, we depart from language in the instant panel's opinion and earlier decisions by this Court that impose upon an attorney a continuing obligation under Rule 11. Instead, we believe that a construction of Rule 11 which evaluates an attorney's conduct at the time a 'pleading, motion, or other paper' is signed is consistent with the intent of the rulemakers and the plain meaning of the language contained in the rule."); *see also* Skidmore Energy, Inc. v. KPMG, 455 F.3d 564, 570 (5th Cir. 2006) (stating that "Rule 11 liability is assessed only for a violation existing at the moment of filing"). Nevertheless, some other federal courts have held that Federal Rule 11 imposes on counsel and parties the duty to review and reevaluate their allegations.

attorney believes will only serve to cause litigation costs to soar to the detriment of the insurer? Aside from the risk of sanctions created by Rule 13, the Frivolous Pleading Statute, or Federal Rule 11, blind adherence to such demands may also give rise to ethical violations on the part of defense counsel. The Texas Disciplinary Rules of Professional Conduct impose ethical obligations on attorneys not to assert claims or defenses unless they reasonably believe "there is a basis for doing so that is not frivolous,"[941] or to "take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter."[942] As explained above, when an attorney is hired by an insurer to defend the insured, the attorney becomes the legal representative of the insured, and as such owes the insured the same type of unqualified loyalty as if he had originally been employed by the insured.[943] Consequently, if a conflict involving the imposition of potential sanctions arises between the insurer and the insured, the attorney owes a duty to the insured to immediately advise him of the conflict so the insured has the opportunity to protect himself.[944] Defense counsel may continue with representation in such instance only if the insured consents.[945] Preferably, defense counsel will obtain the insured's consent in writing to avoid or at least lessen the likelihood of any future dispute.

There do not appear to be any reported decisions in Texas involving an insurer's request that defense counsel employ conduct that could expose the insured to sanctions. However, given the above legal principles, if an insurer requests defense counsel to employ certain conduct in litigation that could subject the insured to sanctions, then a conflict between the insurer and the insured arises, and counsel is obligated to advise the insured of such

[941] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01.

[942] *Id.* R. 3.02.

[943] *See* Emp'rs Cas. Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973); *see also In re* XL Specialty Ins. Co., 373 S.W.3d 46, 55 (Tex. 2012) ("[T]he lawyer *must* represent the insured and protect his interests from compromise by the insurer." (quoting Unauthorized Practice of Law Comm'n v. Am. Home Assurance Co., 261 S.W.3d 24, 42 (Tex. 2008))); *Unauthorized Practice of Law Comm'n*, 261 S.W.3d at 27 ("[T]he insured's lawyer 'owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured' and 'must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions.'" (internal quotation marks omitted)).

[944] *See Tilley*, 496 S.W.2d at 558; *see also* Ulico Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 786 (Tex. 2008).

[945] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c) (explaining requirements for informed consent); *Tilley*, 496 S.W.2d at 558.

request. If the insured consents to counsel's continued representation, because defense counsel must represent the insured with "unqualified loyalty," he would probably not be permitted to expose the insured to sanctions. On the other hand, if it is the insured's conduct that creates the risk of sanctions, defense counsel should explain to the insured his obligation to refrain from filing frivolous pleadings or taking positions that unreasonably increase the costs or burdens of litigation.

Rule 13 and Federal Rule 11 proceedings not only may raise potential conflict of interest problems, but also, they may pose serious attorney-client privilege issues. In a dispute over whether sanctions should be imposed on the client or the attorney, the interests of the attorney and the client may be diverse. If counsel seeks to vindicate himself by relying on directions from the client, the client may need independent representation and the attorney-client relationship may become so tainted as to jeopardize the attorney's representation for the remainder of the litigation. Consequently, if the proposed sanctions are significant, it may be necessary for the court to defer the decision over allocation of responsibility until the litigation has been concluded. Moreover, if counsel, in making the requisite pleading certification, claims to have relied on confidential communications received from the client, the information received from the client is relevant to whether the certification was justified. In such an instance, confidential information may need to be disclosed,[946] and the fact that it may be protected by the attorney-client privilege may not shield it from disclosure in a dispute over the accuracy of the attorney's certification.[947]

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[946]The Texas Disciplinary Rules of Professional Conduct permit an attorney to reveal confidential client information to "establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c). Federal Rule of Civil Procedure 11 does not, however, *require* a party or an attorney to disclose privileged communications or work product to show that a pleading was substantially justified. *See* FED. R. CIV. P. 11 advisory committee's note (1983). According to the committee, "the provisions of Rule 26(c), including appropriate orders after in camera inspection by the court, remains available to protect a party claiming privilege or work product protection." *Id.* This provision carries over into the 1993 amendments to Rule 11. *See id.*

[947]*See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 cmt. 12 ("Sub-paragraph (c)(6) and (8) give the lawyer professional discretion to reveal both unprivileged and privileged information to serve those interests."). But where none of the Rule 1.05 exceptions to disclosure of confidential information apply, the attorney may be ethically prohibited from disclosing any such confidential information. For example, where an attorney's representation of an insured has become unreasonably difficult due to the insured's refusal to communicate with his attorney and the lack of communication requires the attorney to seek withdrawal from the representation, the attorney is

The Texas Disciplinary Rules provide that a "lawyer may reveal confidential information . . . [t]o establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client,"[948] or "when the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law."[949] Thus, if an attorney advised the client against pursuing what the attorney considered to be an inappropriate claim or defense, he would probably be entitled to use otherwise confidential communications to implicate the client if the court concluded that the claim or defense was not well-founded.[950]

§ 10 Insurer's Liability for Defense Counsel's Conduct

Across the United States, there is conflicting authority regarding whether an insurer is liable for the malpractice of the defense counsel it selects.[951] The jurisdictions holding that insurers are not vicariously liable

nonetheless prohibited from disclosing to the insurer or the court that the insured's failure to communicate forms the basis of the withdrawal. Professional Ethics Committee for the State Bar of Texas, Opinion 669 (March 2018). The lack of communication is itself "confidential information" that cannot be used to the disadvantage of the client absent the client's consent. *Id.* Accordingly, the attorney may only disclose that "professional considerations require withdrawal." *Id.*

[948] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(6).

[949] *Id.* R. 1.05(c)(4).

[950] *See id.* R. 1.05(c)(6) (permitting an attorney to reveal confidential client information to "establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client"); *see also* Chevron U.S.A., Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985) (holding that sanctions could be levied against client where client claimed that her lawyer was not authorized to sign a settlement stipulation, and attorney testified that client had authorized him to sign, but told him that she would hire another attorney to try to set stipulation aside so as to delay matters until she could find a source of supply from company other than Chevron). Although Texas Rule of Civil Procedure 166(b)(5) and Federal Rule of Civil Procedure 26(c) regarding protective orders may be available to avoid the disclosure of such privileged material, clients could certainly become less forthright if they learn of the varied circumstances in which Texas Rule 13 or Federal Rule 11 can drive a wedge between them and their counsel.

[951] *Compare* Lifestar Response of Ala., Inc. v. Admiral Ins. Co., 17 So. 3d 200, 218 (Ala. 2009) (insurer not vicariously liable), *and* Merritt v. Reserve Ins. Co., 110 Cal. Rptr. 511, 526–27 (Cal. Ct. App. 1973) (stating that defense counsel, rather than the insurer, should be liable for attorney's malpractice), *and* Marlin v. State Farm Mut. Auto. Ins. Co., 761 So.2d 380, 381 (Fla. Ct. App. 2000) (insurer not vicariously liable), *and* Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 788 N.E.2d 522, 541 (Mass. 2003) (insurer not vicariously liable), *and* Feliberty v. Damon, 527 N.E.2d

base this conclusion on counsel's status as an independent contractor, even though retained by the insurer, and the attorney's ethical obligations mandate that the "paramount interest independent counsel represents is that of the insured, not the insurer."[952] To allow the insurer to be vicariously liable would mean the insurer "is charged with responsibility for the lawyer's day-to-day independent professional judgments in the 'nuts and bolts' of representing its client."[953]

The Texas Supreme Court embraced this approach in 1998 when it decided *State Farm Mutual Automobile Insurance Co. v. Traver*.[954] A handful of earlier cases, however, had hinted at other conclusions. For example, in *Ranger County Mutual Insurance Co. v. Guin*, the court indicated that the insurer becomes the agent of the insured and defense counsel becomes the "sub-agent" in undertaking the defense of the insured.[955] Accordingly, as the insured's agent, the insurer is responsible for the "investigation, preparation for defense of the lawsuit, trial of the case and reasonable attempts to settle."[956] But the court later characterized the broad language in *Guin* as mere dicta.[957]

Importantly, in *Traver* the court held that "a liability insurer is not vicariously responsible for the conduct of an independent attorney it selects

261, 265 (N.Y. 1988) (insurer not vicariously liable), *and* Brown v. Lumbermens Mut. Cas. Co., 369 S.E.2d 367, 371 (N.C. Ct. App. 1988) (holding insurer not liable because it had no control over litigation), *with* Am. Chem. Soc'y v. Leadscope, Inc., 978 N.E.2d 832, 854 (Ohio 2012) ("The better reasoned opinions hold that a client may be vicariously liable for its attorney's torts only if the client authorized or ratified the conduct."), *and* Givens v. Mullikin, 75 S.W.3d 383, 390 (Tenn. 2002) (holding "that an insurer and an insured may be held vicariously liable for the tortious acts or omissions of an attorney hired to defend the insured, if the attorney's tortious actions were directed, commanded, or knowingly authorized by the insurer or by the insured"), *and* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:6 (2018 ed.) ("Most jurisdictions have concluded that the insurer's duty to defend is non-delegable, and, therefore, an insurer cannot insulate itself from liability merely by hiring competent counsel.").

[952] *Feliberty*, 527 N.E.2d at 265; *see Lifestar Response of Ala.*, 17 So. 3d at 218 (quoting *Feliberty*).

[953] *Feliberty*, 527 N.E.2d at 265; *see Lifestar Response of Ala.*, 17 So. 3d at 218 (quoting *Feliberty*).

[954] 980 S.W.2d 625, 628 (Tex. 1998).

[955] 723 S.W.2d 656, 659 (Tex. 1987).

[956] *Id.* There was no contention, however, that Ranger was negligent in investigation or trial of the lawsuit. *See id.*

[957] *See* Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 849 (Tex. 1994).

to defend an insured."[958] The court reasoned that defense counsel has certain ethical duties to the insured such as unqualified loyalty and independence, meaning the attorney must protect the insured even when the insurer's instructions are to the contrary.[959] Texas courts regularly apply the *Traver* rule.[960]

It should be noted, however, that Texas "common law imposes a duty on liability insurers to settle third-party claims against their insureds when reasonably prudent to do so."[961] This is known as the *Stowers* Doctrine,[962] and insurers may be liable for negligently failing to settle *even if* its decision was in line with defense counsel's advice.[963] This liability is limited to the insurer's failure to settle.[964]

[958] 980 S.W.2d at 628; *see also* Taylor v. Allstate Ins. Co., 356 S.W.3d 92, 97 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

[959] *Traver*, 980 S.W.2d at 628.

[960] *E.g.*, Cain v. Safeco Lloyds Ins. Co., 239 S.W.3d 895, 898 (Tex. App.—Dallas 2007, no pet.); Jenkens & Gilchrist v. Riggs, 87 S.W.3d 198, 203 (Tex. App.—Dallas 2002, no pet.); *see also* Mid-Continent Cas. Co. v. Eland Energy, Inc., 709 F.3d 515, 521 (5th Cir. 2013).

[961] Phillips v. Bramlett, 288 S.W.3d 876, 879 (Tex. 2009).

[962] *See id.* (citing G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. 1929)).

[963] *See* Ranger Cty. Mut. Ins. Co. v. Guin, 723 S.W.2d 656, 659 (Tex. 1987) (stating that insurer would be responsible for defense counsel's negligence); Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, 215 S.W.2d 904, 932 (Tex. App.—Beaumont 1948, writ ref'd n.r.e.) ("Responsibility for Insured's defense rested upon Insurer not upon Insurer's agents.").

[964] *See In re* Segerstrom, 247 F.3d 218, 228 (5th Cir. 2001) (observing that "[g]enerally, tort claims alleging breach of [the insurer's duty of reasonable care] have focused on an insurance company's failure to settle claims," and holding that insurer is not vicariously liable for attorney's failure to address conflict of interest).

CHAPTER VI: THE RELATIONSHIP BETWEEN THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT AND LEGAL MALPRACTICE

§ 1 Effect of Violation of Ethical Codes and Rules

Ethical rules and standards have long governed the professional responsibilities of attorneys. The ethical rules dictating the standard of conduct to which attorneys should conform and the civil consequences of noncompliance interrelate in diverse ways. The ethical rules are quasi-statutory, are enforced in disciplinary proceedings by the State Bar, and set forth the standard of behavior to which attorneys should adhere.[965] In addition to serving as the applicable standard of conduct and a basis for discipline, ethical considerations have been asserted as an independent basis of tort liability.[966]

The Texas Disciplinary Rules of Professional Conduct ("Texas Disciplinary Rules") set forth principles to which attorneys should aspire and rules to which they must conform.[967] An attorney must not violate the

[965] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 10, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R., art. X § 9) ("The Texas Rules of Professional Conduct define proper conduct for purposes of professional discipline."); Anderson Producing, Inc. v. Koch Oil Co., 929 S.W.2d 416, 421 (Tex. 1996) (stating that "while the disciplinary rules do not necessarily set forth controlling standards for motions to disqualify, they provide relevant guidelines for such motions"); Ayres v. Canales, 790 S.W.2d 554, 556 n.2 (Tex. 1990) (holding that disciplinary Rule 3.08 "articulates considerations relevant to a procedural disqualification determination"); Kuhn, Collins & Rash v. Reynolds, 614 S.W.2d 854, 856 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e.) ("In applying the Disciplinary Rules, interpretative guidance is found in the basic principles set out in the Canons and in the objectives stated in the Ethical Considerations."); Sealed Party v. Sealed Party, No. CIV.A.H-04-2229, 2006 WL 1207732, at *8 (S.D. Tex. May 4, 2006) ("The [Texas Disciplinary Rules of Professional Conduct] are quasi-statutory and are enforced in disciplinary proceedings by the State Bar.").

[966] *See* Heath v. Herron, 732 S.W.2d 748, 751–52 (Tex. App.—Houston [14th Dist.] 1987, writ denied); Citizens State Bank of Dickinson v. Shapiro, 575 S.W.2d 375, 386 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). *But see* Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 159 n.2 (Tex. 2004) ("[T]he Rules do not define standards of civil liability of lawyers for professional conduct."); Greenberg Traurig of N.Y., P.C. v. Moody, 161 S.W.3d 56, 96 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("Texas disciplinary rules . . . do not establish the standard of care or civil liability for attorneys.").

[967] By order of the Texas Supreme Court dated October 17, 1989, the Texas Code of Professional Responsibility was repealed and the Texas Disciplinary Rules of Professional Conduct were adopted effective January 1, 1990. The Order of the Texas Supreme Court, in part, states:

> It is further ordered that the professional conduct, prior to the effective date of this Order, of all attorneys licensed to practice law in this state shall continue to be

rules, "knowingly assist or induce another to do so, or do so through the acts of another," regardless of whether such violation occurred during an attorney-client relationship.[968] An attorney also must avoid "conduct involving dishonesty, fraud, deceit, or misrepresentation."[969]

Nor may an attorney "engage in conduct constituting obstruction of justice,"[970] or "engage in conduct that constitutes barratry as defined by the law of this state,"[971] or "violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law."[972]

Notwithstanding the promulgation of ethical principles to which all attorneys must adhere, Section 15 of the Preamble to the Texas Disciplinary Rules provides that the "[v]iolation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a

> governed by the Texas Code of Professional Responsibility. It is further ordered that the professional conduct on and after the effective date of this order, of all attorneys licensed to practice law in this state . . . be governed by the Texas Disciplinary Rules of Professional Conduct.

TEX. STATE BAR R. art. X, § 9 (Historical Notes), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West Supp. 2013). As a consequence, the canons, ethical considerations, and disciplinary rules were all replaced. *See id.*; *see also In re* ProEducation Intern., Inc., 587 F.3d 296, 300 (5th Cir. 2009).

[968] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a)(1); *see* Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 262 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *see* O'Quinn v. State Bar of Tex., 763 S.W.2d 397, 401 (Tex. 1988).

[969] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a)(3); Am. Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523, 528 (5th Cir. 1992); Sorenson v. Comm'n for Lawyer Discipline, 349 S.W.3d 73, 76 (Tex. App.—El Paso 2010, no pet.); Olsen v. Comm'n for Lawyer Discipline, 347 S.W.3d 876, 883–84 (Tex. App.—Dallas 2011, pet. denied); Meachum v. Comm'n for Lawyer Discipline, 36 S.W.3d 612, 615 (Tex. App.—Dallas 2000, pet. denied).

[970] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a)(4).

[971] *See id.* R. 8.04(a)(9); TEX. PENAL CODE ANN. § 38.12 (West 1974); TEX. GOV'T CODE ANN. §§ 82.065, 82.0651 (West 2017) (commonly referred to as the civil barratry statutes); Medlock v. Comm'n for Lawyer Discipline, 24 S.W.3d 865, 869–70 (Tex. App.—Texarkana 2000, no pet.). Barratry is generally defined as "[v]exatious incitement to litigation, esp. by soliciting legal client." *Barratry*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* State Bar of Tex. v. Kilpatrick, 874 S.W.2d 656, 658 (Tex. 1994) (stating that an attorney may be disciplined for barratry in civil proceeding without having been convicted in criminal proceeding).

[972] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a)(12). In one jurisdiction, an attorney was disqualified in a lawsuit when, in violation of a state ethics rule, he interviewed ex parte a former general counsel of another party in the suit and obtained confidential information concerning the litigation. *See* Zachair, Ltd. v. Driggs, 965 F. Supp. 741, 753–54 (D. Md. 1997), *aff'd*, No. 97-1811, 1998 WL 211943 (4th Cir., Apr. 30, 1998).

client has been breached."[973] The Preamble further explains that "nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." [974] Consistent with this concept, Texas courts have repeatedly held that a violation of the state bar rules does not create a private cause of action.[975] Nevertheless, Texas courts have continued to use those same ethical rules as standards of conduct for attorneys in legal malpractice cases.[976] As recognized by the Fourteenth Court of Appeals:

[973] TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 15; Wright v. Sydow, 173 S.W.3d 534, 549 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) ("A violation of the Disciplinary Rules does not necessarily establish a cause of action, nor does it void an otherwise valid contract executed outside of the attorney-client relationship."); *see also* Anderson Producing, Inc. v. Koch Oil Co., 929 S.W.2d 416, 421 (Tex. 1996).

[974] TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 15; Fleming v. Kinney *ex rel*. Shelton, 395 S.W.3d 917, 931 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

[975] *See, e.g.*, Jones v. Blume,196 S.W.3d 440, 450 (Tex. App.—Dallas 2006, no pet.); Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc., 779 S.W.2d 474, 479 (Tex. App.—El Paso 1989, writ denied) ("[A] violation of state bar rules does not create a private cause of action."); Blanton v. Morgan, 681 S.W.2d 876, 878–79 (Tex. App.—El Paso 1984, writ ref'd n.r.e.); Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

[976] *See, e.g.*, *In re* Frazin, No. 02-32351-bjh-13, 2008 WL 5214036, at *57 (Bankr. N.D. Tex. Sept. 23, 2008) ("Texas courts have used the Rules as standards for conduct in malpractice and breach of fiduciary duty cases."); Nolan v. Foreman, 665 F.2d 738, 740–43 (5th Cir. 1982) (holding that an alleged violation of disciplinary rules DR 2-106 (reasonableness of fees), DR 2-110(A)(Z) (withdrawal of attorney from employment), and DR 6-102 (prohibiting an attorney in advance from attempting to exonerate himself from malpractice) stated "a cause of action for legal malpractice in the nature of a tort"); Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 905 (Tex. App.—Dallas 2001), *rev'd on other grounds*, 145 S.W.3d 150 (Tex. 2004) (noting that the Texas Disciplinary Rules can be considered by the trier of fact as evidence of a violation of an existing duty of care for claims of legal malpractice or breach of fiduciary duty); *Anderson Producing*, 929 S.W.2d at 422 (stating that an attorney may be witness at trial); *Ex parte* Acosta, 672 S.W.2d 470, 474–75 n.6 (Tex. Crim. App. 1984) (en banc) (holding that an attorney breached his legal duty to clients and violated professional responsibility by failing to apprise them of the dangers of multiple representation); Warrilow v. Norrell, 791 S.W.2d 515, 519 (Tex. App.—Corpus Christi 1989, writ denied) ("The rules governing the State Bar of Texas have the same force and legal effect upon the matters to which they relate as the Texas Rules of Civil Procedure have upon the matters to which they relate."); Avila v. Havana Painting Co., 761 S.W.2d 398, 400 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (stating that the code required attorney to deliver client funds promptly, and failure to do so gave rise to cause of action in tort); Heath v. Herron, 732 S.W.2d 748, 751 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (stating that the code's requirement of competent representation mandates that attorney be properly prepared); Sealed Party v. Sealed Party, No. CIV.A. H-04-2229, 2006 WL 1207732, at *8 (S.D. Tex. May 4, 2006) ("[A]lthough the Texas Rules are not dispositive, they may be considered evidence and significantly inform the analysis

> The Texas Disciplinary Rules of Professional Conduct do not define standards for civil liability and do not give rise to private claims. Nonetheless, a court may deem these rules to be an expression of public policy, so that a contract violating them is unenforceable as against public policy. Although courts may, and often have, used these rules as a measure of public policy, they are not required to do so.[977]

§ 2 Following Client's Instructions

In representing a client, an attorney must follow the client's decisions: "(1) concerning the objectives and general methods of representation; (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law; (3) [i]n a criminal case . . . as to a plea to be entered, whether to waive jury trial, and whether the client will testify."[978]

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of the scope of fiduciary duties between attorneys and their clients, as well as between attorneys and their former clients."); State v. Malone, 692 S.W.2d 888, 896 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.) ("State Bar Rules are to be given the same force and effect as statutes. The Code of Professional Responsibility is an integral part of the State Bar Rules." (citations omitted)); State v. Baker, 539 S.W.2d 367, 372 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) ("[A]lthough the canons of ethics and their ethical considerations set out in the Rules are not binding upon this Court, those canons are highly persuasive and are due our utmost consideration."); J.W. Hill & Sons, Inc. v. Wilson, 399 S.W.2d 152, 154 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.) (having "an attorney standing in open court before a jury and the public . . . attempting to represent conflicting interests creates a situation which should never occur under our adversary system of trying cases"). *But see* Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 159 n.2 (Tex. 2004) ("[T]he Rules do not define standards of civil liability of lawyers for professional conduct."); Greenberg Traurig of N.Y., P.C. v. Moody, 161 S.W.3d 56, 96 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("Texas disciplinary rules . . . do not establish the standard of care or civil liability for attorneys.").

[977] Dardas v. Fleming, Hovenkamp & Grayson, P.C., 194 S.W.3d 603, 613 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (emphasis added) (citations omitted); *see also* Wright v. Sydow, 173 S.W.3d 534, 549 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (holding that a settlement agreement would be enforced even if it were executed in violation of a Texas Disciplinary Rule of Professional Conduct and stating that a violation of one of these rules does not necessarily void a contract); Primrose Operating Co., Inc. v. Jones, 102 S.W.3d 188, 193 (Tex. App.—Amarillo 2003, pet. denied) (stating that disciplinary rules govern non-disciplinary proceedings only to the extent that they manifest public policy).

[978] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a)(1)–(3); Lopez v. Maldonado, No. 13-15-00042-CV, 2016 WL 8924108, at *3 (Tex. App.—Corpus Christi, no pet.) (holding contingent fee agreement requiring attorney's consent to settle voidable at client's option); Davis Law Firm v. Bates, No. 13-13-00209-CV, 2014 WL 585855, at *3 (Tex. App.—Corpus Christi Feb. 13, 2014, no pet.) (holding that a contingency fee contract requiring client to obtain attorney's consent to

A failure to follow the client's decisions or instructions could subject an attorney to disciplinary action[979] as well as malpractice liability.[980] Conversely, an attorney has no duty or obligation to proceed with legal services which the client expressly rejects.[981] Although he must generally abide by the client's instructions, an attorney must "not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent."[982] Thus, where an attorney has confidential information which clearly establishes that his client is likely to commit a criminal or fraudulent act which is likely to result in substantial injury to the financial interests or property of another person, he must promptly make reasonable efforts to

settle violated Rule 1.02(a)(2) of the Texas Disciplinary Rules, which requires an attorney to abide by a client's decision to accept an offer of settlement, and was unenforceable as against public policy (citing Sanes v. Clark, 25 S.W.3d 800, 805 (Tex. App.—Waco 2000, pet. denied))).

[979] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02; Bellino v. Comm'n for Lawyer Discipline, 124 S.W.3d 380, 386 (Tex. App.—Dallas 2003, pet. denied); Gamez v. State Bar of Tex., 765 S.W.2d 827, 831 (Tex. App.—San Antonio 1988, writ denied) (holding that attorney's failure to discuss with divorce client matter of which spouse received the right to claim income tax exemptions of children of marriage, and his failure to obtain client's approval of tax exemption order granting exemptions to client's spouse constituted intentional failure to seek lawful objectives of client and damage to client, in violation of Code of Professional Responsibility).

[980] *See* Garrett v. Giblin, 940 S.W.2d 408, 410 (Tex. App.—Beaumont 1997, no writ); Zidell v. Bird, 692 S.W.2d 550, 553 (Tex. App.—Austin 1985, no writ); Rhodes v. Batilla, 848 S.W.2d 833, 840–41 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *see also* Willis v. Maverick, 760 S.W.2d 642, 643 (Tex. 1988) (alleging attorney had failed, as instructed, to retain provision in agreement preventing sale of marital home); Montfort v. Jeter, 567 S.W.2d 498, 499 (Tex. 1978) (alleging attorney agreed to entry of judgment against the client without client's consent); Crawford v. Davis, 148 S.W.2d 905, 907–08 (Tex. Civ. App.—Eastland 1941, no writ) (alleging attorney's failure to obey his client's instruction to sue before limitations barred his claim on note); Lane v. Mitchell, 289 S.W. 195, 196 (Tex. Civ. App.—San Antonio 1926, writ dism'd w.o.j.) (alleging that an attorney cannot ignore one whom he acknowledged as employer and who paid fees, and he was unauthorized to receive instructions as to her case); *see also* Franks v. Roades, 310 S.W.3d 615, 629 (Tex. App.—Corpus Christi 2010, no pet.) (discussing the exemptions within Rule 1.02 that permit an attorney not to follow his client's decisions and finding there to be no basis for malpractice lawsuit).

[981] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02 cmt. 2 (a lawyer must disclose all good faith settlement offers unless prior communications with the client clearly established that client will not accept the particular offer); *see also Rhodes*, 848 S.W.2d at 840–41; *Zidell*, 692 S.W.2d at 553.

[982] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(c). The attorney, however, "may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning, or application of the law." *Id.*

dissuade the client from committing the crime or fraud.[983] Likewise, where an attorney knows his client expects to be represented in activities that are improper, the attorney must "consult with the client regarding the relevant limitations on the lawyer's conduct."[984]

§ 3 Possessing Requisite Skill

It is well settled that in representing a client an attorney must not neglect a legal matter entrusted to him, or fail to carry out completely the obligations he owes to a client.[985] In addition, an attorney must not accept or continue to represent a client in a legal matter which he knew or should

[983] *See id.* R. 1.02(d); *see generally* Tex. Comm. on Prof'l Ethics, Op. 442, 50 TEX. B.J. 766 (1987) (holding that attorneys who learned during course of representation that prior to representation their clients fraudulently obtained and converted to their own use property belonging to a third party, may not allow their clients to perjure themselves and should warn their clients that in the event they perjure themselves, the attorneys would have to bring the matter to court's attention and ask the court to permit withdrawal); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(e) ("When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.").

[984] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(f).

[985] *See id.* R. 1.01(b)(1)–(2). In *Glaze v. State*, the court determined that:

> [H]aving undertaken to represent the appellant, [the attorney] should have thereafter used proper care to safeguard his client's interest, regardless of intervening financial difficulties. A court cannot function if its officers are permitted to place their own financial interests ahead of the correlative rights of their clients. Nor may retained counsel who has not been fully compensated for past services wait until a critical stage of the proceedings and then bow out of the case leaving the accused and the court to work out the disposition of the case.

628 S.W.2d 252, 255 (Tex. App.—Beaumont 1982), *vacated on other grounds*, 675 S.W.2d 768 (Tex. Crim. App. 1984) (citations omitted); *see also* Allison v. Comm'n for Lawyer Discipline, 374 S.W.3d 520, 524–25 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (lawyer violated Rule 1.01(b)(1) by failing to file a relief application, or obtain extension, on behalf of an immigration client by deadline established by court, resulting in the court holding the client waived right to contest deportation); Joyner v. Comm'n for Lawyer Discipline, 102 S.W.3d 344, 346 (Tex. App.—Dallas 2003, no pet.) (lawyer violated Rule 1.01(b)(1) by failing to file suit within limitations period, failing to respond to discovery, respond to a motion or file any post-judgment motions or notice of appeal); Hawkins v. Comm'n for Lawyer Discipline, 988 S.W.2d 927 (Tex. App.—El Paso 1999, pet. denied) (attorney who failed to advise criminal client when client requested advice, failed to appear for various court hearings, and failed to appear to defend client at hearings before new counsel was appointed, despite court's request to do so, violated Rule 1.01).

have known was beyond his competence.[986] Many years ago, the standard of skill and care which attorneys are required to satisfy was succinctly set forth in a jury charge:

> Attorneys at law engaged in the practice of their profession are held to undertake to use a reasonable degree of care and skill, and to possess, to a reasonable extent, the knowledge requisite to a proper performance of the duties of their profession; and if injury results to the client as a proximate consequence of the want of such knowledge or skill, or from a failure to exercise such reasonable care and diligence, they are liable in damages to the extent of the injury sustained by their client.[987]

There are, however, instances when an attorney may ethically represent a client when he does not possess the necessary skills to handle the matter. In an "emergency" situation, an attorney may accept a legal matter even though he does not possess the requisite degree of skill if his advice or assistance is reasonably required and if he limits the advice and assistance to matters that are only reasonably necessary under the circumstances.[988]

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[986] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a); McIntyre v. Comm'n for Lawyer Discipline, 169 S.W.3d 803, 808–09 (Tex. App.—Dallas 2005, pet. denied) (affirming trial court's holding that lawyer knew, or should have known, that representing a client in bankruptcy court was beyond his competence and was in violation of the disciplinary rule); *see also* Flores v. State, 576 S.W.2d 632, 634 (Tex. Crim. App. 1978) (en banc) (holding that an attorney must acquaint himself not only with the law but also the facts of the case before he can render reasonably effective assistance of counsel; the size of the burden on counsel to acquaint himself with facts will vary depending upon complexities of case, the plea to be entered by the accused, punishment that may be assessed, and other factors); Tex. Comm. on Prof'l Ethics, Op. 412, 47 TEX. B.J. 48 (1984) (holding that an attorney for organization of peace officers who issues an erroneous opinion as to the obligations of the peace officers would be in violation of the Code if the opinion was "issued by the attorney with knowledge that the opinion recommended illegal conduct" or was "a result of the failure of the attorney to act competently in the circumstances").

[987] Patterson & Wallace v. Frazer, 79 S.W. 1077, 1079 (Tex. Civ. App.—El Paso 1904, no writ); *see also* Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 530 (Tex. App.—Austin 2004, no pet.).

[988] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a)(2) ("A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless . . . the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances."); *McIntyre*, 169 S.W.3d at 808–09 (Tex. App.—Dallas 2005, pet. denied) (holding attorney's representation of client in bankruptcy court "went beyond offering advice and

Although Rule 1.01(a)(2) does not define "emergency," there is no suggestion that the rule was intended to be unduly restrictive. In addition, a lawyer may accept or continue employment in a legal matter beyond the lawyer's competence if another lawyer who is competent to handle the matter is associated in the matter and the client provides informed consent of the engagement.[989]

§ 4 Communicating with Client

An attorney must keep a client reasonably informed about the status of the representation and must promptly comply with the client's reasonable requests for information related thereto.[990] Furthermore, the attorney must explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[991] An attorney should therefore set up some system by which he or she can routinely advise the client of the status of the representation. Also, the attorney should convey to the client the information critical to the client's determination of important issues. A subsequent letter confirming such communications also may be prudent.

§ 5 Preserving Confidentiality

A breach of the client's confidentiality could subject the attorney to liability.[992] Under Rule 1.05, an attorney must not knowingly reveal

assistance . . . [during] the emergency" and attorney "knew or should have known representing [client] in the bankruptcy court was beyond his competence").

[989] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a)(1).

[990] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03(a); Beard v. Comm'n for Lawyer Discipline, 279 S.W.3d 895, 902–04 (Tex. App.—Dallas 2009, pet. denied) (holding that the lawyer failed to keep client advised of status of case by not responding to clients' letter, by failing to return clients' file despite repeated requests, and failing to inform them that he had had judgment in their favor set aside on appeal).

[991] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03(b); Hines v. Comm'n for Lawyer Discipline, 28 S.W.3d 697, 701 (Tex. App.—Corpus Christi 2000, no pet.); Emp'rs Cas. Co. v. Tilley, 496 S.W.2d 552, 558–59 (Tex. 1973).

[992] *See* Sealed Party v. Sealed Party, No. CIV.A. H-04-2229, 2006 WL 1207732, at *9 (S.D. Tex. May 4, 2006); Perez v. Kirk & Carrigan, 822 S.W.2d 261, 266 (Tex. App.—Corpus Christi 1991, writ denied); *see also* Gleason v. Coman, 693 S.W.2d 564, 566–67 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (holding that an attorney violated ethical rule which prohibits a lawyer from revealing a client's confidences or secrets, but plaintiff, seeking temporary injunction against attorney, failed to prove he had no adequate remedy at law).

confidential information of a client or a former client to a third party against the client's wishes.[993] This duty to preserve client confidences outlasts the attorney's employment.[994]

The Texas Disciplinary Rules define "confidential information" as both "privileged information" and "unprivileged client information."[995]

> "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-cient privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the attorney during the course of or by reason of the representation of the client.[996]

An attorney is generally prohibited from revealing the confidential information of a client or a former client to anyone other than the client, the client's representatives, or the members, associates, or employees of the attorney's law firm.[997] An attorney also cannot use confidential information,

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[993] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(1)(i); Paxton v. City of Dall., 509 S.W.3d 247, 253 n.33 (Tex. 2017) ("Texas Disciplinary Rule of Professional Conduct 1.05(b) imposes a duty of confidentiality and prohibits a lawyer from knowingly revealing confidential information."); P & M Elec. Co. v. Godard, 478 S.W.2d 79, 80 (Tex. 1972) ("An attorney may not represent conflicting interests; and may not divulge a client's secrets or confidences, or accept employment from others in matters adversely affecting an interest of the client with respect to which confidence has been reposed."); Lott v. Ayres, 611 S.W.2d 473, 475 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) ("An attorney may not . . . divulge a client's secrets or confidences, or accept employment from others in matters adversely affecting an interest of the client with respect to which confidence has been reposed."); Cochran v. Cochran, 333 S.W.2d 635, 641 (Tex. Civ. App.—Houston [14th Dist.] 1960, writ ref'd n.r.e.) (stating that Article 713 of the Texas Code of Criminal Procedure, which provides that an attorney should not disclose a communication made to him by his client during the attorney-client relationship, is a declaration of common law rule of evidence and applies to both criminal and civil cases).

[994] *Sealed Party*, 2006 WL 1207732, at *7; *Gleason*, 693 S.W.2d at 566.

[995] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a).

[996] *Id.*

[997] *See id.* R. 1.05(b)(1)(ii); Teter v. Comm'n For Lawyer Discipline, 261 S.W.3d 796, 800 (Tex. App.—Dallas 2008, no pet.) (uncontroverted summary judgment evidence showed that

either privileged or unprivileged, of a former client to the client's disadvantage after the representation is terminated unless the former client consents after consultation or the confidential information has become generally known.[998]

§ 6 Exceptions to Non-Disclosure of Confidential Information

There are numerous exceptions to the general rule of non-disclosure of confidential information. An attorney may reveal confidential information:

> (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
>
> (2) When the client consents after consultation.
>
> (3) To the client, the client's representatives, or the members, associates, and employees of the firm, except when otherwise instructed by the client.
>
> (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule[] of Professional Conduct, or other law.
>
> (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
>
> (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the

lawyer revealed confidential information about his former client to her employer, in violation of TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(1)(ii)).

[998] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(3); *Sealed Party*, 2006 WL 1207732, at *9; Lott v. Ayres, 611 S.W.2d 473, 475 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (stating that an attorney may not divulge a client's secrets or confidences, or accept employment from another in matters adversely affecting an interest of client with respect to which confidence has been reposed). Similarly, where an attorney's representation of a client has become unreasonably difficult due to the client's refusal to communicate with his attorney and the lack of communication requires the attorney to seek withdrawal from the representation, the attorney is nonetheless prohibited from disclosing to the court that the client's failure to communicate forms the basis of the withdrawal. Tex. Comm. on Prof'l Ethics, Op. 669 (March 2018). The lack of communication is itself "confidential information" that cannot be used to the disadvantage of the client absent the client's consent. *Id.* Accordingly, the attorney may only disclose that "professional considerations require withdrawal." *Id.*

lawyer's associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.[999]

However, when an attorney has confidential information clearly establishing that a client is "likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person," he must reveal such confidential information to the extent reasonably necessary "to prevent the client from committing the criminal or fraudulent act."[1000] An attorney also must reveal confidential information when required to do so by certain other disciplinary rules,[1001] including when "disclosure is necessary to avoid assisting a criminal or fraudulent act."[1002]

[999] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(1)–(8); *see also* Pollard v. Merkel, 114 S.W.3d 695, 701 (Tex. App.—Dallas 2003, pet. denied) (testimony of attorney authorized by the self-defense exception to nondisclosure set out in Texas Rule 1.05(c)(6)); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 341 (1968), *reprinted in* 23 BAYLOR L. REV. 876 (1972) (stating that when justice requires an attorney to sue a client for his fees, it is not unethical for the attorney to use confidential information obtained from the client where clearly necessary to protect his rights). The ABA also recognizes a "generally known" exception to the duty of former-client confidentiality. Am. Bar Assoc. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 479 (Dec. 15, 2017), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_479.authcheckdam.pdf. The "generally known" exception applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. *Id.* Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information. *Id.*

[1000] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(e); *see also* Kennedy v. Gulf Coast Cancer & Diagnostic Ctr. at Se., Inc., 326 S.W.3d 352, 362 (Tex. App.—Houston [1st Dist.] 2010, no pet.); Bernstein v. Portland Sav. & Loan Ass'n, 850 S.W.2d 694, 701–02 (Tex. App.—Corpus Christi 1993, writ denied).

[1001] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(f).

[1002] *Id.* R. 3.03(a)(2); *see In re* Brown, 511 B.R. 843, 852 (Bankr. S.D. Tex. 2014) (finding that counsel's agreement made in court to produce cellular telephone when he knew it was lost

In addition, if a lawyer comes to know of the falsity of offered material evidence, and good faith efforts to gain authorization from the client to correct or withdraw the false evidence fail, the lawyer must then take "reasonable remedial measures, including disclosure of the true facts."[1003] Finally, a lawyer must not fail to disclose a material fact when disclosure is required to either avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.[1004]

A. Criminal Activity

Rule 1.05(b) of the Texas Disciplinary Rules of Professional Conduct generally prohibits the disclosure of confidential information. Nevertheless, an attorney may reveal confidential information "when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal . . . act,"[1005] or when it "reasonably appears necessary to rectify the consequences of a client's criminal . . . act in the commission of which the lawyer's services had been used."[1006]

There are also occasions when an attorney may even be compelled to disclose *potential* criminal conduct. If an attorney has confidential information "that a client is likely to commit a criminal . . . act that is likely

constituted "a fraud on the Court"); Tex. Comm. on Prof'l Ethics, Op. 473, 55 TEX. B.J. 521 (1992) (stating that an attorney appointed to represent a defendant in a criminal case after the defendant has signed a sworn statement that he is indigent and has insufficient funds to hire an attorney is required under Rules 1.05(f) and 3.03(a) to disclose to a tribunal in order to avoid assisting a criminal or fraudulent act that the defendant was not indigent when he signed the request for appointed counsel and could pay for retained counsel).

[1003] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(b); *see* Tex. Comm. on Prof'l Ethics, Op. 473, *reprinted in* 55 TEX. B.J. 521 (1992).

[1004] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(2); *see In re* Rosenthal, No. H-04-186, 2008 WL 983702, at *12 (S.D. Tex. Mar. 28, 2008) (holding that attorney violated Rule 3.03(a)(2) by failing to disclose that documents sought by subpoena had been deleted); Tex. Comm. on Prof'l Ethics, Op. 473, *reprinted in* 55 TEX. B.J. 521 (1992).

[1005] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(7); Comm. on Interpretation of the Code of Prof'l Resp., State Bar of Tex., Op. 603, *reprinted in* 74 TEX. B.J. 74 (2010) (lawyer may disclose confidential information of a client's intention to commit fraud if the requirement of subparagraph 1.05(c)(7) are met, the lawyer has first endeavored unsuccessfully to convince the client not to proceed with the fraud, the lawyer believes that revealing the client's intent will prevent the fraud from occurring, and the disclosure is limited to content necessary to that purpose).

[1006] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(8); *In re* Seigel, 198 S.W.3d 21, 33 (Tex. App.—El Paso 2006, no pet.).

to result in death or substantial bodily harm to a person," the attorney must disclose such information "to the extent revelation reasonably appears necessary to prevent the client from committing the criminal . . . act."[1007] The rationale is that disclosure may prevent the crime and perhaps potential death or bodily harm. Similarly, ABA Model Rule 3.3(b) compels counsel to disclose known material facts to the court when the lawyer "knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct . . . ."[1008]

B. Fraud

The tension between the attorney-client privilege and the need to protect innocent third parties underlies the dilemma created by an attorney's knowledge of a client's fraudulent conduct.[1009] The legal profession has consistently struggled with the dilemma created by client fraud. It is generally accepted, however, that it would be a "perversion" of the attorney-client privilege to extend it to situations in which a client misuses a lawyer's services to further an illegal or fraudulent scheme.[1010]

Moreover, lawyers have traditionally promoted themselves as "officers of the court."[1011] Consequently, the attorney's role as "officer of the court" is another reason why in certain instances attorneys may be obligated to subordinate the interests of their clients to the interests of society.[1012]

[1007] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(e); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)–(2) (2015) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or using the lawyer's services.").

[1008] MODEL RULES OF PROF'L CONDUCT R. 3.3(a), (b) (2015).

[1009] *See* CHARLES L. WOLFRAM, MODERN LEGAL ETHICS § 12.6, at 670 (1986 ed.) ("The clash between those positions has produced, by any measure, the most heated professional and public controversy concerning the Model Rules.").

[1010] *See* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE, § 95, at 584 (7th ed. 2016).

[1011] *See generally* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989); *see also* Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 430 (Tex. 1998) ("As officers of the court, lawyers voluntarily accept a 'fiduciary responsibility' to the justice system and have 'a duty to protect its integrity.'").

[1012] *See* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 48 (1989).

§ 7 Future Client Conduct

The Texas Disciplinary Rules of Professional Conduct and the ABA Model Rules of Professional Conduct generally prohibit counsel from disclosing a client's confidences unless the client intends in the future to commit a crime or fraudulent act. Upon becoming aware of such intent by the client, counsel's first duty is to dissuade the client from committing the act.[1013] If persuasion fails, counsel cannot continue to represent the client. In instances of fraud, for example, continued representation would have the undesirable effect of assisting the client in perpetrating a fraud on a third party or perhaps even a court. Counsel facing this dilemma has but one choice--he must withdraw.[1014] Withdrawal is also compelled because of the attorney's obligation as an officer of the court not to participate in or to perpetrate a fraud.[1015]

Withdrawal, however, may present its own set of problems. Sometimes withdrawal before trial is not possible because trial is imminent, other counsel is unavailable, or the discovery of impending client fraud or collusion does not take place until the trial itself. The most difficult situation arises when the client during trial insists on taking the witness stand while counsel knows the anticipated testimony is perjured.[1016] Counsel's effort to rectify the situation can expose the client to a perjury

[1013] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(d) ("When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud."); *see also Benton*, 980 S.W.2d at 430; MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. (2015).

[1014] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(a)(1) ("A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw . . . if . . . the representation will result in violation of Rule 3.08, or other applicable rules of professional conduct [e.g., violation of Rule 1.02(c) 'a lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent'].."); *see also* Plunkett v. State, 883 S.W.2d 349, 355 (Tex. App.—Waco 1994, pet. ref'd) ("If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw.").

[1015] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(b)(3); Pena v. State, 932 S.W.2d 31, 32 (Tex. App.—El Paso 1995, no pet.) (holding that counsel is under an obligation not to prosecute a frivolous appeal); Meza v. State, 206 S.W.3d 684, 688 (Tex. Crim. App. 2006) (same).

[1016] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(b)(2)–(4), (7); MODEL RULES OF PROF'L CONDUCT R. 3.3 & cmt. (2015); *see also* Staples v. McKnight, 763 S.W.2d 914, 917 (Tex. App.—Dallas 1988, writ denied) (permitting withdrawal where the client was going to commit perjury).

charge, or lead to the assertion that by making such effort, counsel has violated the confidentiality requirement of the attorney-client privilege, thereby exposing him to potential liability. Conversely, if counsel does not seek to prevent the perjured testimony, his participation, although passive, might be construed as participation in the impropriety and a deception on the court. In such event, disciplinary action and even court-imposed sanctions are possibilities.[1017]

An attorney may disclose confidential information if it is necessary to prevent the client from committing a fraudulent act.[1018] Since an attorney may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation,"[1019] an attorney is also barred from counseling or assisting a client in conduct the attorney knows to be illegal or fraudulent.[1020] Accordingly, attorneys may also reveal confidential information when necessary to rectify the consequences of the client's fraudulent act when the attorney's services have been used in the commission of such act.[1021]

Furthermore, attorneys must disclose certain confidential information when it appears the client's fraudulent act is likely to result in death or substantial bodily harm to a person.[1022] Likewise, ABA Model Rule 3.3(b) compels counsel to disclose information to the court as a remedial measure

[1017] *See* Edward Wilkinson, *"That's A Damn Lie!": Ethical Obligations of Counsel When A Witness Offers False Testimony in A Criminal Trial*, 31 ST. MARY'S L.J. 407, 425 (2000) ("[R]etraction of false testimony might not insulate a lawyer from sanctions if the false testimony had greater ramifications than merely supporting a theory of defense that counsel later dismisses or withdraws.").

[1018] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(7); Bernstein v. Portland Sav. & Loan Ass'n, 850 S.W.2d 694, 701–02 (Tex. App.—Corpus Christi 1993, writ denied). *Cf.* Kennedy v. Gulf Coast Cancer & Diagnostic Ctr. at Se., Inc., 326 S.W.3d 352, 362–63 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding that Rule 1.05(e) did not allow corporation's former in-house counsel to disclose legal memo against corporation's wishes, despite counsel's argument that rules allow attorney to disclose otherwise confidential information in cases in which client is likely to commit a criminal or fraudulent act resulting in death or substantial bodily harm, as memo would not apparently apply to prospective conduct).

[1019] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a)(3); Thawer v. Comm'n for Lawyer Discipline, 523 S.W.3d 177, 179 (Tex. App.—Dallas Mar. 6, 2017, no pet.).

[1020] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(c).

[1021] *See id.* R. 1.05(c)(8). *But see In re* Seigel, 198 S.W.3d 21, 33 (Tex. App.—El Paso 2006, no pet.) (no duty to disclose client confidences because no evidence client's testimony was perjurious).

[1022] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(e); *Bernstein*, 850 S.W.2d at 701; *Kennedy*, 326 S.W.3d at 362–63.

when the lawyer knows his or her client "intends to engage, is engaging or has engaged in criminal or fraudulent conduct . . . ."[1023]

Rule 1.05(c)(8) of the Texas Disciplinary Rules of Professional Conduct permits an attorney to reveal his client's confidential information "[t]o the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the [attorney's] services had been used."[1024] Furthermore, under Rule 1.15(a), if counsel fails, for example, to prevent the perjured testimony or false evidence, he should seek to withdraw.[1025] If withdrawal cannot occur for some reason, counsel should disclose the perjury or false evidence to the court.[1026] It is then for the court to determine what should be done, such as ordering a mistrial or mandating other appropriate relief.

[1023] MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2015). For a discussion of an approach that would permit, but not require, the disclosure of client confidences, see generally Kenneth J. Drexler, Note, *Honest Attorneys, Crooked Clients and Innocent Third Parties: A Case for More Disclosure*, 6 GEO. J. LEGAL ETHICS 393 (1992). *See also* Ken Strutin, *Preserving Attorney-Client Confidentiality at the Cost of Another's Innocence: A Systemic Approach*, 17 TEX. WESLEYAN L. REV. 499 (2011) (discussing granting transactional immunity to a client confessing to a crime to avoid forcing an attorney to disclose client confidences to preserve innocent nonclient from substantial harm).

[1024] Comment 12 to TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 provides:

> [T]he lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.02(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Since the lawyer's services were made an instrument of the client's crime or fraud, the lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable.

Id. R. 1.05 cmt. 12; *see also In re Seigel*, 198 S.W.3d at 33; Perez v. State, 129 S.W.3d 282, 289 (Tex. App.—Corpus Christi 2004, no pet.) (holding that trial counsel's disclosure of client's felony conviction that client had not revealed during the pre-sentence investigation was permitted by the Texas Disciplinary Rules of Professional Conduct Rule 1.05(c)(8)).

[1025] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(a)(1); Staples v. McKnight, 763 S.W.2d 914, 917 (Tex. App.—Dallas 1988, writ denied) (lawyer may withdraw if client intends to commit perjury).

[1026] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(4), (7); *In re Seigel*, 198 S.W.3d at 33.

§ 8 Past Client Conduct

For the most part, attorneys are prohibited from revealing a client's past conduct to outside parties without the client's consent.[1027] Exceptions to this general prohibition include (1) when the attorney believes it is necessary to comply with a court order, one of the Texas Disciplinary Rules, or other law;[1028] or (2) "to the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."[1029]

At common law, silence on the part of a party possessing relevant information does not ordinarily constitute fraudulent concealment.[1030] Nevertheless, a duty to disclose ordinarily exists "(1) where there is a previous confidential relationship between the parties; (2) where it appears one or each of the parties expressly reposes a trust or confidence in the other; (3) or where the contract or transaction itself is intrinsically fiduciary and calls for good faith . . . ."[1031] In a fiduciary, trust, or other confidential

[1027] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)–(e); *see also* Prizel v. Karelsen, Karelsen, Lawrence & Nathan, 74 F.R.D. 134, 138 (S.D.N.Y. 1977); *see generally* D.E. Evins, Annotation, *Attorney-Client Privilege As Affected By Its Assertion As to Communications, or Transmission of Evidence, Relating to Crime Already Committed*, 16 A.L.R.3d 1029 (1967); Ken Strutin, *Preserving Attorney-Client Confidentiality at the Cost of Another's Innocence: A Systemic Approach*, 17 TEX. WESLEYAN L. REV. 499, 505 (2011).

[1028] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(4); Paxton v. City of Dall., 509 S.W.3d 247, 253 n.33 (Tex. 2017) (explaining that the Texas attorney general has ruled that information considered confidential pursuant to Rule 1.05 (such as unprivileged client information) is not confidential under the Public Information Act because the rule permits disclosure as necessary to comply with other law).

[1029] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(8); *In re Seigel*, 198 S.W.3d at 33; *Perez*, 129 S.W.3d at 289.

[1030] *E.g.*, Bradford v. Vento, 48 S.W.3d 749, 755 (Tex. 2001) ("As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information.").

[1031] *See* O'Neal v. Burger Chef Sys., Inc., 860 F.2d 1341, 1349 (6th Cir. 1988); Norwood v. Raytheon Co., 237 F.R.D. 581, 598 n.44 (W.D. Tex. 2006). *Compare* Anderson v. Anderson, 620 S.W.2d 815, 819 (Tex. Civ. App.—Tyler 1981, no writ) (upholding trial court's finding of fraudulent concealment where granddaughter maintained a position of trust and confidence with grandmother and failed to disclose material facts about a deed conveyance which injured grandmother), *and* Phillips Petroleum Co. v. Daniel Motor Co., 149 S.W.2d 979, 987–89 (Tex. Civ. App.—Eastland 1941, writ dism'd judgm't cor.) (upholding trial court's finding of no fraudulent concealment where defendant had no duty to disclose discrepancies found in invoices as it did not knowingly conceal material facts about the fraudulent scheme but held good faith belief that account was handled as plaintiffs desired), *with O'Neal*, 860 F.2d at 1349–50 (holding that the district court erred in finding that defendant franchisor owed a duty to franchisee to disclose tentative plans to sell the franchise as

relationship, the person occupying the position of fiduciary is under a duty to reveal the material facts to the other person.[1032] Furthermore, where there is a duty to speak, estoppel may arise from silence.[1033] However, the attorney's obligation to preserve a client's confidences overrides these general principles in most instances.[1034]

Texas Disciplinary Rule 1.05(c)(5) and (6) expressly permit an attorney to reveal a client's confidences when claims or charges are brought against him or her.[1035] However, even though counsel may be permitted to disclose confidential information, he should only exercise such right to the extent necessary to defend such claims or charges.

In the leading case of *United States v. Weger*, the court allowed an attorney to disclose confidential information concerning the client's past crime even though a charge had not yet been brought against the

the case did not fall within the situations requiring a duty to disclose: the agreement created no confidential relationship nor were there any preexisting relationships which may have created a fiduciary duty), *and* Myre v. Meletio, 307 S.W.3d 839, 844–46 (Tex. App.—Dallas 2010, pet. denied) (reversing district court judgment because the evidence was legally insufficient to show fraud where there was no evidence of a confidential relationship or fiduciary relationship between real estate developers and homeowners, thus precluding the imposition of a duty to disclose).

[1032] *See, e.g.*, Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) ("As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation."); *Myre*, 307 S.W.3d at 843 ("A duty to disclose may arise in certain situations involving partial disclosure or when the parties have a confidential or fiduciary relationship.").

[1033] *See* Emp'rs Cas. Co. v. Tilley, 496 S.W.2d 552, 560 (Tex. 1973). In *Tilley*, the court said that the failure of counsel and the insurer to notify the insured of the specific conflict constituted an estoppel. *Id.* at 560–61. Thus, the insurer was estopped from denying its responsibilities under the policy. Pac. Indem. Co. v. Acel Delivery Serv., Inc., 485 F.2d 1169, 1176 (5th Cir. 1973) (holding that insurer's failure to disclose conflict of interest constituted an estoppel); Martin v. Cockrell, 335 S.W.3d 229, 238 (Tex. App.—Amarillo 2010, no pet.) ("The principle of estoppel by silence arises where a person is under a duty to another to speak, but refrains from doing so and thereby leads the other to act in reliance on a mistaken understanding of the facts.").

[1034] *See* Huie v. DeShazo, 922 S.W.2d 920, 925 (Tex. 1996) (holding that trust beneficiaries not entitled to discovery from trustee's attorney despite trustee's duty to disclose); State v. DeAngelis, 116 S.W.3d 396, 407 (Tex. App.—El Paso 2003, no pet.) (holding that crime-fraud exception to attorney-client privilege did not apply to defeat privilege); Bernstein v. Portland Sav. & Loan Ass'n, 850 S.W.2d 694, 701–02 (Tex. App.—Corpus Christi 1993, writ denied) (holding that an attorney is not obligated to disclose client confidences to avert nonviolent fraud).

[1035] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(d)(2)(ii) (allowing an attorney to also reveal "unprivileged client information" to defend against claims of wrongful conduct or to respond to allegations concerning the attorney's representation); *see also* Willy v. Admin. Review Bd., 423 F.3d 483, 497 (5th Cir. 2005); Sealed Party v. Sealed Party, No. Civ.A.H-04-2229, 2006 WL 1207732, at *9 (S.D. Tex. May 4, 2006).

attorney.[1036] The Seventh Circuit Court of Appeals concluded that the attorney-client privilege was not created to shield clients from charges for fraudulent conduct, and a client who abused the attorney-client relationship waived the attorney-client privilege.[1037] Consequently, in those instances where a client abuses the attorney-client relationship and uses the attorney's assistance as a means to commit fraud, "the seal of secrecy is broken" and the attorney-client privilege is waived.[1038]

§ 9 Representing Conflicting Interests

Representing conflicting interests will unquestionably expose an attorney to a claim of legal malpractice. It is axiomatic that an attorney is prohibited from representing opposing parties in the same litigation.[1039] The Texas Disciplinary Rules also bar an attorney from representing a person in other matters if the representation:

[1036] 709 F.2d 1151, 1156 (7th Cir. 1983). The court said:

> The disclosure of a client's confidences, if in fact they are confidences, is authorized by Disciplinary Rule 4-101(C)(4) of the Code of Professional Responsibility which provides that:
>
> "A lawyer may reveal
>
> . . .
>
> (4) confidences or secrets necessary to defend himself or his employees or associates against an accusation of wrongful conduct."
>
> While it is true that there were no formal charges brought against the law firm in the instant case, based on the fact that the fraudulent title opinion was submitted on the law firm's . . . stationery, there could have been a reasonable belief on the part of government officials that the law firm had been involved in the preparation of the fraudulent title opinion . . . . The code . . . thus affords an attorney the opportunity to exonerate himself and defend against potential criminal charges or charges of attorney misconduct by . . . disclos[ing] information . . . when a client has . . . used the attorney's . . . stationery . . . or legal forms in . . . the commission of a fraud.

Id.; Rylewicz v. Beaton Servs., Ltd., No. 85 C 10535, 1987 WL 8610, at *2 (N.D. Ill. Mar. 17, 1987) (characterizing the waiver of attorney-client privilege in *Weger* as justified in response to an "ongoing fraud").

[1037] *Weger*, 709 F.2d at 1156.

[1038] *See id.* at 1156. Indeed, in Texas there is an exception to the attorney-client privilege for legal services sought or obtained in furtherance of a crime or fraud. *See* TEX. R. EVID. 503(d)(1).

[1039] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(a); *In re* Seven-O Corp., 289 S.W.3d 384, 390 (Tex. App.—Waco 2009, no pet.).

> (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; o
>
> (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.[1040]

The "conflicting interests" rule, adopted in 1990, represented a material change in the conflict of interest obligations of attorneys. The prior rule barred an attorney from representing a new client against an existing client even though there was no "substantial relationship" between the matter for the new client and the representation of the existing client.[1041] The old test was whether the differing interests of the two clients were so "conflicting, inconsistent, diverse or otherwise discordant" that the independent professional judgment of the attorney was adversely affected.[1042] Thus, under the current rule, an attorney can be held liable for prosecuting a personal injury action on behalf of one client, and exhausting the insurance fund available, while failing to represent the interests of another client in the same case.[1043]

[1040] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(b)(1), (2); *In re* Hous. Cty. *ex rel.* Session, 515 S.W.3d 334, 339 (Tex. App.—Tyler 2015, no pet.).

[1041] *Compare* Mandell & Wright v. Thomas, 441 S.W.2d 841, 846 (Tex. 1969) (holding that law firm could represent multiple claimants against the owners of a sunken vessel because the respective interests were not "adverse and hostile"), *with* NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989) (ruling that taking a position adverse to a former client is permissible as long as the respective matters are not "substantially related" as the goal in "former client" matters is the protection of "confidences and secrets of the 'former client'"), *and* Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 128–31 (Tex. 1996) (holding that an attorney who had obtained confidential information from a non-client pursuant to a joint defense agreement was disqualified from personally undertaking a representation adverse to that non-client in a substantially related matter).

[1042] *See* Tex. State Bar R., art. X, § 9, DR 5-161(A), DR 5-105(A) (TEX. CODE OF PROF'L RESP.), 34 TEX. B.J. 766 (1982, superseded 1990); Tex. State Bar R., art. X, § 9, EC 5-14 (TEX. CODE OF PROF'L RESP.) (1972, superseded 1990); *see also* Lott v. Ayres, 611 S.W.2d 473, 476 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) ("A lawyer is precluded from accepting or continuing employment when asked to represent two or more clients who may have differing interests whether such interests be conflicting, inconsistent, diverse or otherwise discordant.").

[1043] *See In re* Kahn, No. 14-15-00615-CV, 2015 WL 7739735, at *4 (Tex. App.—Houston [14th Dist.] Dec. 1, 2015, no pet.) ("[Rule] 1.06(b) provides that a lawyer shall not represent a

An attorney may represent multiple clients if he "reasonably believes the representation of each client will not be materially affected,"[1044] and "each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."[1045] If any affected client refuses to consent, then the attorney may not proceed with the multiple representation.

An attorney has a legal duty to refuse employment by clients with conflicting interests unless the attorney makes a full and prompt disclosure of the nature and extent of the conflict to the clients, who then consent to such representation.[1046] In multiple representation litigation, trial counsel has the primary responsibility for advising the prospective client of possible

person if it reasonably appears that the representation may become adversely limited by the lawyer's responsibilities to another client . . . a lawyer should not jointly represent parties if it is likely that a conflict between them will eventuate.").

[1044] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(1); *see In re Kahn*, 2015 WL 7739735, at *3.

[1045] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(2); *In re* Seven-O Corp., 289 S.W.3d 384, 389 (Tex. App.—Waco 2009, no pet.); *In re* Gutierrez, 309 B.R. 488, 498 (Bankr. W.D. Tex. 2004); *see also Mandell & Wright*, 441 S.W.2d at 846 (ruling that before interest of different clients can be said to conflict precluding representation by single law firm or attorney, their respective interests must be adverse and hostile); *In re* H.W.E., 613 S.W.2d 71, 72 (Tex. Civ. App.—Fort Worth 1981, no writ) (holding that an attorney is not precluded from representing multiple parties in suit unless clients' interests are actually adverse and hostile and that a mere potential conflict of interest is insufficient to prohibit multiple representation as long as there is no real and substantial conflict); *Lott*, 611 S.W.2d at 476 (stating that attorney was excused from employment contract because conflict arose precluded from accepting or continuing employment when asked to represent two or more clients who have different interests, whether such interests be "conflicting, inconsistent, diverse, or otherwise discordant"); Texarkana Coll. Bowl, Inc. v. Phillips, 408 S.W.2d 537, 540 (Tex. Civ. App.—Texarkana 1966, no writ) ("[C]ounsel may, within very narrow limits, represent clients having adverse economic interests.").

[1046] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(2); Gonzales v. State, 605 S.W.2d 278, 281 (Tex. Crim. App. 1980). *But see* Tex. Comm. on Prof'l Ethics, Op. 536, *reprinted in* 64 TEX. B.J. 7 (2001) (lawyer cannot receive fee from investment adviser for the referral of lawyer's clients, even with full disclosures and informed consent, because "the inherent uncertainties involved in a lawyer monitoring his client's involvement in the [investment advisory program] over a period of time would make it impossible for the lawyer to provide full disclosure of the implications and possible adverse consequences resulting from the representation").

conflicts of interests in their positions.[1047] Consequently, in *Pete v. State*, the court concluded:

> At the outset of the trial it was retained counsel, not the trial court, who was under a duty to investigate and determine any possible conflict between his clients. The trial court could only have been aware of the general possibility of conflict of interest that exists whenever there are multiple defendants. This possibility, although always real, is not inevitable.[1048]

An attorney who has represented multiple parties in a matter must not thereafter represent any of those parties in a dispute, unless all such parties to the dispute give prior consent.[1049] If an attorney has accepted representation in violation of the rule regarding conflicts of interests, or if multiple representation properly accepted thereafter becomes improper, the attorney must promptly withdraw from one or more representations.[1050] The attorney only needs to withdraw to the extent necessary for any remaining representations not to be in violation of the rule regarding the safeguarding of a client's confidences.[1051]

§ 10 Conflict of Interest: Former Client

The rules of professional responsibility serve as a guide for a lawyer's ethical conduct.[1052] The rules also serve as guidance for the courts on

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[1047] *See In re Seven-O Corp.*, 289 S.W.3d at 388; *Gonzales*, 605 S.W.2d at 281; Pete v. State, 533 S.W.2d 808, 809–10 (Tex. Crim. App. 1976), *overruled on other grounds*, Hurley v. State, 606 S.W.2d 887, 889 (Tex. Crim. App. 1980).

[1048] 533 S.W.2d at 809–10.

[1049] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(d); City of Dall. v. Redbird Dev. Corp., 143 S.W.3d 375, 388 (Tex. App.—Dallas 2004, no pet.) (counsel not disqualified from representing one defendant where the second defendant consented to the withdrawal).

[1050] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(e); *In re* Posadas USA, Inc., 100 S.W.3d 254, 257 (Tex. App.—San Antonio 2001, no pet.) (holding that trial court abused discretion in denying motion to withdraw pursuant to Rule 1.06(e) where conflict arose between attorney and his multiple clients).

[1051] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(e). If an attorney is prohibited by Rule 1.05 from engaging in particular conduct, no other attorney while a member of or associated with that attorney's firm may engage in that conduct either. *See id.* R. 1.06(f); Palomino v. Miller, No. 3-06-CV-0932-M, 2007 WL 1650417, at *3 n.2 (N.D. Tex. June 7, 2007).

[1052] The preamble to the rules provide the following:

whether an attorney is disqualified from representation in a particular matter.[1053] Under the rules, an attorney is prohibited from representing a client "if there is a 'reasonable probability' that the representation would cause the [attorney] to violate the [confidentiality] obligations owed the former client . . . ."[1054] Consequently, if a reasonable probability exists that the representation will involve an unauthorized disclosure of the former client's confidential information, such representation would be improper.[1055] Whether a reasonable probability exists is a question of fact to be resolved on a case-by-case basis.[1056] While the rules do not directly give rise to malpractice liability, a malpractice issue might be raised by failure to comply with the rules.[1057]

> The Texas Disciplinary Rules of Professional Conduct . . . . state[] minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment.

TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 7; Comm'n for Lawyer Discipline v. Hanna, 513 S.W.3d 175, 178 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *see also* Bd. of Law Exam'rs v. Stevens, 868 S.W.2d 773, 777 (Tex. 1994); Delta Air Lines, Inc. v. Cooke, 908 S.W.2d 632, 632 (Tex. App.—Waco 1995, orig. proceeding) (dissenting opinion).

[1053] *See* Henderson v. Floyd, 891 S.W.2d 252, 253 (Tex. 1995) (per curiam); Gillis v. Provost & Umphrey Law Firm, LLP, No. 05-13-00892-CV, 2015 WL 170240, at *13 n.11 (Tex. App.—Dallas Jan. 14, 2015, no pet.).

[1054] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09 cmt. 4. This is a factual inquiry. *In re* Black, No. 15-40546, 2016 WL 125617, at *8 (Bankr. E.D. Tex. Jan. 11, 2016) ("Whether there is a 'reasonable probability' that the representation will involve a violation of Rule 1.05 is a question of fact."); Peterson v. Kroschel, No. 01-13-00554-CV, 2015 WL 3485784, at *2 (Tex. App.—Houston [1st Dist.] June 2, 2015, no pet.).

[1055] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09 cmt. 4; *In re Black*, 2016 WL 125617, at *8.

[1056] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09 cmt. 4; *In re Black*, 2016 WL 125617, at *8; *Kroschel*, 2015 WL 3485784, at *3.

[1057] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 15 ("These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached."); Garcia v. Garza, 311 S.W.3d 28, 43 (Tex. App.—San Antonio 2010, pet. denied).

A. Liability

The Disciplinary Rules provide that an attorney must act in certain ways. Failure to act accordingly may rise to the level of malpractice. Although the Disciplinary Rules are not a direct basis for malpractice claims, they guide the courts in determining whether an attorney acted properly.[1058] Indeed, attorneys have been held tortiously liable for conduct that would violate the Disciplinary Rules.[1059]

The Texas Disciplinary Rules of Professional Conduct dictate an attorney's responsibility to the legal system and to society.[1060] Violation of the rules can have serious consequences, ranging from private reprimand[1061]

[1058] *See, e.g.*, Floyd v. Hefner, 556 F. Supp. 2d 617, 642 (S.D. Tex. 2008) ("Although violations of these disciplinary rules do not necessarily require a finding of liability, the rules do have a bearing on the standard of conduct of a reasonably prudent attorney."); Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 131 (Tex. App.—Corpus Christi 1995, orig. proceeding).

[1059] *See generally* Reppert v. Hooks, No. 07-97-0302-CV, 1998 WL 548784, at *9 (Tex. App.—Amarillo Oct. 12, 1998, pet. denied) (recognizing that several duties towards clients are reflected in the Texas Disciplinary Rules of Professional Conduct, and while those rules do not give rise to private cause of action, in the context of negligence claim, an attorney still owed a client "a duty to maintain the confidentiality of privileged communications received during the existence of the attorney-client relationship even after the termination of the relationship").

[1060] The attorney wears several hats under our legal system. "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. Lawyers, as guardians of the law, play a vital role in the preservation of society." TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 1; *see also In re* Anderson, No. 15-33603, 2017 WL 1066563, at *8 (Bankr. S.D. Tex. Mar. 17, 2017).

[1061] *See* TEX. RULES DISCIPLINARY P. R. 1.06(Z), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (West 2013). Possible sanctions under the rules include the following:

1. Disbarment.

2. Resignation in lieu of discipline.

3. Indefinite Disability suspension.

4. Suspension for a term certain.

5. Probation of suspension, which probation may be concurrent with the period of suspension, upon such reasonable terms as are appropriate under the circumstances.

6. Interim suspension.

7. Public reprimand.

8. Private reprimand.

The term "Sanction" may include the following additional ancillary requirements:

to suspension[1062] to disbarment.[1063] Effective January 1, 1990, the rules are broken down into nine parts.[1064] Part I, covering the attorney-client

a. Restitution (which may include repayment to the Client Security Fund of the State Bar of any payments made by reason of Respondent's Professional Misconduct); and

b. Payment of Reasonable Attorneys' Fees and all direct expenses associated with the proceedings.

Id.; *see also* Brown v. Comm'n for Lawyer Discipline, 980 S.W.2d 675, 684 (Tex. App.—San Antonio 1998, no pet.) (the Commission for Lawyer Discipline was entitled to recover award of reasonable attorney fees in attorney disciplinary proceedings even when lawyers represented Commission on pro bono basis). Effective June 1, 2018, the revised Disciplinary Rules set forth a comprehensive system for determining sanctions, which aim to permit "flexibility and creativity in assigning actions in particular cases of lawyer misconduct." TEX. RULES DISCIPLINARY P. PART XV & R. 15.01(b) (effective June 1, 2018). The new rules set out criteria for when it is appropriate to impose each of the permitted sanctions in a long list of professional misconduct situations. *Id.* R. 15.02–15.09. The new rules also permit the Chief Disciplinary Counsel to subpoena the production of books and records during the course of an investigation and to compel the attendance of witnesses to an investigatory hearing. TEX. RULES DISCIPLINARY P. R. 2.12(B)–(D) (effective June 1, 2018).

[1062] Part VIII of the Texas Rules of Disciplinary Procedure provides for compulsory discipline when an attorney is convicted of a serious crime but the sentence is probated. TEX. RULES DISCIPLINARY P. R. 8.06; *see also In re* Lock, 54 S.W.3d 305, 306 (Tex. 2001); *In re* Birdwell, 20 S.W.3d 685, 687 (Tex. 2000). A serious crime is defined in Rule 1.06(Z) as barratry; "any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes." TEX. RULES DISCIPLINARY P. R. 1.06(Z); *see also* Gamez v. State Bar of Tex., 765 S.W.2d 827, 834–35 (Tex. App.—San Antonio 1988, writ denied) (ruling that a one-year suspension was justified where attorney engaged in multiple forms of misconduct, including making substantial payments to creditors from debtor's estate without obtaining authorization of bankruptcy court and not filing accounting in bankruptcy case).

[1063] *See In re* Caballero, 272 S.W.3d 595, 601 (Tex. 2008); Goldstein v. Comm'n for Lawyer Discipline, 109 S.W.3d 810, 815 (Tex. App.—Dallas 2003, pet. denied) (trial court is permitted to award attorney's fees as a sanction if it also orders disbarment as a sanction); Flume v. State Bar of Tex., 974 S.W.2d 55, 63 (Tex. App.—San Antonio 1998, no pet.); Sanchez v. Bd. of Disciplinary Appeals, 877 S.W.2d 751, 752 (Tex. 1994). Mandatory disbarment occurs "[w]hen an attorney has been convicted of an Intentional Crime, and that conviction has become final, or the attorney has accepted probation with or without an adjudication of guilt for an Intentional Crime." TEX. RULES DISCIPLINARY P. R. 8.05. An intentional crime is "(1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary." TEX. RULES DISCIPLINARY P. R. 1.06(T).

[1064] Parts I–IX of the rules are as follows:

I. Client-Lawyer Relationship

II. Counselor

relationship, is the area of the rules providing guidance as to attorney malpractice.

In general, the attorney has the duty of providing his client with competent and diligent representation,[1065] maintaining good lines of communication with the client,[1066] and protecting the client's confidential information.[1067] Failure to satisfy these obligations violates the Disciplinary Rules and may subject the attorney to malpractice liability.

For example, the lawyer must not reveal a client's confidential information except in certain circumstances. The rules define "confidential information" as including both privileged and nonprivileged client information.[1068] A lawyer has a duty to not knowingly reveal most confidential information, however obtained.[1069] In the disqualification scenario, an attorney may be disqualified for being in possession of confidential material of the other party, even if the attorney did not act unethically and the information is not harmful.[1070] In addition, the lawyer

III. Advocate

IV. Non-Client Relationships

V. Law Firms And Associations

VI. Public Service

VII. Information About Legal Services

VIII. Maintaining The Integrity Of The Profession

IX. Severability of Rules.

TEX. DISCIPLINARY RULES PROF'L CONDUCT R. pts. I–IX.

[1065] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01; *see* McIntyre v. Comm'n for Lawyer Discipline, 169 S.W.3d 803, 807 (Tex. App.—Dallas 2005, pet. denied).

[1066] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03; Bellino v. Comm'n for Lawyer Discipline, 124 S.W.3d 380, 387 (Tex. App.—Dallas 2003, pet. denied) (attorney failed to communicate with client regarding settlement).

[1067] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a); Perillo v. Johnson, 205 F.3d 775, 799 (5th Cir. 2000).

[1068] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a). This is a more expansive definition than provided in the former Canons of Ethics and Code of Professional Responsibility. *Perillo*, 205 F.3d at 800 n.10.

[1069] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(1).

[1070] *See In re* RSR Corp., 475 S.W.3d 775, 779 (Tex. 2015) ("[A] lawyer who uses privileged information improperly obtained from an opponent potentially subverts the litigation process." (citing *In re* Meador, 968 S.W.2d 346, 351 (Tex. 1998))).

may not use confidential information against a client[1071] or former client[1072] or use confidential information for the benefit of the lawyer or a third person without the client's permission.[1073] This duty requires the attorney to go to great lengths to protect the client's confidential information, even to the extent of being convicted of misprision of a felony in lieu of revealing client confidences.[1074]

Under the Disciplinary Rules, an attorney may not represent a client where a conflict of interest is likely to develop.[1075] In addition, an attorney's own interests may conflict with those of the client. Thus, most business transactions between attorney and client are prohibited.[1076]

The rules specifically address issues regarding conflict of interest with a former client. A lawyer may not ethically represent a client in a matter adverse to a former client without consultation if it is the "same or a substantially related matter."[1077] To determine whether two parties' interests are adverse, courts use the standard English definition of "adverse."[1078] Thus, "adversity [for the purposes of the conflict of interest rules] is a product of the likelihood of the risk and the seriousness of its consequences."[1079] Similarly, the phrase "substantially related" is not defined in the rules, but the commentary suggests that it "primarily involves situations where a lawyer could have acquired confidential information

[1071] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(2).

[1072] *See id.* R. 1.05(b)(3); *In re* Marriage of Wilson, No. 10-07-00159-CV, 2008 WL 2522326, at *2 (Tex. App.—Waco June 25, 2008, no pet.); Tex. Serenity Acad., Inc. v. Glaze, No. H-12-0550, 2012 WL 6048110, at *2 (S.D. Tex. Dec. 5, 2012).

[1073] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(4). However, consent given without full disclosure is ineffective. *See* Hoggard v. Snodgrass, 770 S.W.2d 577, 584–85 (Tex. App.—Dallas 1989, orig. proceeding); *see also In re* Seven-O Corp., 289 S.W.3d 384, 387 n.3 (Tex. App.—Waco 2009, no pet.).

[1074] *See* Duncan v. Bd. of Disciplinary Appeals, 898 S.W.2d 759, 761 (Tex. 1995).

[1075] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(b)(2); *In Re* Kahn, No. 14-15-00615-CV, 2015 WL 7739735, at *4 (Tex. App.—Houston [14th Dist.] Dec. 1, 2015, no pet.).

[1076] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08; Rosas v. Comm'n for Lawyer Discipline, 335 S.W.3d 311, 319 (Tex. App.—San Antonio 2010, no pet.). However, an attorney is permitted to advance expenses in contingent fee cases and where the client is indigent. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08(d).

[1077] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09(a)(3); Wasserman v. Black, 910 S.W.2d 564, 568 (Tex. App.—Waco 1995, orig. proceeding) ("Clients should not be put in a position where they must fret over whether the confidential information they disclosed to their previous attorney will later be used against them."); *see also In re Kahn*, 2015 WL 7739735, at *4.

[1078] *See* Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 132 (Tex. 1996) (orig. proceeding).

[1079] *Id.*

concerning a prior client that could be used either to that prior client's disadvantage or for the advantage of the lawyer's current client or some other person."[1080]

While these rules define an attorney's conduct, historically the nature of legal malpractice limited the amount of applicable case law.[1081] Today, however, the rules are frequently used in the context of motions to disqualify counsel, and those cases provide valuable insight.

B. Disqualification

> (a) Without prior consent, a lawyer who personally has formally represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
>
> (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
>
> (2) if the representation in reasonable probability will involve a violation of Rule 1.05 [the rule safeguarding the client's confidentiality]; or
>
> (3) if it is the same or a substantially related matter.[1082]

[1080] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09 cmt. 4B; *see also* State Bar of Tex. v. Dolenz, 3 S.W.3d 260, 270–71 (Tex. App.—Dallas 1999, no pet.) (stating that matters are "substantially related" when "a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved are so similar").

[1081] Seventeen of the thirty-two opinions issued by Texas courts in 1996 concerning legal malpractice were designated not for publication under TEX. R. APP. P. 90, 52 TEX. B.J. 1147, 1170 (Tex. & Tex. Crim. App. 1986, amended 1997) (current version at TEX. R. APP. P. 47.7(b)). In 2003, the rules were changed to discontinue designating opinions in civil cases as "published" or "unpublished"; all opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value.

[1082] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09(a)(1)–(3); *In re* Colum. Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824 (Tex. 2010); *see also* Hoggard v. Snodgrass, 770 S.W.2d 577, 583 (Tex. App.—Dallas 1989, orig. proceeding) ("Attorneys may not represent conflicting interests and may not accept employment from a new client in a matter that adversely affects a former client's interest with respect to which the former client has reposed confidence in the attorney."); Clarke v. Ruffino, 819 S.W.2d 947, 950 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding) ("[An attorney] should not represent a client if the representation may in reasonable probability involve a violation of the . . . rules governing confidentiality of information.").

A motion to disqualify counsel is the proper procedural vehicle to challenge an attorney's representation when an attorney seeks to represent an interest adverse to that of a former client.[1083] A former client moving to disqualify an attorney based on possible disclosure of confidences from a former representation must prove: (1) a prior attorney-client relationship existed; (2) the relationship involved factual matters that are substantially related to facts in the present suit; and (3) a genuine threat that the confidences gained by the attorney in the former representation will be used against the former client in the present action.[1084] If the moving party can meet this burden, he is entitled to a presumption that confidences and secrets were imparted to the former attorney.[1085] This presumption is conclusive and irrebuttable.[1086] However, to prevent the use of a motion to disqualify counsel as a dilatory tactic or an instrument of harassment,[1087] trial courts must strictly adhere to the applicable standard when deciding such motions.[1088] A clear abuse of discretion is shown if the court refuses to disqualify an attorney when it is evident that the subject matters of the two representations are substantially related.[1089]

[1083] *See* NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 399 (Tex. 1989); *In re* Gunn, No. 14-13-00566-CV, 2013 WL 5631241, at *2 (Tex. App.—Houston [14th Dist.] Oct. 15, 2013, no pet.). In some circumstances, a motion to disqualify is also appropriate to disqualify a law firm who employs a paralegal who actually worked for an opposing party. *See In re Colum. Valley Healthcare Sys.*, 320 S.W.3d at 829.

[1084] *See Coker*, 765 S.W.2d at 400; *In re* Tex. Windstorm Ins. Ass'n, 417 S.W.3d 119, 134 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see also Hoggard*, 770 S.W.2d at 582–83; Lott v. Ayres, 611 S.W.2d 473, 474–75 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (holding that because no substantial relationship between action against corporation existed, court did not presume that the attorney breached duty owed former husband in representing former wife in both actions by having gained confidential information from him; thus, information that the attorney received, or may have received, from speaking to former husband regarding suit against corporation had no bearing on divorce suit or upon attorney's duty to former husband).

[1085] *See In re Tex. Windstorm Ins. Ass'n*, 417 S.W.3d at 134; P & M Elec. Co. v. Godard, 478 S.W.2d 79, 80–81 (Tex. 1972) (orig. proceeding); *Hoggard*, 770 S.W.2d at 583; *Lott*, 611 S.W.2d at 474.

[1086] *See In re Tex. Windstorm Ins. Ass'n*, 417 S.W.3d at 134; *Hoggard*, 770 S.W.2d at 583.

[1087] *See In re Tex. Windstorm Ins. Ass'n*, 417 S.W.3d at 129; Arkla Energy Res., a Div. of Arkla, Inc. v. Jones, 762 S.W.2d 694, 695 (Tex. App.—Texarkana 1988, orig. proceeding).

[1088] *See In re Tex. Windstorm Ins. Ass'n*, 417 S.W.3d at 129; *Hoggard*, 770 S.W.2d at 582–83; *Lott*, 611 S.W.2d at 474–75.

[1089] *See* Gleason v. Coman, 693 S.W.2d 564, 566 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); Cimarron Agric., Ltd. v. Guitar Holding Co., L.P., 209 S.W.3d 197, 202 (Tex. App.—El Paso 2006, no pet.).

The client's consent to adverse representation without a full disclosure by the attorney is ineffective.[1090] An uninformed consent to adverse representation does not mean the client consents to a violation of the prohibition against the disclosure of confidential information or to the use of such confidential information against the client.[1091] Thus, in such a situation an attorney may still be subject to liability for the unauthorized disclosure of confidential information even if the client agrees to the adverse representation.[1092] Although the attorney will not be presumed to have revealed the confidences of the consenting former client to the present client, the court should perform its role in the regulation of the legal profession and disqualify counsel from further representation in the pending litigation.[1093]

1. The Substantial Relationship Test

The party moving to disqualify must provide sufficient information to the trial court so "it can engage in a painstaking analysis of the facts."[1094] In order to succeed on its motion for disqualification, the movant "need not divulge any confidences, but he must delineate with specificity the subject matter, issues, and causes of action presented in the former representation."[1095] For instance, in *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Fifth Circuit found the evidence insufficient to establish a substantial relationship between current litigation and a law firm's prior representation despite a "facial similarity" between the cases.[1096] Although the movant demonstrated that both representations

[1090] *See Hoggard*, 770 S.W.2d at 585; *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(c)(2); *In re* Seven-O Corp., 289 S.W.3d 384, 387 n.3 (Tex. App.—Waco 2009, no pet.).

[1091] *See* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 229 (7th Cir. 1978); *Hoggard*, 770 S.W.2d at 585.

[1092] *See Westinghouse*, 588 F.2d at 229; *Hoggard*, 770 S.W.2d at 585.

[1093] NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989); Capital City Church of Christ v. Novak, No. 03-04-00750-CV, 2007 WL 1501095, at *3 (Tex. App.—Austin May 23, 2007, no pet.).

[1094] J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Morris, 776 S.W.2d 271, 278 (Tex. App.—Dallas 1989, orig. proceeding); Tierra Tech de Mex., S.A. de C.V. v. Purvis Equip. Corp., No. 3:15-CV-4044-G, 2016 WL 5791548, at *3 (N.D. Tex. Oct. 4, 2016).

[1095] *Morris*, 776 S.W.2d at 278; *In re* Liberty Ins. Corp., No. 04-08-00464-CV, 2008 WL 3925942, at *1 (Tex. App.—San Antonio Aug. 27, 2008, no pet.); *see also* Church of Scientology v. McLean, 615 F.2d 691, 693 (5th Cir. 1980).

[1096] 646 F.2d 1020, 1030–31 (5th Cir. 1981); *see also In re Liberty Ins. Corp.*, 2008 WL 3925942, at *2.

involved "margin accounts," there was no explanation how the margin account issue raised in the first case related to the account question presented in the later case.[1097] A conclusory allegation of a substantial relationship will not suffice.[1098]

Once the burden of establishing a substantial relationship is met, the movant is entitled to the conclusive presumption that the attorney possessed client confidences, and disqualification is mandated.[1099] Thus, once this presumption attaches, a litigant cannot defeat a disqualification by a showing that the former client did not actually provide confidential information to the attorney.[1100] Where the parties admit to a substantial

[1097] *See Duncan*, 646 F.2d at 1030–31.

[1098] *See* Brown v. Green, 302 S.W.3d 1, 11 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (finding that former client's claims and statements pertaining to the use of confidential information in the divorce proceedings are too general and conclusory in nature to support a claim of breach of fiduciary duty); Cimarron Agric., Ltd. v. Guitar Holding Co., L.P., 209 S.W.3d 197, 203 (Tex. App.—El Paso 2006, no pet.) (holding that trial court's order disqualifying law firm from representing client in any future litigation before underground water conservation district in a proceeding to which the former client was a party was not appropriate because court failed to make an individualized determination on whether any future action by law firm would be adverse or substantially related to the representation of the former client); Hydril Co. v. Multiflex, Inc., 553 F. Supp. 552, 555–56 (S.D. Tex. 1982). In *Hydril*, a misappropriation and unfair competition case, the movant alleged violations of then-existing Canons 4 and 9 of the then-existing Texas Code of Professional Responsibility. *Id.* The court held that merely stating that the previous representation involved advice about the protection of intellectual property in the areas of trade secrets, patents, and trademarks did not provide the court with sufficient information on which to engage in a "painstaking analysis of the facts." *Id.* Comparing the subject matter of the two representations, the court found "absolutely no basis" for considering them "substantially related." *Id.* For a thorough discussion of the history of the "substantial relationship" test, see Gregory L. Allen, Comment, *Texas Finally Adopts a Standard by Which to Govern Former Client Conflicts of Interest: Texas Disciplinary Rules of Professional Conduct Rule 1.09*, 21 TEX. TECH L. REV. 737, 744 (1990). *See also* Rebecca Simmons & Manuel C. Maltos, *Exploring Disqualification of Counsel in Texas: A Balancing of Competing Interests*, 37 ST. MARY'S L.J. 1009, 1028 (2006).

[1099] *See Morris*, 776 S.W.2d at 282 (ruling that no presumption existed absent any affirmative showing that attorney has "unethically revealed the confidences of a former client to a present client"); *Cimarron Agric., Ltd.*, 209 S.W.3d at 202; Clarke v. Ruffino, 819 S.W.2d 947, 951 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding); Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 299 (Tex. App.—Dallas 1988, orig. proceeding) (stating that there was an "irrebuttable presumption that a client gives confidential information to an attorney actively handling the client's case"); Gleason v. Coman, 693 S.W.2d 564, 567 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

[1100] *See Duncan*, 646 F.2d at 1028 (holding that once substantial relationship is shown, disclosure of client confidences not susceptible to rebuttal proof); Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980) (concluding that if substantial relationship is found "it matters not whether

relationship between the two representations, the trial court has no discretion to deny a motion to disqualify.[1101] By creating an irrebuttable presumption, the movant is not forced to reveal the very confidences sought to be protected.[1102] Thus, by proving the attorney-client relationship and the substantial relationship between the two representations, the moving party establishes as a matter of law an appearance of impropriety and, therefore, the basis for disqualification.[1103] Although the "appearance of impropriety" concept was not carried over into the Texas Disciplinary Rules, the rules do urge attorneys to strive for and maintain the highest standards of ethical conduct and to conduct themselves so as to gain the respect and confidence of the public.[1104]

In *NCNB Texas National Bank v. Coker*, decided under the earlier Texas Code of Professional Responsibility[1105] and involving a law firm suing a former client, the Texas Supreme Court held that the trial court abused its discretion in failing to apply the proper standard of law--the substantial

confidences were in fact imparted to the lawyer by the client"); *In re* Hoar Const., L.L.C., 256 S.W.3d 790, 802 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

[1101] *See* Centerline Indus. v. Knize, 894 S.W.2d 874, 876 (Tex. App.—Waco 1995, orig. proceeding).

[1102] *See In re* Colum. Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824 (Tex. 2010); Henderson v. Floyd, 891 S.W.2d 252, 254 (Tex. 1995); NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989).

[1103] *See Coker*, 765 S.W.2d at 400; *In re* Quintanilla, No. 14-16-00473-CV, 2016 WL 4483743, at *4 (Tex. App.—Houston [14th Dist.] Aug. 25, 2016, no pet.); Hoggard v. Snodgrass, 770 S.W.2d 527, 583 (Tex. App.—Dallas 1989, orig. proceeding).

[1104] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 1 ("A consequent obligation of lawyers is to maintain the highest standards of ethical conduct."); *id.* preamble ¶ 7 ("The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment."); *id.* preamble ¶ 9 ("Each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. 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."); *id.* preamble ¶ 11 ("The rules and Comments do not, however, exhaust the moral and ethical considerations that should guide a lawyer, for no worthwhile human activity can be completely defined by legal rules."); *see also* Occidental Chem. Corp. v. Brown, 877 S.W.2d 27, 31 n.3 (Tex. App.—Corpus Christi 1994, no writ).

[1105] The current rules expanded the definition of what is confidential, and incorporated the "substantial relationship" test. *See* Clarke v. Ruffino, 819 S.W.2d 947, 951 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding).

relationship test--to the motion to disqualify counsel.[1106] "To hold that the two representations were 'similar enough' to give an 'appearance' that confidences which could be disclosed 'might be relevant' to the representations falls short of the requisites of the established substantial relation standard."[1107] Because of the harshness of disqualification, the court sought to promulgate the standard to be met before the irrebuttable presumption attaches by stating:

> The moving party must prove the existence of a prior attorney-client relationship in which the factual matters involved were so related to the facts in the pending litigation that it creates a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary. Sustaining this burden requires evidence of specific similarities capable of being recited in the disqualification order. If this burden can be met, the moving party is entitled to a conclusive presumption that confidences and secrets were imparted to the former attorney.[1108]

Since there is no definition of "substantial relationship" in the Texas Disciplinary Rules,[1109] *Coker* and its progeny are instructive:

[1106] 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding); Lopez v. Sandoval, No. 13-03-322-CV, 2006 WL 417326, at *3 (Tex. App.—Corpus Christi Feb. 23, 2006, no pet.) (referring to the *Coker* standard).

[1107] *Coker*, 765 S.W.2d at 400; *Schick v. Berg*, No. 03 CIV. 5513(LBS), 2004 WL 856298, at *9 (S.D.N.Y. Apr. 20, 2004), *aff'd,* 430 F.3d 112 (2d Cir. 2005) ("Texas courts have interpreted the substantial relation test to require a precise recitation of the way in which the two cases are related."); *see also* Arkla Energy Res., a Div. of Arkla, Inc. v. Jones, 762 S.W.2d 694, 695 (Tex. App.—Texarkana 1988, no writ) ("[I]t is clear . . . that a superficial resemblance between issues is not enough to constitute a substantial relationship, and that facts which are community knowledge or which are not material to a determination of the issues litigated do not constitute 'matters involved' within the meaning of the rule.").

[1108] *Coker*, 765 S.W.2d at 400; *In re* Tex. Windstorm Ins. Ass'n, 417 S.W.3d 119, 134 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see also* J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Morris, 776 S.W.2d 271, 278 (Tex. App.—Dallas 1989, orig. proceeding); Gleason v. Coman, 693 S.W.2d 564, 566 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); Lott v. Ayres, 611 S.W.2d 473, 475 n.1 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.); Howard Hughes Med. Inst. v. Lummis, 596 S.W.2d 171, 174 n.2 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

[1109] *See generally In re* Works, 118 S.W.3d 906, 908 (Tex. App.—Texarkana 2003, no pet.) (observing that the "'substantial relationship' test is a product of common law and predates the

> [T]o satisfy the substantial relationship test as a basis for disqualification, a movant must prove that the facts of the previous representation are so related to the facts in the pending litigation that a genuine threat exists that confidences revealed to former counsel will be divulged to a present adversary.[1110]

In *Texaco, Inc. v. Garcia*, a lawyer had previously represented an oil company defendant in a case involving seepage from underground storage tanks.[1111] The new case involved seepage from tanks underlying a gas station.[1112] Even though the court did not presume that confidential information had been revealed, it held that a substantial relationship existed because there were "similar liability issues, similar scientific issues, and similar defenses and strategies" involved in the case.[1113] On the other hand, in *Davis v. Stansbury*, a wife consulted an attorney regarding a divorce and her husband subsequently approached the attorney's partner regarding the same divorce proceeding.[1114] The court held that discussions over a divorce between the same two parties are substantially related.[1115] Nevertheless, the wife's counsel was not disqualified because the husband had only limited contact with the second attorney and imparted no privileged information.[1116]

Texas Rules of Disciplinary Conduct for attorneys"); *In re* Cap Rock Elec. Co-op., Inc., 35 S.W.3d 222, 230 (Tex. App.—Texarkana 2000, no pet.) (substantial relationship test "does not originate in the disciplinary rules, but in the common law").

[1110] Metro. Life Ins. Co. v. Syntek Fin. Corp., 881 S.W.2d 319, 320–21 (Tex. 1994); *In re Tex. Windstorm*, 417 S.W.3d at 134; *see also* Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996) (orig. proceeding); Centerline Indus. v. Knize, 894 S.W.2d 874, 876 (Tex. App.—Waco 1995, orig. proceeding) (stating that Rule 1.09(a)(3) "establishes a simple prohibition: Without a former client's consent, a lawyer should not represent another person in a matter adverse to the former client when the lawyer represented the former client in the same matter or a substantially related matter."); *Morris*, 776 S.W.2d at 278 ("A superficial resemblance between issues is not enough to constitute a substantial relationship, and facts that are community knowledge or that are not material to a determination of the issues litigated do not constitute 'matters involved' within the meaning of the law.").

[1111] 891 S.W.2d 255, 256 (Tex. 1995) (orig. proceeding).

[1112] *See id.*

[1113] *Id.* at 257; *In re* Kahn, No. 14-13-00081-CV, 2013 WL 1197895, at *4 (Tex. App.—Houston [14th Dist.] Mar. 26, 2013, no pet.).

[1114] 824 S.W.2d 278, 279 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).

[1115] *See id.* at 281–82. *But see In re Tex. Windstorm*, 417 S.W.3d at 134–37; *In re* Drake, 195 S.W.3d 232, 237 (Tex. App.—San Antonio 2006, no pet.).

[1116] *See Davis*, 824 S.W.2d at 281–82. *But see* Centerline Indus. v. Knize, 894 S.W.2d 874, 876 (Tex. App.—Waco 1995, orig. proceeding) (holding that "if two matters are substantially related so

Conversely, Texas courts have rejected the argument that proof of a "substantial relationship" could be used to establish a presumption of breach of a fiduciary duty. For instance, in *Brown v. Green*, a former client sued his attorneys for breach of fiduciary duty asserting that the attorneys revealed confidential information or misused that information against him in subsequent various suits against him.[1117] In an attempt to prove his claim, the former client argued that once there was evidence of a "substantial relationship" between the prior representation and the current case, there was a breach; however, the court rejected this argument stating that former client's statement was a misreading of Texas case law.[1118] Instead, the court stated that "to show breach based on misuse or disclosure of confidential information, [former client] was required to produce evidence of actual misuse or disclosure but was not required to establish a substantial relationship between representations."[1119]

Lott v. Ayres also involved the question of whether a "substantial relationship" existed between the subject matter of two representations.[1120] In *Lott*, a former client sued his attorney for breach of fiduciary duty when the attorney subsequently represented his wife in a divorce action.[1121] The former client, Lott, had earlier consulted the attorney about representing him and his wife in a negligence action arising out of an abortion performed on his wife.[1122] When the attorney began to represent the wife in her divorce proceeding, Lott filed a lawsuit to enjoin the attorney from representing his wife.[1123] Lott alleged that the attorney breached a fiduciary duty owed him by reason of the attorney-client relationship that existed during the wife's damage suit.[1124] Lott also alleged that the attorney had used information against him in the divorce proceeding that was obtained during their prior

that Rule 1.09(a)(3) is brought into play, it should make no difference whether the lawyer gained no confidences or whether all the confidences gained have been publicly disclosed").

[1117] 302 S.W.3d 1, 8 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

[1118] *Id.* at 9.

[1119] *Id.*; *see also* City of Garland v. Booth, 895 S.W.2d 766, 772–73 (Tex. App.—Dallas 1995, writ denied); Capital City Church of Christ v. Novak, No. 03–04–00750–CV, 2007 WL 1501095, at *3–4 (Tex. App.—Austin May 23, 2007, no pet.) (mem. op.).

[1120] 611 S.W.2d 473, 475 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

[1121] *Id.* at 474.

[1122] *See id.*

[1123] *See id. Lott* also requested that a receiver be appointed to obtain the attorney's work product as it related to his representation of his wife's damage suit, and for damages, actual and exemplary, as well as damages under the Deceptive Trade Practices-Consumer Protection Act. *Id.*

[1124] *See id.*

relationship and that the attorney must be presumed to have used confidential information by reason of his prior representation.[1125] The court granted the motion for summary judgment filed by the attorneys.[1126]

Although the court of appeals recognized "an attorney may not represent conflicting interests; and may not divulge a client's secrets or confidences, or accept employment from others in matters adversely affecting an interest of the client with respect to which confidence has been reposed," it held there was no breach of fiduciary duty, because the two representations were not "substantially related."[1127]

The "substantially related" test "speaks in terms of a substantial *relationship*, not substantial *identity*, of legal and factual elements between the prior representation and the pending litigation."[1128] Therefore, simply listing the "similarities between past and present matters" and not specifying the specific "similar underlying facts" will fail to support the conclusion that the prior and pending representations are substantially related.[1129]

"[T]he substantial relationship test . . . is not the only basis which now governs a trial court's determination as to whether an attorney should be disqualified."[1130] The sharing of confidences of non-clients can also result in disqualification (as when co-defendants' attorneys share information).[1131] A party moving for disqualification based on this "theory must establish in an evidentiary hearing (1) that confidential information has been shared and

[1125] *See id.*

[1126] *See id.*

[1127] *Id.* at 475; *see also* Tierra Tech de Mex. SA de CV v. Purvis Equip. Corp., No. 3:15-CV-4044-G, 2016 WL 4062070, at *4 (N.D. Tex. July 29, 2016) (holding that movant did not carry burden of demonstrating "with specificity the existence of a substantial relationship" between the current and prior joint representation).

[1128] Cimarron Agr., Ltd. v. Guitar Holding Co., L.P., 209 S.W.3d 197, 202 (Tex. App.—El Paso 2006, no pet.).

[1129] *In re* Tex. Windstorm Ins. Ass'n, 417 S.W.3d 119, 135 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *In re* Drake, 195 S.W.3d 232, 237 (Tex. App.—San Antonio 2006, no pet.).

[1130] Clarke v. Ruffino, 819 S.W.2d 947, 950 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding).

[1131] *See* Nat'l Med. Enters. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996) (orig. proceeding); Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 131 (Tex. App.—Corpus Christi 1995, orig. proceeding) (explaining that disqualification motion made on basis of joint defense privilege, Tex. R. Evid. 503(b)(1)(C), is part of attorney-client privilege); Peeler v. Baylor Univ., No. 10-08-00157-CV, 2009 WL 2964375, at *1 (Tex. App.—Waco Sept. 16, 2009, no pet.); *In re* Skiles, 102 S.W.3d 323, 326–27 (Tex. App.—Beaumont 2003, no pet.).

(2) that the matter in which that information was shared is substantially related to the matter in which disqualification is sought."[1132]

Further, an attorney's personal life can be the cause of disqualification.[1133] However, the effect of spouses ending up on opposing sides of litigation is an undeveloped area of law. "The propriety of attorneys/spouses representing opposing parties in a criminal trial is one of first impression. It is clear, however, that if there is any impropriety in spouses representing adversaries, the disqualification extends to the partners and associates of the spouse."[1134]

2. Chinese Walls

The prohibition against the representation of clients with conflicting interests embodies three principal ideals. First, the attorney owes a duty of loyalty to his client and to the client's confidences.[1135] Second, the attorney must represent the client in a zealous manner.[1136] Third, the attorney must not attempt to represent a client when the attorney's judgment may be distorted by other concerns.[1137] To avoid problems presented by these ideals, the ethics rules and the courts have taken a prophylactic approach, which generally prohibits the subsequent representation.[1138] Once a court determines that the two representations are substantially related, the court will presume that the client's confidences were revealed to the attorney during the earlier representation.[1139] The presumption that confidences were

[1132] *Euresti*, 903 S.W.2d at 132; *see also In re Tex. Windstorm*, 417 S.W.3d at 133.

[1133] *See* Haley v. Boles, 824 S.W.2d 796, 796 (Tex. App.—Tyler 1992, orig. proceeding).

[1134] *Id.* at 797. *But see* State v. Swanson, No. CV 1505008759, 2015 WL 5781242, at *3 (Del. Super. Ct. Sept. 29, 2015) (in "circumstances where there is a close familial relationship between an attorney for the State and an attorney employed by the [Public Defender's Office ('PDO')], the potential concurrent conflict of interest is personal and will not be imputed to other attorneys in the PDO or to the Department of Justice").

[1135] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT Preamble ¶¶ 2–3, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R., art. X, § 9).

[1136] *See id.*

[1137] *See id.*

[1138] *See In re* Colum. Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824–28 (Tex. 2010); Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1471 n.8 (1981).

[1139] *See In re Colum. Valley Healthcare Sys.*, 320 S.W.3d at 824; NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989).

shared with the attorney is generally held to be irrebuttable,[1140] because in many cases, although an attorney may not have received any confidential information from the former client, to determine whether confidences were actually shared would require an inquiry into the very information that the former client is seeking to protect.[1141] Accordingly, courts have typically held that the nature and extent of the confidential information received by the attorney is irrelevant and not subject to inquiry.[1142] Instead, the attorney will simply be disqualified.[1143]

After the disqualification of the attorney, the court must then take the second step in the analysis and decide whether to apply the presumption of shared confidences to the attorney's entire firm.[1144] This presumption is referred to as the doctrine of vicarious disqualification.[1145] The doctrine presumes that the disqualified attorney shared the confidences of the prior client with the entire firm, and therefore it is widely held that this presumption also is irrebuttable.[1146]

In *In re Columbia Valley Healthcare System*, the Texas Supreme Court applied this second irrebuttable presumption to the attorney's law firm.[1147] "When the lawyer moves to another firm and the second firm is representing an opposing party in ongoing litigation, a second irrebuttable presumption arises; it is presumed that the lawyer will share the confidences with members of the second firm, requiring imputed disqualification of the firm."[1148] "The effect of this second presumption is the mandatory disqualification of the second firm."[1149]

[1140] *See Coker*, 765 S.W.2d at 400.

[1141] *See In re Colum. Valley Healthcare Sys.*, 320 S.W.3d at 824; *Coker*, 765 S.W.2d at 399.

[1142] *See Coker*, 765 S.W.2d at 400.

[1143] *See id.*

[1144] *In re Colum. Valley Healthcare Sys.*, 320 S.W.3d at 824.

[1145] *See* Warren Fields, *Attorneys: Vicarious Disqualification and the Model Rules of Professional Conduct*, 40 OKLA. L. REV. 231, 231 n.1 (1987).

[1146] *In re Colum. Valley Healthcare Sys.*, 320 S.W.3d at 824; *see* Amon Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 REV. LITIG. 665, 668–71 (1997); *see also* Natalie Broaddus, Comment, *A Strange Way to Protect Clients: Why Recent Changes in the Model Rules of Professional Conduct Should be Adopted in Texas*, 53 S. TEX. L. REV. 149, 169 (2011).

[1147] 320 S.W.3d at 824.

[1148] *Id.*; *see also In re* Nat'l Lloyds Ins. Co., No. 13-15-00521-CV, 2016 WL 552112, at *6 (Tex. App.—Corpus Christi Feb. 10, 2016, no pet.).

[1149] *In re* Guar. Ins. Servs., Inc., 343 S.W.3d 130, 134 (Tex. 2011).

The creation of a "Chinese wall," the one method that has emerged to rebut the presumption of vicarious disqualification of the attorney's firm, is a system of screening procedures that prevents any flow of confidential information from a disqualified attorney to any other member of his or her present firm who arguably may be an adversary of the disqualified attorney's former client.[1150] The Chinese wall is a well-established innovation in the law, and is intended to show that client confidences have not been shared.[1151] Until 1977, when the United States Court of Claims in *Kesselhaut v. United States*[1152] allowed a private law firm to insulate a former government attorney,[1153] no court recognized the application of this screening method for private firms.[1154]

Rule 1.09(b) of the Texas Disciplinary Rules effectively extends the inability of a lawyer joining a new law firm to represent a client against a former client to all lawyers in his new firm.[1155] If, however, the new attorney did not personally represent the client while with his former firm, the rule does not necessarily serve to disqualify either the new attorney or the attorney's new firm from representing another client in the same or substantially related matter, even if the interests of the clients conflict.[1156]

[1150] *See In re* Simon, No. 03-16-00090-CV, 2016 WL 3517889, at *2 n.9 (Tex. App.—Austin June 22, 2016, no pet.) (mem. op.); MODEL RULES OF PROF'L CONDUCT R. 1.11(b) (1983) (endorsing Chinese walls as a means of avoiding imputed firm disqualification).

[1151] Phx. Founders, Inc. v. Marshall, 887 S.W.2d 831, 834 (Tex. 1994) (orig. proceeding).

[1152] 555 F.2d 791 (Ct. Cl. 1977) (per curiam).

[1153] *Id.* at 793–94. Until this point, the principal difficulty with the Chinese wall defense had been that it apparently conflicted with the general principle established by the Model Code of Professional Responsibility DR 5-105(D) (1980) that when an attorney is disqualified, his firm is disqualified as well. *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 342 (1975).

[1154] *See* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321 (7th Cir. 1978) (rejecting wall as a defense for simultaneous representation of adverse clients); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 229–36 (2d Cir. 1977) (rejecting wall as a defense); Hull v. Celanese Corp., 513 F.2d 568, 571–72 (2d Cir. 1975) (finding Chinese wall argument "somewhat technical" and inconsistent with "the spirit of Canon 9"); W.E. Bassett Co. v. H.C. Cook Co., 201 F. Supp. 821, 824–25 (D. Conn. 1962) (disqualifying firm although it "took particular pains" to segregate disqualified partner), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962).

[1155] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09 cmt 5, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R., art. X, § 9).

[1156] *See* Gregory L. Allen, Comment, *Texas Finally Adopts a Standard by Which to Govern Former Client Conflicts of Interest: Texas Disciplinary Rules of Professional Conduct Rule 1.09*, 21 TEX. TECH L. REV. 737, 755 (1990); Amon Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 REV. LITIG. 665, 668–71 (1997); Rebecca Simmons & Manuel C. Maltos, *Exploring Disqualification of Counsel in Texas: A Balancing of Competing Interests*, 37 ST. MARY'S L.J. 1009,

The so-called "Chinese wall" was originally created to deal with conflicts created by the entry of a government lawyer into private practice,[1157] and was developed in response to disqualifications based upon the appearance of impropriety under Canon 9 of the ABA Model Code of Professional Conduct.[1158] The policy underlying the use of such a "quarantine" is to ensure government agencies a constant supply of well-qualified attorneys, yet allow those attorneys to be employable after completing their government service.[1159]

Among the factors courts have considered in determining the efficacy of such a device are: (1) the size of the firm; (2) the extent of departmentalization within the firm; (3) prohibitions [in the firm] against discussion of the [confidential information]; and (4) exclusion of the [screened off attorney] from relevant files and participation in the action . . . .[1160]

1031 (2006). *See generally* Tex. Comm'n On Prof'l Ethics. Op. 527, 63 TEX. B.J. 4 (1999). *But see* In re Basco, 221 S.W.3d 637, 639 (Tex. 2007) ("[E]ven if departing attorneys have no connection with a former client of a former firm, they cannot take on a case against that client if it involves questioning the validity of the earlier representation.").

[1157] *See* MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. (Am. Bar Ass'n 1983) (authorizing use of the "Chinese wall" and stating, in part: "the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government"); *In re* Colum. Valley Healthcare Sys., L.P., 320 S.W.3d 819, 826 (Tex. 2010).

[1158] *See generally* Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71 (2014); Janine Griffiths-Baker & Nancy J. Moore, *Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?*, 80 FORDHAM L. REV. 2541 (2012); Randall B. Bateman, *Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls*, 33 DUQ. L REV. 249 (1995); Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677 (1980).

[1159] *See* Amoco Chem. Corp. v. MacArthur, 568 F. Supp. 42, 47 (N.D. Ga. 1983); Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 297 (Tex. App.—Dallas 1988, orig. proceeding); Christopher J. Dunnigan, *The Art Formerly Known As the Chinese Wall: Screening in Law Firms: Why, When, Where, and How*, 11 GEO. J. LEGAL ETHICS 291, 293 (1998).

[1160] *In re Colum. Valley Healthcare Sys.*, 320 S.W.3d at 825; *In re* Reeder, 515 S.W.3d 344, 350 (Tex. App.—Tyler 2016, no pet.); *Petroleum Wholesale, Inc.*, 751 S.W.2d at 297; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.11. The Texas Disciplinary Rules also state that:

> (b) No lawyer in a firm with which a lawyer subject to paragraph (a) is associated may knowingly undertake or continue representation in such a matter unless:
>
> > (1) The lawyer subject to paragraph (a) is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

The Texas Disciplinary Rules allow the use of a "Chinese wall" to avoid disqualification in situations involving a lawyer who worked as a public officer or employee and then entered private employment.[1161] "[T]his device [is intended] to rebut the presumption of shared confidences arising . . . between an attorney and the other members of his firm and to reduce or eliminate the appearance of impropriety . . . ."[1162] Extension of this concept to the private sector is intended to prevent the harsh results of vicarious disqualification.[1163]

Nevertheless, despite compelling policy reasons, use of the "Chinese wall" in non-government situations to avoid disqualification of lawyers in Texas varies between federal court and Texas state court. In *Lemaire v. Texaco, Inc.*, for example, a federal court concluded that Fifth Circuit permits a "Chinese wall" as a device by which an entire law firm can avoid vicarious disqualification when it hires an attorney who was personally disqualified from representing a client of that firm because of his earlier employment with another law firm.[1164] In *Lemaire*, an attorney representing an oil company defendant in a complex commercial suit changed law firms and began working for the firm representing the plaintiffs in the same suit.[1165] The court found that, before accepting the new position, the attorney "went to great lengths to insure that he would have no connection with any facet of this lawsuit."[1166] The attorney made certain that he would receive no part of any fees collected in the case or share in its expenses; he refused to discuss the underlying litigation with any member of his new

> (2) written notice is given with reasonable promptness to the appropriate government agency.

TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.10(b)(1)–(2).

[1161] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.10(b)(1)–(2) cmt. 3; *In re Colum. Valley Healthcare Sys.*, 320 S.W.3d at 826.

[1162] *Petroleum Wholesale, Inc.*, 751 S.W.2d at 297; *see also In re* Reeder, 515 S.W.3d 344, 350–53 (Tex. App.—Tyler 2016, no pet.) (holding screening measures implemented by a legal assistant's current law firm rebutted the presumption of shared confidences such that trial court abused discretion by disqualifying the current law firm).

[1163] *Petroleum Wholesale, Inc.*, 751 S.W.2d at 297.

[1164] 496 F. Supp. 1308, 1309, 1311 (E.D. Tex. 1980); *see also* Nat'l Oilwell Varco, L.P. v. Omron Oilfield & Marine, Inc., 60 F. Supp. 3d 751, 767 n.11 (W.D. Tex. 2014) ("Under Texas law, efforts to screen conflicted attorneys through mechanisms like 'Chinese walls' cannot rebut the presumption of shared confidences among lawyers . . . the presumption of shared confidences is irrebuttable under Texas law. The same is not true of Fifth Circuit law . . . .").

[1165] 496 F. Supp. at 1308.

[1166] *Id.* at 1309.

firm and testified that he had no knowledge of the status of the case.[1167] He also assured the court that his nonparticipation would continue to be strictly observed.[1168] Significantly, the evidence also showed there was no other firm in the area qualified or even willing to represent the plaintiff in litigation of the magnitude involved.[1169] Under these circumstances, the court held that the presumption of shared confidences between the disqualified lawyer and other members of his new firm was rebuttable, that the evidence clearly rebutted the presumption, and that an appearance-of-impropriety challenge[1170] to plaintiffs' counsel's continued representation was too weak a basis for disqualification because the plaintiffs' right to have counsel of their choice greatly outweighed any appearance of impropriety.[1171] This principle still controls: "Under Fifth Circuit precedent, there is no established irrebuttable presumption a lawyer shares client confidences he possesses with other lawyers at his law firm. On the other hand, the Fifth Circuit has indicated in recent precedent . . . that, to the extent there is still a presumption . . . the presumption is rebuttable."[1172]

[1167] *Id.*

[1168] *Id.*

[1169] *Id.*

[1170] At that time, Canon 9 of the Texas Code of Professional Responsibility provided that Texas' attorneys should avoid the "appearance of impropriety." Tex. State Bar R. art. XII, § 8, Canon 9 (Texas Code of Prof'l. Resp.) (1971, superseded 1990). That concept was not carried over into the Texas Disciplinary Rules.

[1171] *See Lemaire*, 496 F. Supp. at 1310; *see also* Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977) (per curiam) (stating that, if no actual wrongdoing has occurred, the erection of a "Chinese wall" is permissible to avoid vicarious disqualification). The *Kesselhaut* court reasoned that the disqualification of an entire law firm is "entirely too harsh and should be mitigated by appropriate screening such as we now have here, when truly unethical conduct has not taken place and the matter is merely one of the superficial appearance of evil, which a knowledge of the facts will dissipate." 555 F.2d at 793.

In *Kesselhaut*, the individual attorney was personally disqualified on the basis of imputed knowledge gained as general counsel for the Federal Housing Administration ("FHA"). *Id.* at 792. After his retirement from that agency, he worked part-time for a law firm representing certain other attorneys who had done legal work for the FHA and who, as plaintiffs, were urging a claim for attorneys' fees that the administration disputed. *Id.* The court held that under those facts the screening procedure used by the firm was sufficient to avoid disqualification of the other members of the firm. *Id.* at 794. *Kesselhaut* did not involve an attorney whose personal disqualification was based on actual knowledge of a former client's confidences.

[1172] Nat'l Oilwell Varco, L.P. v. Omron Oilfield & Marine, Inc., 60 F. Supp. 3d 751, 762–63 (W.D. Tex. 2014) (citing *In re* ProEducation Intern., Inc., 587 F.3d 296, 304 (5th Cir. 2009)).

Similarly, the District Court for the Western District of Texas distinguished Texas law:

> In contrast, the Texas Supreme Court has clearly held this presumption of shared confidences applies and is irrebuttable. As explained above, however, the instant motion to disqualify is a substantive motion under federal law, and this Court, while it considers the Texas Rules and Texas case law as guidance, looks to Fifth Circuit precedent as controlling authority.[1173]

The Fifth Circuit has held that Texas Rule 1.09 allows migrating lawyers to remove imputation in the absence of a personal representation or acquisition of confidential information.[1174] In *ProEducation*, Kennedy worked as an associate in the law firm from February 2003 to November 2004.[1175] Another attorney in the firm, Schooler, had been representing MindPrint, Inc., a creditor in the bankruptcy proceeding of ProEducation International, Inc., since 1999.[1176] Kennedy "had no knowledge of or involvement with MindPrint" while he worked for the firm.[1177] In September 2006, Kennedy entered an appearance in ProEducation's bankruptcy proceeding on behalf of a creditor.[1178] MindPrint moved to disqualify Kennedy from representing the creditor based on an imputed conflict of interest.[1179] The bankruptcy court held that Kennedy was disqualified based on "two irrebuttable presumptions: first, 'confidential information has been given to the attorney actually doing work for the client,' and second, 'confidences obtained by an individual lawyer will be shared with the other members of his firm.'"[1180]

[1173] *Nat'l Oilwell Varco, L.P.*, 60 F. Supp. 3d at 760 n.4 (internal citations omitted); *see also* DataTreasury Corp. v. Wells Fargo & Co., No. 2:06-cv-72-DF, 2009 WL 10679840, at *9 (E.D. Tex. Dec. 30, 2009).

[1174] *In re* ProEducation Int'l, Inc., 587 F.3d 296, 301–02 (5th Cir. 2009) (citing and discussing Amon Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 REV. LITIG. 665, 677, 684–85, 702–03 (1997) and Tex. Comm. on Prof'l Ethics, Formal Op. 501 (1994)).

[1175] *Id.* at 297.

[1176] *Id.*

[1177] *Id.*

[1178] *Id.* at 298.

[1179] *Id.*

[1180] *Id.*

After examining both the Texas Disciplinary Rules of Professional Conduct and the ABA Model Rules of Professional Conduct, the Fifth Circuit stated that "both require that a departing lawyer must have actually acquired confidential information about the former firm's client or personally represented the former client to remain under imputed disqualification."[1181] After further analysis, the court concluded that under Texas Rule 1.09(b), Kennedy was conclusively disqualified by imputation from representing the creditor only while he remained at the firm.[1182] When Kennedy ended his affiliation with the firm without personally acquiring confidential information about MindPrint, his imputed disqualification also ended.[1183] The court thus stated that the bankruptcy court should have considered Kennedy's evidence of his lack of involvement with MindPrint while at the firm.[1184]

Similarly, in *Carbo Ceramics, Inc. v. Norton-Alcoa Proppants*, where an attorney migrated between firms on opposing sides of pending litigation, the federal district court determined that Texas Disciplinary Rule 1.09(a)(2) involved a factual inquiry which was "clearly inconsistent with the application of an irrebuttable presumption" and therefore concluded that the presumption was rebuttable.[1185] Acknowledging that the Fifth Circuit had not yet addressed whether the presumption of shared confidences between a lawyer and the firm to which he moved was rebuttable, the court applied Section 204 of the Restatement (Third) of the Law Governing Lawyers, which removes any restrictions imputed to a lawyer when (1) the tainted lawyer has been terminated and (2) no confidential information of the former client was disclosed to any lawyer in the firm.[1186] Because the firm had terminated the lawyer after only two months, the evidence demonstrated that he shared no confidential information, and the motion to

[1181] *Id.* at 301.

[1182] *Id.* at 303.

[1183] *Id.* (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09 cmt. 7); Amon Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 REV. LITIG. 665, 684–85 (1997) ("If the transferring lawyer did not represent the former client while at his former firm and possesses no confidential information material to the matter, the transferring lawyer is no longer deemed to have imputed knowledge about his former firm's client. Accordingly, the transferring lawyer . . . [is] entitled to accept the representation adverse to his former firm's client.").

[1184] *Id.*

[1185] 155 F.R.D. 158, 163 (N.D. Tex. 1994).

[1186] *Id.* (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 204 (Tent. Draft No. 4, 1991)).

disqualify was not filed until the case was ready for trial, the court refused to disqualify the firm. The court deemed it unnecessary to address the efficacy of the Chinese wall that had been erected and observed that the Fifth Circuit had not addressed the issue.[1187]

Additionally, in *Smirl v. Bridewell*, a lawyer was contacted regarding the retention of his services as local counsel by plaintiff's attorney, but they did not come to an agreement.[1188] The lawyer later became local counsel for defendant.[1189] Because local counsel was neither a "member" of nor "associated with" the main firm, the court did not disqualify the defendant's firm.[1190]In contrast, *Petroleum Wholesale, Inc. v. Marshall*, where the plaintiff sued Petroleum along with other defendants for wrongful death, demonstrates that in Texas state court, a "Chinese wall" may not prevent disqualification in situations involving prior non-government employment.[1191] In *Petroleum Wholesale*, the attorney representing the plaintiff employed an associate who, although he did not personally work on the underlying wrongful death case, participated in confidential discussions, including those involving strategy, the strengths and weaknesses of the case, and the potential for settlement.[1192] After the lawsuit began, the associate accepted a position with the law firm representing the defendant, Petroleum.[1193] The parties did not dispute that the associate was personally disqualified from representing Petroleum in the litigation.[1194]

The plaintiff eventually moved to disqualify the law firm defending Petroleum in the suit.[1195] Petroleum's counsel presented evidence that it had effectively isolated the new associate from contact with any other attorney handling the litigation by erecting a "Chinese wall."[1196] The associate was

[1187] *Id.* at 164.

[1188] 932 S.W.2d 743, 744 (Tex. App.—Waco 1996, orig. proceeding).

[1189] *Id.*

[1190] *Id.* at 744–45 (stating that a "member" means partner or shareholder in a professional corporation, and "associated with" means a lawyer on the payroll of a law firm as employee).

[1191] 751 S.W.2d 295, 300 (Tex. App.—Dallas 1988, orig. proceeding).

[1192] *Id.* at 296.

[1193] *Id.*

[1194] *Id.*

[1195] *Id.*

[1196] *Id.* (stating that the evidence showed that the lawsuit's files were removed from the central file room and kept under lock and key in a storage room and only the lead counsel had access to the key, that the firm also removed the files of twenty-two other cases pending in which it represented a

instructed not to discuss the case with anyone else at the firm, and all of the firm's shareholder attorneys, associates, and support staff were instructed not to mention the case in the new associate's presence.[1197] If the new associate did by chance overhear any discussion of the case, he was immediately to make his presence known to the participants, who were then to cease their conversation.[1198] Any violation of these procedures would result in the violator's termination from the firm.[1199] Finally, everyone, from the firm's senior attorneys to its support staff, was instructed not to leave any part of the file unattended on a desk or any other place where a casual passerby might happen upon it.[1200] These procedures were in place before the new associate actually joined the law firm.[1201]

Petroleum's counsel contended that it implemented an effective screening device that rebutted any presumption of shared confidences and that these procedures refuted any appearance of impropriety.[1202] On appeal the court had to resolve two principal issues: "(1) whether Texas law authorizes the use of a 'Chinese wall' to avoid [the disqualification] of a large law firm employing a disqualified lawyer; and (2) whether [Petroleum's counsel] had established an effective 'Chinese wall.'"[1203] Discussing the then-applicable Texas Code of Professional Responsibility, the court explained:

> [T]wo presumptions give rise to the doctrine of vicarious disqualification . . . . The first is an irrebuttable presumption that a client gave confidential information to an attorney actively handling the client's case. The second is that an attorney who obtains such confidences shares them with other members of the attorney's firm, because of the interplay among lawyers who practice together. [Thus,] under the second presumption the actual knowledge of the

defendant being sued by clients of plaintiff's counsel, and that identical protections were also developed to screen the new associate from these cases).

[1197] *Id.*

[1198] *Id.*

[1199] *Id.*

[1200] *Id.*

[1201] *Id.*

[1202] *Id.*

[1203] *Id.* at 297.

> individual attorney is imputed to the other [attorneys in the firm].[1204]

The court of appeals held that even if the associate did not personally work on the litigation at his new firm, it was undisputed that he participated in confidential discussions about the case while employed by plaintiff's counsel.[1205] The court thereupon held:

> [T]he erection of a Chinese wall will not rebut the presumption of shared confidences when an attorney in private practice has actual knowledge of a former client's confidences in relation to a particular suit and he thereafter undertakes employment with a firm representing an adversary of the former client in that same suit. Accordingly, we further hold that to allow [the firm] to represent Petroleum in this case would be a violation of Canon 4. Therefore, the specifically identifiable impropriety required by the first prong of the Canon 9 test has been met.[1206]

Holding the "Chinese wall" insufficient to refute the appearance of impropriety (the possible disclosure of the former client's confidence), the

[1204] *Id.* at 299–300 (citations omitted). In *Petroleum Wholesale*, because the defense firm acknowledged that confidential information concerning the litigation actually had been given to its new associate, the second presumption was not necessary as a basis for the associate's disqualification. *Id.* at 300. He was disqualified based on his actual knowledge rather than his imputed knowledge. *Id.* The defense firm argued, however, that its construction of a "Chinese wall" successfully rebutted the second presumption as it related to the associate and his new firm, and the associate was not able to share those confidences with his present fellow lawyers. *Id.* The court plainly disagreed. *Id.*; *see also In re* Colum. Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824 (Tex. 2010) (second irrebuttable presumption that lawyer shares confidences with members of the second firm requires "imputed disqualification of the firm").

[1205] *Petroleum Wholesale*, 751 S.W.2d at 299–300.

[1206] *Id.* The court of appeals also concluded that under then-existing Canon 9, "to determine whether the challenged lawyer or firm has avoided 'even the appearance of professional impropriety,' [the] movant for disqualification must show that: . . . there is a reasonable possibility of the occurrence of a 'specifically identifiable appearance of improper conduct' and that the likelihood of public suspicion or obloquy outweighs the social interest in obtaining counsel of one's choice." *Id.* at 297 (quoting *In re* Corrugated Container Antitrust Litig., 659 F.2d 1341, 1345 (5th Cir. 1981) (citations omitted)); *see also* Dillard v. Berryman, 683 S.W.2d 13–15 (Tex. App.—Fort Worth 1984, no writ) (disqualifying a law firm from defending a client in a civil assault case because one attorney, who was a district attorney before he joined the firm, had confidential conversations with the plaintiff when he had sought criminal prosecution for the assault).

Texas court disqualified Petroleum's counsel from representing it in the litigation.[1207] Although Petroleum insisted that no actual impropriety had occurred or will occur, the court explained "actual impropriety, however, is not the proper test."[1208] Rather, "it is the relationship of the attorneys to the parties and to each other that controls, not whether they have actually engaged in conduct which would create a conflict."[1209] Even though the court acknowledged that there may not have been any actual impropriety, it was concerned that the public had no means to verify independently the lack of any impropriety.[1210] The court distinguished *Lemaire*, which held a "Chinese wall" was sufficient to rebut the presumption of shared confidences, on the principal basis that *Petroleum* did not contend that substitute counsel was unavailable, a factor which seemed to tip the scales in favor of refusing to disqualify plaintiffs' counsel in *Lemaire*.[1211]

Recent authority confirms the view that in Texas state court the presumptions that arise out of the substantial relationship test are irrebuttable, and thus not circumvented by a "Chinese wall."[1212] And, the result of these presumptions is the mandatory disqualification of the second firm.[1213] The Texas Disciplinary Rules would also seem to support the proposition in state court that the "Chinese wall" is not an acceptable device to avoid a conflict of interests that arises in private practice with a former

[1207] *See Petroleum Wholesale*, 751 S.W.2d at 301.

[1208] *Id.*; *see also In re Corrugated Container*, 659 F.2d at 1344–45; Church of Scientology of Cal. v. McLean, 615 F.2d 691, 692 (5th Cir. 1980).

[1209] *Dillard*, 683 S.W.2d at 15.

[1210] *Id. But see* J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Morris, 776 S.W.2d 271, 282 (Tex. App.—Dallas 1989, no writ) (ruling that where the attorney had imputed knowledge, but not actual knowledge, "there arose no appearance of impropriety sufficient, as a matter of law, to mandate the disqualification of the entire firm . . . .").

[1211] *See Petroleum Wholesale*, 751 S.W.2d at 298–99.

[1212] *See, e.g.*, *In re* Guar. Ins. Servs., Inc., 343 S.W.3d 130, 134 (Tex. 2011) (per curiam) (stating there is an irrebuttable presumption that a migrating attorney has shared a client's confidences with members of the seond firm when the second firm is representing an opposing party in the same ongoing matter); NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989) (stating that former client establishing the existence of a prior attorney-client relationship concerning matters "substantially related" to the pending lawsuit is entitled to a conclusive presumption that confidences and secrets were imparted to the former attorney); *In re* Reeder, 515 S.W.3d 344, 349 (Tex. App.—Tyler 2016, no pet.) (same); Capital City Church of Christ v. Novak, No. 03-04-00750-CV, 2007 WL 1501095, at *4 (Tex. App.—Austin May 23, 2007, no pet.).

[1213] *In re Guar. Ins. Servs., Inc.*, 343 S.W.3d at 134; *In re Reeder*, 515 S.W.3d at 349.

client.[1214] The appearance-of-impropriety standard that the "Chinese wall" was intended to satisfy no longer exists under the Texas Disciplinary Rules. Moreover, because the Rules only provide for a "Chinese wall" in situations involving government attorneys, one can argue that the Rules intended to exclude the application of such a device in any other situation.[1215] However, effective screening mechanisms can protect client confidences when the person who has migrated law firms is not an attorney, but a paralegal or non-lawyer employee.[1216]

The problem of vicarious disqualification can be resolved by obtaining the consent of the interested parties.[1217] Texas Disciplinary Rule 1.09, which pertains to conflict of interests situations with former clients, is "primarily for the protection of clients and its protections can be waived by [the client]."[1218] However, "a waiver is effective only if there is consent after disclosure of the relevant circumstances, including the lawyer's past or intended role on behalf of each client, as appropriate."[1219]

A law firm may not be disqualified if the firm's new attorney had only imputed knowledge, and not actual knowledge, of the former client's matter.[1220] In *Enstar Petroleum Co. v. Mancias*, for example, the court held that the new attorney was disqualified because his former firm had represented a party involved in the current litigation and to allow him to represent a client in that litigation, even though he had no actual knowledge of that party's matter, would result in the appearance of impropriety.[1221] However, the court in *Mancias* also held "new partners of a vicariously

[1214] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.10, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R., art. X, § 9).

[1215] *Id*.

[1216] *In re Guar. Ins. Servs.*, 343 S.W.3d at 134; *In re* Colum. Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824 (Tex. 2010) (orig. proceeding); Phx. Founders, Inc. v. Marshall, 887 S.W.2d 831, 834–35 (Tex. 1994) (orig. proceeding).

[1217] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09 cmt. 3.

[1218] *Id.* R. 1.09 cmt. 10; *see also In re* Cerberus Capital Mgmt., L.P., 164 S.W.3d 379, 382 (Tex. 2005) (corporation knowingly waived any conflict by signing waiver letter containing the disclosures required by comment 10 of Rule 1.09).

[1219] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09 cmt. 10; *see also* Hoggard v. Snodgrass, 770 S.W.2d 577, 585 (Tex. App.—Dallas 1989, no writ).

[1220] *See In re* CMH Homes, Inc., No. 04-13-00050-CV, 2013 WL 2446724, at *7 (Tex. App.—San Antonio June 5, 2013, no pet.); Enstar Petro. Co. v. Mancias, 773 S.W.2d 662, 664 (Tex. App.—San Antonio 1989, orig. proceeding).

[1221] 773 S.W.2d at 664; *see also* Am. Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1129 (5th Cir. 1971).

disqualified partner, to whom knowledge has been imputed during a former partnership, are not necessarily disqualified: they need only show that the vicariously disqualified partner's knowledge was imputed, and not actual."[1222] Since the new attorney's knowledge was only imputed, his new law firm was not vicariously disqualified.[1223] Significantly, in *Mancias* the court also concluded that the movant "waived its right to disqualify the entire firm by the late filing of such motion."[1224]

Thereafter, in *Henderson v. Floyd*, a mandamus action, the Texas Supreme Court disqualified a law firm on the basis of Rule 1.09.[1225] The lawyer in *Henderson*, who went to work for plaintiff's counsel one month before trial, had previously worked for the firm representing the defendant, but had never worked on a specific assignment on the case, was never counsel of record, and had never met the defendant. However, the attorney had access to the file, "may have" proofread briefs and seen a settlement video, and may have been privy to strategy and other discussions about the case.[1226] While employed at his new firm, the attorney avoided all contact with the case, the firm attempted to shield him from any exchange of confidential information, and it was not alleged that any confidential information had been disclosed.[1227] Nevertheless, reasoning that the attorney "may have done some actual work on the case, albeit minor, and was at least exposed to confidential information," the *Henderson* court decided that "the simple fact is that relator's former lawyer is now associated with his opponent's lawyer. Rule 1.09 does not permit such representation . . . ."[1228]

[1222] 773 S.W.2d at 664 (citing *Am. Can Co.*, 436 F.2d at 1129).

[1223] *Id.*; *see also In re* Nat'l Lloyds Ins. Co., No. 13-15-00521-CV, 2016 WL 552112, at *6 (Tex. App.—Corpus Christi Feb. 10, 2016, orig. proceeding) (holding that attorney established she "did not work on any matter," "did not personally represent [client of her former employer], and did not personally receive any confidential information" about that client and thus her imputed disqualification ended when she left her former employer).

[1224] *See* 773 S.W.2d at 664.

[1225] 891 S.W.2d 252, 254 (Tex. 1995) (per curiam).

[1226] *Id.* at 253.

[1227] *Id.*

[1228] *Id.* at 254. *But see* Nat'l Oilwell Varco, L.P. v. Omron Oilfield & Marine, Inc., 60 F. Supp. 3d 751, 762–63 (W.D. Tex. 2014) ("Under Fifth Circuit precedent, there is no established irrebuttable presumption a lawyer shares client confidences he possesses with other lawyers at his law firm. On the other hand, the Fifth Circuit has indicated in recent precedent . . . that, to the extent there is still a presumption . . . the presumption is rebuttable.").

In *In re Basco*, a unanimous Texas Supreme Court found that disqualification is mandatory under Rule 1.09 when an attorney might be in the position of criticizing a former colleague's legal advice.[1229] In the main suit, a doctor asserted various claims against Baylor Medical Center at Grapevine for terminating his hospital privileges.[1230] One of Baylor's reasons for the termination was the doctor's failure to report a medical malpractice suit filed against him.[1231] The doctor claimed the non-disclosure was based upon the advice of his attorney in the underlying suit.[1232] The lawyer for the doctor in the underlying malpractice action was a former partner of the lawyer then representing Baylor in present action; the lawyer who eventually represented Baylor moved to another law firm.[1233]

Baylor's attorney testified he did not work on the case while he was at the previous firm.[1234] The doctor moved to have the hospital's lawyer disqualified and the court agreed, holding "even if departing attorneys have no connection with a former client of a former firm, they cannot take on a case against that client if it involves questioning the validity of the earlier representation."[1235] In this case, the court was concerned that the hospital's lawyer would have to question his former partner about the advice given to the doctor while they were colleagues and would have to challenge that advice.[1236] According to the court, this would undermine the integrity of the judicial system: "The legal system's image is ill-served by lawyers criticizing the work of their former associates with whom they shared in the fees paid for the work."[1237]

Accordingly, in Texas state court, a lawyer who has previously represented a client may not represent another person on a matter adverse to the client if the matters are the same or substantially related.[1238] If the

[1229] 221 S.W.3d 637, 638–39 (Tex. 2007) (per curiam).

[1230] *Id.* at 638.

[1231] *Id*.

[1232] *Id*.

[1233] *Id*.

[1234] *Id*.

[1235] *Id.* at 639.

[1236] *Id.*

[1237] *Id.* at 638 (citing *In re* EPIC Holdings, Inc., 985 S.W.2d 41, 52 (Tex.1998) (orig. proceeding)).

[1238] *In re* Guar. Ins. Servs., Inc., 343 S.W.3d 130, 133–34 (Tex. 2011) (per curiam) (citing Phx. Founders, Inc. v. Marshall, 887 S.W.2d 831, 833 (Tex. 1994) (orig. proceeding)); *In re* Colum. Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824 (Tex. 2010) (orig. proceeding).

lawyer worked on the earlier matter, there is an irrebuttable presumption that the lawyer obtained confidential information during the representation.[1239] That attorney's knowledge is imputed to every attorney at the law firm, creating an "irrebuttable presumption that an attorney in a law firm has access to the confidences of the clients and former clients of other attorneys in the firm."[1240] A second irrebuttable presumption arises when a lawyer moves to another firm and the second firm represents an opposing party to the lawyer's former client.[1241] In such circumstances, it is presumed that the lawyer has shared the client's confidences with members of the second firm, thus requiring the disqualification of the second firm.[1242]

In the Fifth Circuit, however, if the transferring lawyer did not represent the former client while at his former firm and possesses no confidential information material to the matter, the transferring lawyer is no longer deemed to have imputed knowledge about his former firm's client.[1243] Accordingly, the transferring lawyer is entitled to accept the representation adverse to his former firm's client.[1244]

3. Government Service and Private Employment

"[An attorney must] not represent a private client in connection with a matter in which he participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation."[1245] Furthermore, no attorney in the firm of such an

[1239] *In re Guar. Ins. Servs.*, 343 S.W.3d at 134; *Phx. Founders, Inc.*, 887 S.W.2d at 833 (citing NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 399–400 (Tex. 1989)).

[1240] Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996).

[1241] *In re Guar. Ins. Servs.*, 343 S.W.3d at 134; *Phx. Founders, Inc.*, 887 S.W.2d at 834 (citing Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 300 (Tex. App.—Dallas 1988, orig. proceeding)).

[1242] *In re Guar. Ins. Servs*., 343 S.W.3d at 134.

[1243] *In re* ProEducation Intern., Inc., 587 F.3d 296, 303 (5th Cir. 2009) (citing Amon Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 REV. LITIG. 665, 684–85 (1997)).

[1244] *Id*.

[1245] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.10(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R., art. X, § 9). *See generally* Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 323 (1966) ("County Attorney's disqualification to defend criminal cases extends to his partners or associates in all courts throughout the state whether privately employed or court-appointed. The father of a County Attorney is not per se disqualified to defend a criminal case prosecuted by his son but such practice should be discouraged."), *reprinted* in 23 BAYLOR. L. REV. 851; Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 307 (1965) (stating a District Attorney or his law firm may not

attorney may knowingly undertake or continue representation in such a matter unless: (1) the attorney "is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is given with reasonable promptness to the appropriate government agency."[1246]

An attorney possessing confidential information about a person or other legal entity acquired while he was a public officer or employee may not represent a private client whose interests are adverse to that person or legal entity.[1247] After learning of such a situation, that attorney's firm may undertake or continue representation in that matter only if the disqualified attorney "is screened from any participation in the matter and is apportioned no part of the fee therefrom."[1248]

> [An attorney] serving as a public officer or employee [also must] not:
>
> (1) [p]articipate in a matter involving a private client when [he] had represented that client in the same matter while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
>
> (2) [n]egotiate for private employment with any person who is involved as a party or as attorney for a party in a

ethically represent the bonding-company defendant in civil suit filed by county situated in his district), *reprinted* in 23 BAYLOR. L. REV. 827; Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 183 (1958) (ruling it "improper for district or county attorneys or county judges to accept employment in any case in which they are acting adversely to the state or the county"), *reprinted* in 18 BAYLOR. L. REV. 278.

[1246] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.10(b)(1)–(2).

[1247] *Id.* R. 1.10(c); Smith v. Abbott, 311 S.W.3d 62, 75 (Tex. App.—Austin 2010, pet. denied) (password-protected database of the Attorney General's office, containing data used to track driver's license suspensions for nonpayment of child support, was "confidential government information"). *See generally* Comm. on Interpretation of the Cannons of Ethics, State Bar of Tex., Op. 272 (1963) (stating that "no member of a law firm, of which the Mayor of a city is a member, may represent clients before city's corporation court, the judge of which is appointed by and removable at the will of the City Commission"), *reprinted* in 18 BAYLOR. L. REV. 345; Comm. on Interpretation of the Cannons of Ethics, State Bar of Tex., Op. 82 (1952) (ruling that "an attorney who is city alderman may not accept employment in criminal cases before the city court of his city"), *reprinted* in 18 BAYLOR. L. REV. 230.

[1248] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.10(d).

> matter in which the lawyer is participating personally and substantially.[1249]

4. Non-Lawyer Employees

The Texas disciplinary rules do not speak to the duties of nonlawyer employees of a law firm toward clients' confidential information. However, they task a supervising lawyer to refrain from "ordering, encouraging, or permitting a nonlawyer to reveal such information."[1250]

The Texas Supreme Court has spoken at least seven times on this issue.[1251] In *Grant v. Thirteenth Court of Appeals*, a law firm temporarily employed a legal secretary who had previously worked for opposing counsel.[1252] The secretary had extensively participated in the litigation at issue at her former firm, and the new firm allowed her to continue working even after finding out about her previous work.[1253] Because of the extent of her participation and the lack of screening mechanisms within the firm, the firm was disqualified.[1254] The court held that when a nonlawyer switches firms a *rebuttable* presumption arises that the nonlawyer will share confidential information with the members of the new firm.[1255] This presumption can be rebutted "upon a showing that sufficient precautions have been taken to guard against any disclosure of confidences."[1256] Under the analysis in *Grant*, the failure to use screening mechanisms amounts to taking no precautions, and therefore is insufficient to rebut the presumption.[1257]

[1249] *Id.* R. 1.10(e)(1), (2).

[1250] Phx. Founders, Inc. v. Marshall, 887 S.W.2d 831, 834 (Tex. 1994) (orig. proceeding).

[1251] *See generally In re* Turner, 542 S.W.3d 553 (Tex. 2017) (per curiam); *In re* RSR Corp., 475 S.W.3d 775 (Tex. 2015) (orig. proceeding); *In re* Guar. Ins. Servs., Inc., 343 S.W.3d 130 (Tex. 2011) (per curiam); *In re* Colum. Valley Healthcare Sys., L.P., 320 S.W.3d 819 (Tex. 2010) (orig. proceeding); *In re* Am. Home Prods. Corp., 985 S.W.2d 68 (Tex. 1998); *Phx. Founders*, 887 S.W.2d 831; Grant v. Thirteenth Ct. of Appeals, 888 S.W.2d 466 (Tex. 1994) (per curiam); *see also* Tex. Comm. on Prof'l Ethics, State Bar of Tex., Op. 650 (2015).

[1252] 888 S.W.2d at 466.

[1253] *Id.* at 467.

[1254] *Id.* at 468.

[1255] *Id.* at 467 (citing *Phx. Founders*, 887 S.W.2d at 835).

[1256] *Id.*

[1257] *Id.* at 468

Grant holds that the test for disqualification "is met by demonstrating a genuine *threat* of disclosure, not an actual materialized disclosure."[1258] Texas courts follow the ABA standard that states:

> The nonlawyer should be cautioned . . . that the employee should not work on any matter on which the employee worked for the former employer . . . . When the new firm becomes aware of such matters, the employing firm must also take reasonable steps to ensure that the employee takes no action and does no work in relation to matters on which the employer worked in the prior employment, absent client consent after consultation.[1259]

In *Phoenix Founders, Inc. v. Marshall*, a paralegal went to work for a firm involved in litigation opposite to her previous firm.[1260] During the three weeks of her employment with the second firm, the paralegal recorded six-tenths of an hour on that litigation for locating a pleading.[1261] At the end of the three weeks, she returned to work for the first firm.[1262] The second firm requested that the first firm be disqualified from further representation in the matter.[1263]

The Supreme Court concluded that a "paralegal who has actually worked on a case must be subject to the . . . conclusive presumption that confidences and secrets were imparted during the course of the paralegal's work on the case."[1264] However, paralegals are not conclusively presumed to share confidential information with members of their firms.[1265] Thus, the court held that, "disqualification is not required if the rehiring firm is able to establish that it has effectively screened the paralegal from any contact with the underlying suit."[1266]

[1258] *Id*. (emphasis in original).

[1259] *Id.* at 467–68 (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1526 (1988)).

[1260] 887 S.W.2d at 833.

[1261] *Id.*

[1262] *Id*.

[1263] *Id*.

[1264] *Id.* at 834 (citing NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989)).

[1265] *Id*.; Arzate v. Hayes, 915 S.W.2d 616, 619 (Tex. App.—El Paso 1996, writ dism'd).

[1266] *Phx. Founders*, 887 S.W.2d at 833. Disqualification in such a case would have to be based on the ethical provisions requiring a supervising attorney to ensure the nonlawyer's conduct complies with the lawyer's professional obligations. *Id.* at 834; *see also In re* Guar. Ins. Servs., Inc., 343

In subsequent holdings discussing this area of law, the Texas Supreme Court has repeatedly looked to its earlier analysis in *Grant* and *Phoenix Founders*.[1267] For example, in *In re American Home Products*, the court determined a legal assistant[1268] was subject to an irrebuttable presumption "that confidences and secrets were imparted" to her in connection with her prior employment.[1269] She was also subject to a second presumption—a rebuttable presumption because she was a non-lawyer—that she had shared the confidences with her new employer.[1270] In *In re American Home Products*, the court found the second presumption that the client information was shared was not rebutted and so the firm was disqualified.[1271] To guide its analysis, the court outlined the criteria that would be sufficient to rebut the presumption of shared information:

> [T]he only way the rebuttable presumption can be overcome is: (1) to instruct the legal assistant "not to work on any matter on which the paralegal worked during the prior employment, or regarding which the paralegal has information relating to the former employer's representation," and (2) to "take other reasonable steps to ensure that the paralegal does not work in connection with

S.W.3d 130,134 (Tex. 2011) (per curiam) (citing *In re* Am. Home Prods. Corp., 985 S.W.2d 68, 75 (Tex. 1998)); *In re* Reeder, 515 S.W.3d 344, 350 (Tex. App.—Tyler 2016, no pet.).

[1267] *In re* Colum. Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824 (Tex. 2010) (orig. proceeding); *In re Am. Home Prods. Corp*., 985 S.W.2d at 74.

[1268] Although the legal assistant was at times referred to as an investigator or a consultant, the court determined her job title was not dispositive. Instead, because the tasks she performed "were the same as those that might be executed by a legal assistant as a full-time employee of a law firm or by a legal assistant in the legal department of a party," the court held that the analysis for nonlawyer employee of a law firm also applied to her. *In re Am. Home Prods. Corp.*, 985 S.W.2d at 74.

[1269] *Id.* at 74–75 (citing *Phx. Founders*, 887 S.W.2d at 834); *see also In re* RSR Corp., 475 S.W.3d 775, 780 (Tex. 2015) (orig. proceeding); *In re Guar. Ins. Servs., Inc.*, 343 S.W.3d at 134; *In re Reeder*, 515 S.W.3d at 349.

[1270] *In re Am. Home Prods. Corp.*, 985 S.W.2d at 75; *see also In re RSR Corp.*, 475 S.W.3d at 780; *In re Guar. Ins. Servs., Inc.*, 343 S.W.3d at 134; *Phx. Founders*, 887 S.W.2d at 834; *In re Reeder*, 515 S.W.3d at 349.

[1271] 985 S.W.2d at 76.

> matters on which the paralegal worked during the prior employment, absent client consent.[1272]

However, "a simple informal admonition to a nonlawyer employee not to work on a matter on which the employee previously worked for opposing counsel, even if repeated twice and with the threat of termination" does not qualify as "other reasonable measures" a firm must perform to appropriately isolate a side-switching employee from the same litigation matter.[1273] Instead, "other reasonable measures must include, at a minimum, formal, institutionalized screening measures that render the possibility of the nonlawyer having contact with the file less likely."[1274] Accordingly, "*effective* screening methods may be used to shield the employee from the matter in order to avoid disqualification."[1275] And, the failure to take effective reasonable steps to shield side-switching legal assistants from working a case after previously having worked on the same matter will result in a disqualification of the second law firm.[1276]

The factors a trial court should consider in determining whether the screening used by a firm is effective include:

> [T]he substantiality of the relationship between the former and current matters; the time elapsing between the matters;

[1272] *Id*. at 75 (citing *Phx. Founders*, 887 S.W.2d at 835) (emphasis omitted); *see also In re RSR Corp.*, 475 S.W.3d at 780; *In re Guar. Ins. Servs., Inc.*, 343 S.W.3d at 134; *In re Reeder*, 515 S.W.3d at 350.

[1273] *In re* Colum. Valley Healthcare Sys., L.P., 320 S.W.3d 819, 826 (Tex. 2010) (orig. proceeding).

[1274] *Id*.

[1275] *Id.* (citing Grant v. Thirteenth Ct. of Appeals, 888 S.W.2d 466 (Tex. 1994) (per curiam)) (emphasis in original); *see also In re RSR Corp.*, 475 S.W.3d at 780; *In re Guar. Ins. Servs., Inc.*, 343 S.W.3d at 136; *In re Reeder*, 515 S.W.3d at 350.

[1276] *In re Colum. Valley Healthcare Sys.*, 320 S.W.3d at 822 (noting that in this case, "the assistant actually worked on the case [at the second law firm] at her employer's directive"). Specifically, the legal assistant made a copy of a birth certificate and social security card in the same litigation matter while employed at the second law firm. *Id.* at 823; *see also In re* Turner, 542 S.W.3d 553, 557 (Tex. 2017) (per curiam) (affirming disqualification where second law firm did not learn that legal assistant worked on same matter while at previous law firm until after her work on the matter at second firm commenced, and stating that "[a] law firm must instruct a nonlawyer to refrain from working on conflicted matters *before* she commences work on a particular matter. This is true regardless of whether the second firm knows of the precise conflict."). In *In re Turner*, the disqualification applied even though the paralegal had failed to disclose on her resume or during interviews that she had even been employed by the first law firm. *Id.*

> the size of the firm; the number of individuals presumed to have confidential information; the nature of their involvement in the former matter; and the timing and features of any measures taken to reduce the danger of disclosure.[1277]

In the end, the court must determine "whether [the firm] has taken measures sufficient to reduce the potential for misuse of confidences to an acceptable level."[1278] Nonetheless, even when a screening measure is used, the "presumption of shared confidences becomes conclusive if: (1) information relating to the representation of an adverse client has in fact been disclosed, (2) screening would be ineffective or the nonlawyer necessarily would be required to work on the other side of a matter that is the same as or substantially related to a matter on which the nonlawyer has previously worked, or (3) the nonlawyer has actually performed work, including clerical work, on the matter at the lawyer's directive if the lawyer reasonably should know about the conflict of interest."[1279]

The presumptions and screening analysis set forth in *American Home Products* does not apply to all non-legal employees. Such analysis does not "govern a fact witness with information about his former employer if his position with that employer existed independently of litigation and he did not primarily report to lawyers."[1280] For example, in *In re RSR Corp.*, the Texas Supreme Court considered whether a trial court abused its discretion in disqualifying plaintiffs' law firm because they had "worked so closely" with the former finance manager of defendants.[1281] The trial court relied on the *American Home Products* analysis, reasoned the migrating finance manager was like a migrating paralegal, and disqualified the law firm.[1282] However, the Supreme Court held that this was an improper disqualification standard: "To the extent the fact witness discloses his past employer's privileged and confidential information, the factors outlined by *In re Meador*, 968 S.W.2d 346 (Tex. 1998) (orig. proceeding), should guide the

[1277] *In re Colum. Valley Healthcare Sys.*, 320 S.W.3d at 824–825; *Phx. Founders*, 887 S.W.2d at 836; *In re Reeder*, 515 S.W.3d at 350.

[1278] *In re Guar. Ins. Servs*., 343 S.W.3d at 135; *Phx. Founders*, 887 S.W.2d at 836.

[1279] *In re Colum. Valley Healthcare Sys*., 320 S.W.3d at 828.

[1280] *In re RSR Corp.*, 475 S.W.3d at 776.

[1281] *Id*.

[1282] *Id*.

trial court's discretion regarding disqualification."[1283] *In re Meador* offers the following factors courts must consider when evaluating whether to disqualify attorneys or law firms who obtain an opponent's privileged materials outside the normal course of discovery:

> (1) whether the attorney knew or should have known that the material was privileged;
>
> (2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
>
> (3) the extent to which the attorney reviews and digests the privileged information;
>
> (4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
>
> (5) the extent to which movant may be at fault for the unauthorized disclosure;
>
> (6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.[1284]

The court in *RSR Corp.* also disapproved of another court of appeals decision[1285] applying the *American Home Products* presumptions and disqualifying a firm for hiring an engineer as a consultant in a lawsuit against her prior employer: "[T]he *American Home Products* presumptions do not apply to fact witnesses who, at their original place of employment, were not hired for litigation purposes and were not directly supervised by lawyers. We disapprove of *Bell Helicopter* for disqualifying a firm that hired the opposing side's former engineer without first considering the *Meador* factors."[1286]

[1283] *Id*.

[1284] *Id.* at 778–79 (citing *In re* Meador, 968 S.W.2d 346, 351–52 (Tex. 1998)).

[1285] *In re* Bell Helicopter Textron, Inc., 87 S.W.3d 139 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]).

[1286] *In re RSR Corp.*, 475 S.W.3d at 782.

§ 11 Conflict of Interest: Intermediary

An attorney acts as an intermediary when he is representing two or more parties with potentially conflicting interests.[1287] Serving as an intermediary between clients is inappropriate unless several requirements are satisfied. First, the lawyer must consult with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect of the common representation on the attorney-client privilege.[1288] The attorney must obtain each client's written consent to the common representation.[1289] Second, the attorney must reasonably believe that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any client if the contemplated resolution is unsuccessful.[1290] Third, the attorney must reasonably believe that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.[1291]

To avoid liability while acting as intermediary, an attorney must consult with each client concerning the decisions to be made and the considerations relevant to making them, so that each client can make an adequately informed decision.[1292] Moreover, an attorney must withdraw as intermediary if any of the clients requests such a withdrawal, or if any of the conditions stated above is no longer satisfied.[1293] After withdrawal, the attorney shall not continue to represent any of the clients in the matter that was the subject of the common representation.[1294] If an attorney is prohibited from serving as an intermediary, no other attorney while a member of or associated with the attorney's firm may engage in that activity.[1295]

[1287] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.07(d), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R., art. X, § 9).

[1288] *Id.* R. 1.07(a)(1).

[1289] *Id*.

[1290] *Id.* R. 1.07(a)(2).

[1291] *Id.* R. 1.07(a)(3).

[1292] *Id.* R. 1.07(b).

[1293] *Id.* R. 1.07(c).

[1294] *Id*.

[1295] *Id.* R. 1.07(e).

Attorneys should be very cautious in agreeing to act as an intermediary, and prudence suggests that the precise arrangements, after full disclosure, to be employed by the attorney should be in writing. Otherwise, a dissatisfied party may later conclude that the intermediary-attorney in fact favored the opposing party.

§ 12 Candor with the Court

> An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The lawyer cannot serve two masters; and the one [the attorney has] undertaken to serve primarily is the court.[1296]

Accordingly, an attorney must not knowingly make a false statement of material fact or law to a court, or fail to disclose a fact to a court when disclosure is necessary to avoid assisting a criminal or fraudulent act.[1297]

An attorney also must not knowingly fail to disclose to the court any controlling authority directly adverse to the position of his client and not

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[1296] *In re* Integration of Neb. State Bar Ass'n, 275 N.W. 265, 268 (Neb. 1937); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(1)–(2); Sahyers v. Prugh, Holliday & Karatinos, P.L., 560 F.3d 1241, 1245 (11th Cir. 2009) (explaining that "a lawyer's duties as a member of the bar—an officer of the court—are generally greater than a lawyer's duties to the client"); People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (1928) (citation omitted) ("Membership in the bar is a privilege burdened with conditions. [A lawyer is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.").

[1297] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a) 1–2 & cmt. 2–3. *Compare* Schlafly v. Schlafly, 33 S.W.3d 863, 872–74 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding that counsel violated duty of candor by misrepresenting the appellate record), *and* Resolution Trust Corp. v. Tarrant Cty. Appraisal Dist., 926 S.W.2d 797, 802 n.4 (Tex. App.—Fort Worth 1996, n.w.h.) (explaining that plaintiff violated Rule 3.03 by asserting for first time on appeal that trial court lacked jurisdiction when parties knew such jurisdiction did not exist at time of filing suit), *and* Volcanic Gardens Mgmt. Co., Inc. v. Paxson, 847 S.W.2d 343, 347–48 (Tex. App.—El Paso 1993, orig. proceeding) (comparing lawyer's duty under Rule 3.03(a)(1)–(2) to crime-fraud exception to attorney-client privilege and stating that not only must an attorney refrain from making false or misleading statements to the court, but also he must disclose authority that is directly adverse to his position in the controlling jurisdiction if his adversary does not raise such authority), *with* Utz v. McKenzie, 397 S.W.3d 273, 282–83 (Tex. App.—Dallas 2013, no pet.) (denying request for sanctions and holding counsel's argument that potentially inapposite case "should" apply did not misrepresent law).

disclosed by opposing counsel.[1298] Furthermore, an attorney must not knowingly offer or use evidence he knows to be false.[1299]

If an attorney has offered material evidence and later learns of its falsity, he must make a good faith effort to persuade the client to authorize him to correct or withdraw the false evidence.[1300] If such efforts are unsuccessful, an attorney must then take reasonable remedial measures, including disclosure of the true facts.[1301] These obligations continue until remedial measures are no longer reasonably possible.[1302] In *In re City of Lancaster*, for example, the court of appeals held that attorneys for the city violated the disciplinary rules by failing to inform the court that facts sworn to in an original petition for mandamus which, although true when petition was filed, had subsequently been rendered false by subsequent events.[1303]

§ 13 Attorney Serving as Witness

An attorney must not accept or continue employment in a contemplated or pending adjudicatory proceeding if he knows or believes he or a lawyer in his firm is or may be a witness necessary to establish an essential fact on behalf of his client.[1304] This has been a long-standing ethical proscription.[1305] However, an attorney may serve as a witness where:

[1298] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a)(4).

[1299] *Id.* R. 3.03(a)(5).

[1300] *Id.* R. 3.03(b).

[1301] *Id*.

[1302] *Id.* R. 3.03(c); *see* Kirkham v. State, 632 S.W.2d 682, 684–85 (Tex. App.—Amarillo 1982, no writ) (citation omitted) ("The appellant's attorney, citing DR 7-102(A)(4) of the State Bar Rules . . . did not believe he could, in good conscience, allow his client to testify that he was not intoxicated to any degree, when his client had previously stated under oath that he was under the influence of intoxicating liquor to some degree" and the court held: "It cannot be considered ineffective assistance of counsel for an attorney to discourage a client from taking the stand in order to testify falsely.").

[1303] 228 S.W.3d 437, 442 (Tex. App.—Dallas 2007, orig. proceeding).

[1304] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08(a); *see, e.g., In re* Tex. Tech. Servs., Inc., 476 S.W.3d 748, 751–52 (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding) (holding trial court abused its discretion by disqualifying worker's former employer's attorneys from defending employer in worker's current employer's action against former employer for tortious interference with contractual and business relationship, where attorneys had verbally communicated with customer to discourage customer from contracting with new employer); *In re* Garza, 373 S.W.3d 115, 117–18 (Tex. App.—San Antonio 2012, orig. proceeding) (holding disqualification was abuse of discretion because attorney's role as notary and witness of signing of deed did not render testimony necessary to establish an essential fact); Banks v. Boone, 691 S.W.2d 783, 784 (Tex.

> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) the testimony relates to the nature and value of legal services rendered in the case;
>
> (4) the lawyer is a party to the action and is appearing pro se; or
>
> (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.[1306]

App.—Amarillo 1985, orig. proceeding) (ruling that the trial judge was not required in marriage dissolution action to order withdrawal of law firm representing wife on ground that husband intended to call as witness partner in the law firm to give testimony which was allegedly in direct contravention of, and prejudicial to, wife's pleaded interest in certain property involved in suit); Holt v. State, 683 S.W.2d 92, 93 (Tex. App.—Austin 1984, no writ) (per curiam) (holding that trial court erred in excluding attorney's testimony for defendant rather than forcing attorney's associate to withdraw as trial counsel or face disciplinary proceedings); Bullock v. Kehoe, 678 S.W.2d 558, 560 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (upholding trial court's decision not to disqualify appellee's law firm despite fact that several members were material witnesses to the suit, because appellant had not shown that he was harmed in any way or that an improper judgment was rendered); Stocking v. Biery, 677 S.W.2d 792, 795 (Tex. App.—San Antonio 1984, orig. proceeding) (affirming trial court's decision to not disqualify defendant's law firm where opposing counsel intended to call defense attorney as witness but where there was no evidence that attorney's testimony would be prejudicial to his client's interest); Bert Wheeler's, Inc. v. Ruffino, 666 S.W.2d 510, 511, 513–14 (Tex. App.—Houston [1st Dist.] 1983, orig. proceeding) (holding that trial court did not abuse its discretion in deciding to disqualify attorney, where attorney stipulated that he would appear as witness on behalf of his client, where attorney fails to show that testimony will fall within one of four exceptions to disciplinary rule requiring lawyer to withdraw from representation in trial if he learns or it is obvious that he or a lawyer in his firm ought to be called as witness on behalf of client).

[1305] *See* Tex. State Bar R. art. X, § 9, DR 5-101(B)–102 (TEX. CODE OF PROF'L RESP.) (1988, superseded 1990).

[1306] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08(a)(1)–(5); *see also* Audish v. Clajon Gas Co., 731 S.W.2d 665, 673 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (ruling that attorney's affidavit submitted for oil corporation in support of partial summary judgment in condemnation proceeding did not require disqualification of attorney's law firm where affidavit testimony was uncontested and related only to fact that original notice of hearing and returned service

Texas Disciplinary Rule 3.08(a) applies after an attorney has undertaken employment in contemplated or pending litigation, and later learns, or it becomes obvious, that he or a lawyer in his firm will be called as a witness other than on behalf of his client.[1307] To support disqualification under Rule 3.08(a), the movant must present evidence that the attorney's testimony is "necessary" and goes to an "essential fact" of the nonmovant's case.[1308] The burden is on the party moving for disqualification to show that the opposing lawyer's dual roles as attorney and witness will cause the moving party actual prejudice.[1309] Without these limitations, the rule could be improperly employed "as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice."[1310] An attorney must not continue as an advocate in a pending adjudicatory proceeding if he believes he will be compelled to furnish testimony that will be substantially adverse to his client, unless the client consents after full disclosure.[1311] In such a case the lawyer may continue the representation "until it is apparent that his testimony is or may be prejudicial to his client."[1312] The mere

were delivered to law firm, stored in firm file, and later personally delivered to Commissioners by attorney).

[1307] *See In re* Sanders, 153 S.W.3d 54, 57 (Tex. 2004) (orig. proceeding) (per curiam); *In re* Reeder, 515 S.W.3d 344, 354 (Tex. App.—Tyler, no pet.); Olguin v. Jungman, 931 S.W.2d 607, 611 (Tex. App.—San Antonio 1996, no writ); *Stocking*, 677 S.W.2d at 794 (holding that the "mere announcement by the movant that he intends to call opposing counsel as a witness is insufficient to demand disqualification"); *Bert Wheeler's, Inc.*, 666 S.W.2d at 514 (holding that trial court did not abuse its discretion in deciding to disqualify attorney or in refusing to reinstate attorney who could have been called to testify to prejudice of his client).

[1308] *In re Reeder*, 515 S.W.3d at 354 (citing *In re* Chu, 134 S.W.3d 459, 464 (Tex.App.–Waco 2004, orig. proceeding)).

[1309] *See In re Sanders*, 153 S.W.3d at 57; *In re Garza*, 373 S.W.3d at 118.

[1310] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08 cmt. 10 (stating that lawyer "should not seek to disqualify an opposing lawyer by unnecessarily calling that lawyer as a witness").

[1311] *See id.* R. 3.08(b), (c) (stating that without the client's informed consent, an attorney may not act as advocate in an adjudicatory proceeding in which another lawyer in his firm is prohibited from serving as advocate). *But see* FDIC v. U.S. Fire Ins. Co., 50 F.3d 1304, 1317–18 (5th Cir. 1995) (ruling that two attorneys were disqualified despite client's consent, but firm allowed to continue representation); United Pac. Ins. Co. v. Zardenetta, 661 S.W.2d 244, 248 (Tex. App.—San Antonio 1983, orig. proceeding) (holding that the client may not waive application of former rule).

[1312] *Stocking*, 677 S.W.2d at 794 (quoting Rules Governing the State Bar of Texas art. 12, § 8, DR 5-102 (1973)); *see also Olguin*, 931 S.W.2d at 611.

announcement by the movant that he intends to call opposing counsel as a witness is insufficient to compel disqualification.[1313]

Although Rule 3.08 was promulgated as a disciplinary standard rather than one of procedural disqualification,[1314] courts have "recognized that the rule provides guidelines relevant to a disqualification determination."[1315] In *Anderson Producing Inc. v. Koch Oil Co.*, where the Supreme Court ruled that the attorney was not disqualified by performing out-of-court activities such as drafting pleadings, assisting with pretrial strategy, or engaging in settlement negotiations, the court stated that a standard different than that set forth in Rule 3.08 had not been urged by the parties, but that did "not exclude the possibility that we would apply a different standard under other appropriate circumstances."[1316]

Several reasons have been advanced for the rule prohibiting an attorney from testifying.[1317] But in general, the Rule "is grounded principally on the belief that the finder of fact may become confused when one person acts as both advocate and witness."[1318] This dual role gives rise to the concern that "the attorney may be more impeachable for interest and, therefore, a less effective witness."[1319] In addition, the dual role may place the testifying

[1313] *See In re Garza*, 373 S.W.3d at 118 (holding that disqualification of counsel is inappropriate under Rule 3.08(a) when opposing counsel merely announces their intention to call the attorney as a fact witness without establishing both a genuine need for the attorney's testimony and that the testimony goes to an essential fact); *Olguin*, 931 S.W.2d at 611; *Stocking*, 677 S.W.2d at 794; *Zardenetta*, 661 S.W.2d at 248.

[1314] *See* TEX. DISCIPLINARY RULES PROF. CONDUCT R. 3.08 cmt. 9.

[1315] *In re* Sanders, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding) (citing Anderson Producing v. Koch Oil Co., 929 S.W.2d 416 (Tex. 1996)); *accord* Spears v. Fourth Ct. of Appeals, 797 S.W.2d 654, 656 (Tex. 1990) (citing Ayres v. Canales, 790 S.W.2d 554, 556 n.2 (Tex. 1990)); *Ayres*, 790 S.W.2d at 556 n.2.

[1316] 929 S.W.2d at 422.

[1317] For an excellent discussion of the purpose and application of the rule, *see* Barbara Hanson Nellermoe & Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 ST. MARY'S L. J. 443, 478 (1997); *see also* Rebecca Simmons & Manuel C. Maltos, *Exploring Disqualification of Counsel in Texas: A Balancing of Competing Interests*, 37 ST. MARY'S L.J. 1009, 1045–47 (2006); *see generally* James B. Lewis, *The Ethical Dilemma of Testifying Advocate: Fact or Fancy*, 19 HOUS. L. REV. 75 (1981); Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M. L. REV. 47 (2006).

[1318] *In re* Keenan, 501 S.W.3d 74, 77 (Tex. 2016) (quoting *Anderson Producing*, 929 S.W.2d at 422).

[1319] *Id.* at 77 (quoting Warrilow v. Norrell, 791 S.W.2d 515, 521 n.6 (Tex. App.—Corpus Christi 1989, no writ); *see also* Bert Wheeler's, Inc. v. Ruffino, 666 S.W.2d 510, 513 (Tex. App.—Houston [1st Dist.] 1983, orig. proceeding).

attorney in the unseemly and ineffective position of arguing his own credibility.[1320] The roles of advocate and witness are inconsistent, because the function of an attorney is to advance his client's cause, and the function of a witness is to state facts objectively.[1321] Furthermore, the dual role could hinder opposing counsel in challenging the credibility of the testifying attorney.[1322]

Unless the attorney's testimony falls within one of the exceptions set forth in the Texas Disciplinary Rules, the failure of a court to disqualify an attorney who seeks to act as both witness and advocate may be reversible error.[1323] Consequently, when trial counsel foresees the possibility that he will be a witness at trial on behalf of his client, all doubts should be resolved against his continued participation as trial counsel.[1324]

Because the consequences of disqualifying an attorney can create considerable hardship, however, disqualification is a "severe remedy."[1325] As the court of appeals stated in *Bert Wheeler's Inc. v. Ruffino*, when it held that the trial court did not abuse its discretion in disqualifying an attorney:

> We recognize that the denial of relator's right to have Hoppess represent him at trial will likely create some hardship to relator, and that any remedy by appeal may be inadequate. We believe that this is true in most cases where a lawyer is forced to withdraw after spending several years preparing a case for trial. Also, there is a clear danger of such a tactic being used by an opposing counsel to

[1320] *In re Keenan*, 501 S.W.3d at 77 (quoting *Warrilow*, 791 S.W.2d at 522).

[1321] *Id.*; *see also Anderson Producing*, 929 S.W.2d at 422; *Bert Wheeler's, Inc.*, 666 S.W.2d at 513; TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08 cmt. 4, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R., art. X, § 9) ("A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others.").

[1322] *Bert Wheeler's, Inc.*, 666 S.W.2d at 513.

[1323] *See Warrilow*, 791 S.W.2d at 520–23 (ruling that trial court abused its discretion by failing to disqualify attorney; refusal to disqualify attorney when he testified as fact witness was not reversible error, but refusal to disqualify him when he testified as expert witness was reversible error).

[1324] *Id.* at 523 n.10.

[1325] *In re* Sanders, 153 S.W.3d 54, 57 (Tex. 2004) (quoting Spears v. Fourth Ct. of Appeals, 797 S.W.2d 654, 656 (Tex. 1990)).

> disqualify the skillful, the stubborn, or the perpetual adversary.[1326]

It is therefore axiomatic that Rule 3.08 "should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice."[1327] To prevent abuse of the rule, the trial court should require the party seeking disqualification to demonstrate actual prejudice resulting from the opposing lawyer's acting in a dual role.[1328] Furthermore, mandamus is appropriate to correct a trial court's erroneous disqualification order because there is no adequate remedy by appeal.[1329]

Ayres v. Canales illustrates the 3.08(a)(4) exception for lawyers appearing pro se.[1330] In *Ayres*, the client, Nix, requested that Ayres, an attorney, "represent certain of his relatives in a case involving the death of their daughter."[1331] The case settled and thereafter Nix, also an attorney, requested the attorney pay him a referral fee.[1332] The attorney thereafter filed a declaratory judgment action to determine whether any referral fee agreement existed.[1333] During the pendency of that action, Nix filed a motion to disqualify seeking to prohibit the attorney and members of his firm from participating as counsel in the case on the ground that they were disqualified under then-existing State Bar Disciplinary Rules DR 5-101(B) and DR 5-102 because the attorney, along with another attorney in his firm, were potential witnesses.[1334] The trial judge overruled the motion but ordered that "neither [the attorney] nor any member of the firm . . . shall verbally participate in the taking of any depositions, examination or cross

[1326] 666 S.W.2d at 514.

[1327] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08 cmt. 10; *see also In re Sanders*, 153 S.W.3d at 57–58 (affirming trial court's refusal to disqualify from divorce proceeding attorney who accepted client parent's performance of remodeling work as payment for representation; although obligation to perform work impacted ability of client to care for child and pay child support, attorney's testimony was not necessary to establish essential fact, as movant failed to explain how other record evidence was insufficient to establish nature of client's obligation).

[1328] *See* Ayres v. Canales, 790 S.W.2d 554, 558 (Tex. 1990) (orig. proceeding).

[1329] *In re Sanders*, 153 S.W.3d at 56.

[1330] 790 S.W.2d at 556–57.

[1331] *Id.* at 555.

[1332] *Id*.

[1333] *Id*.

[1334] *Id*.

examination of witnesses or otherwise participate verbally in any proceeding in the presence of the jury."[1335]

On appeal, the main issues were: (1) whether the attorney could properly represent himself in the declaratory judgment action; (2) whether the attorney or another firm attorney who will testify could represent their firm; and (3) whether non-testifying members of the firm could represent the attorney and his firm.[1336] Interpreting new Rule 3.08(a)(4) and comment 6 to Rule 3.08, the court stated that the Rule is included to protect an attorney's right to self-representation.[1337] Accordingly, the court held that the attorney could represent himself in the declaratory judgment action.[1338]

The court, moreover, decided that an attorney may be counsel for a client and a witness at trial if the attorney has promptly notified opposing counsel of his dual role and that disqualification would work substantial hardship on the client.[1339] Comment 7 to Rule 3.08 explains that this subsection of the rule was based upon a balancing of the client's interests in being represented by counsel of his choice with the interests of the opposing party.[1340] For example, the opposing party may be unfairly

[1335] *Id*.

[1336] *Id.* at 556.

[1337] *Id.* at 557.

[1338] *Id.* at 556–57. Texas Rule of Civil Procedure 7 provides that "[a]ny party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court." TEX. R. CIV. P. 7. Thus, according to the court, ordering a party to be represented by an attorney violates Rule 7. *Ayres*, 790 S.W.2d at 557; *see also Ex parte* Shaffer, 649 S.W.2d 300, 301–02 (Tex. 1983) (orig. proceeding) (citation omitted) (holding that trial court's order which directed defendant to retain an attorney to represent him in the suit, and which provided that a failure to comply would result in an order of contempt was void, since "ordering a party to be represented by an attorney abridges that person's right to be heard by himself. If [the person's] lack of an attorney was being used to unnecessarily delay trial or was abusing the continuance privilege, the proper action would have been to order him to proceed to trial as set, with or without representation."); Ugwonali v. Agbor, No. 05-10-00527-CV, 2011 WL 1568011, at *1 (Tex. App.—Dallas Apr. 27, 2011, no. pet.) (stating that "an individual who is a party to civil litigation has the right to represent himself at trial and on appeal"); Mendez v. Sweeny Comm. Hosp., No. 14-02-00843-CV, 2003 WL 21192136, at *2 n.2 (Tex. App.—Houston [14th Dist.] May 22, 2003, no pet.) (observing that a litigant has the right to represent himself and that ordering a party to be represented by an attorney abridges that right).

[1339] *See Ayres*, 790 S.W.2d at 557; TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08(a)(5), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R., art. X, § 9).

[1340] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08 cmt. 7; *see also Ayres*, 790 S.W.2d at 557.

prejudiced in some situations where a party's attorney testifies regarding a contested matter.[1341]

Comment 10 to Rule 3.08 warns that the rule "should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice . . . [and to do so] would subvert its purpose."[1342] Because in *Ayres v. Canales*, Nix did not demonstrate that he would actually be prejudiced by the attorney and his colleague serving as both counsel and witness, or show any other compelling basis for disqualification, the court held that the trial court clearly abused its discretion in precluding the attorneys from serving as both a witness and an advocate.[1343]

With respect to other members of the firm, the court in *Ayres* ruled that subparagraph (c) and comment 8 to Rule 3.08, which replaced DR 5-101 and DR 5-102, make clear that another lawyer in the testifying lawyer's firm may act as an advocate if the client gives informed consent.[1344] Thus, although the testifying lawyer and his law firm were both parties to the suit, the disqualification of non-testifying members of the firm was not warranted.[1345] Accordingly, the court held that the trial judge committed a clear abuse of discretion in issuing an order that prevented non-testifying members of the firm from representing Ayres and the firm.[1346]

[1341] *See Ayres*, 790 S.W.2d at 557. The court in *Ayres* acknowledged that the opposing party may be handicapped in challenging the credibility of the testifying attorney. Perhaps the most common justification given for the advocate-witness rule is when an attorney representing a party also serves as a witness and testifies as to controversial or contested matters, there exists a potential danger the jury will confuse the roles of counsel. *Id.* at 557 n.4. "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether statement by an advocate-witness should be taken as proof or as an analysis of the proof." *Id.* (quoting TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08 cmt. 4 (1989)); *see also* Bert Wheeler's, Inc. v. Ruffino, 666 S.W.2d 510, 513 (Tex. App.—Houston [1st Dist.] 1983, orig. proceeding); United Pac. Ins. Co. v. Zardenetta, 661 S.W.2d 244, 247–48 (Tex. App.—San Antonio 1983, orig. proceeding).

[1342] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08 cmt. 10.

[1343] 790 S.W.2d at 557

[1344] *Id.* at 557–58; TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08(c) & cmt. 8.

[1345] *See Ayers*, 790 S.W.2d at 558. However, the court said: "We do not, of course, foreclose the possibility that a different result would be warranted under different facts." *Id.* at 558 n.6; *see also* McElroy v. Gaffney, 529 A.2d 889, 894 (N.H. 1987) ("[I]n applying the disqualification rule, care must be taken 'to prevent literalism from . . . overcoming substantial justice to the parties.'") (citation omitted); Cossette v. Country Style Donuts, Inc., 647 F.2d 526, 530 (5th Cir. 1981) (refusing to mechanically apply attorney-witness disqualification rule).

[1346] *Ayers*, 790 S.W.2d at 558; *see also Cossette*, 647 F.2d at 531.

In *Anderson Producing Inc. v. Koch Oil Co.*, the Texas Supreme Court addressed the situation where an attorney inadvertently becomes a material fact witness just weeks before trial.[1347] Despite learning that he may be a fact witness at trial, the attorney continued to participate in settlement negotiations, assist with trial preparation, and sign pleadings.[1348] Three weeks before trial, in response to the defendant's discovery requests, the attorney was identified as one of the client's expert witnesses.[1349] Relying on Disciplinary Rule 3.08, the defendant Koch moved to disqualify the attorney and his law firm as trial counsel, and, alternatively, requested that the attorney be prohibited from testifying at trial on any substantive matter.[1350] The trial court denied Koch's motion, but the court of appeals reversed and remanded for a new trial.[1351]

Rule 3.08(a) was amended in 1994 to prohibit "employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding."[1352] The Texas Supreme Court in *Anderson* construed the amendment as one which does not "alter the substantive scope of the rule, but rather to clarify the interpretation properly inferred from the existing comments and rationale underlying the rule."[1353] Even though Rule 3.08 "was not promulgated as the controlling standard for disqualification proceedings," the court acknowledged that it has "recognized that [the rule] articulates relevant considerations for such proceedings."[1354] Applying Rule 3.08, the court reversed the court of appeals and concluded that the rule "only prohibits a testifying attorney from acting as an advocate before a tribunal, not from engaging in pretrial, out-of-court matters such as preparing and signing pleadings, planning trial strategy, and pursuing settlement negotiations."[1355] The court reasoned that the considerations upon which Rule 3.08 rests "do not apply when the testifying lawyer is

[1347] 929 S.W.2d 416, 419 (Tex. 1996).

[1348] *Id.* at 419.

[1349] *Id.*

[1350] *Id.*

[1351] *Id.* at 420.

[1352] *Id.* at 423; *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R., art. X, § 9).

[1353] 929 S.W.2d at 423.

[1354] *Id.* at 422.

[1355] *Id.*

merely performing out-of-court functions, such as drafting pleadings or assisting with pretrial strategy."[1356]

The *Anderson* court explicitly declined to address whether an attorney who appears as an expert witness at trial, whose law firm is being compensated on a contingent fee basis, violates other disciplinary rules.[1357] Disciplinary Rule 3.04(b) bars a lawyer from paying or offering to pay a witness contingent upon the content of the testimony of the witness or the outcome of the case.[1358] Although the court acknowledged that "it certainly could be argued that [the attorney] and his firm violated this rule by basing Anderson's case on [the attorney's] testimony, where the members of the firm (including [the attorney]) were being compensated based on Anderson's success," the court ruled that Koch did not raise the issue in the trial court or on appeal and therefore the court expressed no opinion on the issue.[1359]

In *In re Sanders*, the Texas Supreme Court again emphasized that a movant must demonstrate actual prejudice to justify the severe remedy of disqualification.[1360] In that case, a divorce and custody proceeding, the husband's attorney had accepted the husband's promise to perform handyman services as payment for legal representation.[1361] The wife moved to disqualify the attorney, arguing that his testimony was necessary to establish the extent of the husband's obligation, which affected the husband's ability to care for the minor child or pay child support.[1362] The trial court denied the motion to disqualify.[1363]

The Supreme Court affirmed the denial, noting that "mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules" are insufficient to support disqualification.[1364] Rather, the movant must demonstrate actual prejudice, which the wife had failed to

[1356] *Id*. "If Koch believed that Campbell was violating that representation merely by sitting at counsel table, it should have objected." *Id.* at 423. No such objection was made by Koch. *Id*.

[1357] *Id.* at 422.

[1358] *Id.* at 424–25.

[1359] *Id.* at 425.

[1360] 153 S.W.3d 54, 57 (Tex. 2004) (per curiam) (citing Ayres v. Canales, 790 S.W.2d 554, 558 (Tex. 1990) (orig. proceeding)).

[1361] *Id.* at 56.

[1362] *Id.* at 56–57.

[1363] *Id.* at 56.

[1364] *Id.* at 57 (citing Spears v. Fourth Ct. of Appeals, 797 S.W.2d 654, 656 (Tex. 1990)).

do.[1365] Even if the attorney's testimony was necessary to establish the "essential" fact of the husband's continuing obligations, the court reasoned that the wife had failed to "explain why other sources" in the record were insufficient to establish the same fact.[1366]

The court revisited Rule 3.08 in 2016, in *In re Keenan*.[1367] In *Keenan*, the parties disputed whether amendments to neighborhood deed restrictions were validly enacted. Specifically, the dispute turned on whether a sufficient majority of homeowners had cast ballots in favor of the amendments.[1368] Keenan sought production of the ballots, but the homeowners objected that the ballots were confidential and privileged voting records.[1369] The trial court refused to order production of the ballots, but instead allowed Keenan's counsel to inspect the ballots himself.[1370] In addition, the trial court ordered that the contents of the ballots could not be disclosed "to anyone else" without further order.[1371]

After Keenan's counsel inspected the ballots and concluded that the amendments were not passed with a sufficient number of votes, Keenan sought modification of the order on the ground that the attorney could not himself be a witness at trial.[1372] The trial court refused to modify the order, but stated that the attorney could share his notes on the ballots with Keenan's testifying expert.[1373]

The Texas Supreme Court concluded that Keenan was entitled to mandamus relief, reasoning that Keenan's counsel should not be forced to testify in violation of Rule 3.08.[1374] The court further reasoned that, even if the attorney could convey his knowledge of the ballots to the testifying expert, such an arrangement would "make the testimony of the expert highly dependent on the reliability and credibility of the attorney."[1375] This

[1365] *Id*. (citing *Ayres*, 790 S.W.2d at 558).

[1366] *Id*.

[1367] 501 S.W.3d 74 (Tex. 2016) (per curiam).

[1368] *Id.* at 75–76.

[1369] *Id.* at 76.

[1370] *Id*.

[1371] *Id*.

[1372] *Id*.

[1373] *Id*.

[1374] *Id.* at 76–77.

[1375] *Id.* at 77.

would impermissibly "create a dual role similar to the dual role Rule 3.08 seeks to avoid."[1376]

CHAPTER VII: TRANSACTIONS WITH CLIENT

§ 1 Generally

Texas courts have long required fairness in an attorney's business interactions with a client. As early as 1889, the Texas Supreme Court observed that the "presumption always arises against the validity of a purchase or sale between the client and attorney made during the existence of the relation."[1377] Today, the rule is embodied in Texas Disciplinary Rule 1.08(a), which provides:

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

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.[1378]

The mandate of this rule is absolute: unless the client consents in writing to terms of the business transaction which are fair, reasonable, and fully disclosed to the client, an attorney shall not enter into a business transaction with a client.[1379] In the event a transaction is challenged and

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[1376] *Id.*

[1377] Cooper v. Lee, 12 S.W. 483, 486 (Tex. 1889) (quoting Pomeroy's Equity Jurisprudence Vol. 2, p. 489).

[1378] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08(a)(1)–(3), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R., art. X, § 9).

[1379] *See* Rosas v. Comm'n for Lawyer Discipline, 335 S.W.3d 311, 316–17 (Tex. App.—San Antonio 2010, no pet.); State Bar of Tex. v. Dolenz, 3 S.W.3d 260, 265–68 (Tex. App.—Dallas 1999, no pet.); *see generally* Blough v. Wellman, 132 Idaho 424 (1999). For additional discussion of prohibited transactions between lawyers and their clients, *see* Susan Sabb Fortney & Jeff Hans, *Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest*, 33 ST. MARY'S L.J. 669, 704–13 (2002); John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405, 408 (2002).

alleged to have violated Rule 1.08, the lawyer bears the burden to plead and prove that the transaction was fair, reasonable, and consented to after full disclosure.[1380] Texas Code DR 5-104(A), the precursor to Rule 1.08(a), prohibited a lawyer from entering a business transaction with a client "if they have differing interests" and the client "expects the lawyer to exercise his professional judgment therein for the protection of the client."[1381] Rule 1.08(a) eliminates the "differing interests" and "client expectation" requirements. By its plain language, Rule 1.08(a) "applies when a lawyer enters into a business transaction with a client."[1382]

The Rule does not define "business transaction" other than it "does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others."[1383] Examples of "standard commercial transactions" include banking or brokerage services, medical services, manufacturing and distributing products to the client, and utilities services.[1384] In those transactions, "the lawyer has no advantage in dealing with the client, and the restrictions [contained in Rule 1.08] are therefore unnecessary and impracticable."[1385]

In a 1990 opinion issued soon after Rule 1.08 was enacted, the Texas Committee on Professional Ethics concluded that a lawyer may ethically own an interest in a lending institution making loans to lawyer's personal injury clients, provided that the institution charged reasonable rates and the loans complied with a variety of other disciplinary rules.[1386] More recently, in a 2016 opinion, the Committee concluded that an attorney who owns a vendor, such as a firm-owned graphics company, does engage in a "business transaction with a client" by billing the client for litigation expenses paid to that vendor.[1387] Accordingly, the Committee concluded that the lawyer must comply with Rule 1.08(a) when billing the client for

[1380] *Dolenz*, 3 S.W.3d at 268 (concluding, under Texas Code of Professional Responsibility provision equivalent to current Rule 1.08, that client's consent to prohibited transaction is in the nature of an avoidance or affirmative defense to professional misconduct).

[1381] TEX. STATE BAR R., art. XII, § 8, DR 5-104(A) (TEX. CODE OF PROF'L RESP.), 34 TEX. B.J. 758 (1971, superseded 1990).

[1382] Gillespie v. Hernden, 516 S.W.3d 541, 550 (Tex. App.—San Antonio 2016, pet. denied).

[1383] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08(j).

[1384] *Id.* R. 1.08 cmt. 2.

[1385] *Id.*

[1386] Tex. Comm. on Prof'l Ethics, Op. 465 (1990).

[1387] Tex. Comm. on Prof'l Ethics, Op. 658 (2016).

the costs of the vendor's services.[1388] This ethics opinion is consistent with Texas cases holding that a lawyer need not be a named party to a transaction to have engaged in a business transaction with a client. Rather, it is sufficient that the lawyer have a controlling interest in the party to the transaction.[1389] Finally, in the context of engagement letters, Texas courts have concluded that "the establishment of a lawyer-client relationship is not a 'business transaction with a client' within the meaning of Rule 1.08(a)."[1390] Thus, the execution of a contingent-fee contract with a client does not fall under Rule 1.08(a).[1391]

Rule 1.08(a) and its presumption of unfairness do not apply if the lawyer and client did not have an attorney-client relationship at the time of the transaction.[1392] For example, the Rule does not apply if the attorney and the client have had dealings as an attorney and a client in the past, but were not involved in a particular matter of legal representation at the time of the transaction and the transaction in question did not arise out of a particular past legal representation.[1393] Nor does the Rule require that the lawyer represent the client in connection with the business transaction in

[1388] *Id*.

[1389] Rosas v. Comm'n for Lawyer Discipline, 335 S.W.3d 311, 315 (Tex. App.—San Antonio 2010, no pet.) (transaction between client and attorney's holding company); *In re* Pace, 456 B.R. 253, 281–82 (Bankr. W.D. Tex. 2011) (attorney controlled limited liability company that purchased condo owned by client's wholly-owned company).

[1390] Gillespie v. Hernden, 516 S.W.3d 541, 549–50 (Tex. App.—San Antonio 2016, pet. denied); *see also Rosas*, 335 S.W.3d at 316; Tex. Comm. on Prof'l Ethics, Op. 586 (2008).

[1391] *Gillespie*, 516 S.W.3d at 550 (holding that contingent fee contract was not a business transaction with a client, under disciplinary rules, such that attorneys were not required to explain the potential value of attorney's share of mineral interests client recovered after settlement).

[1392] *Rosas*, 335 S.W.3d at 316 ("In order to find a violation of Rule 1.08(a), the trial court first had to find an attorney-client relationship existed at the time of the business transaction.").

[1393] *See* Shropshire v. Freeman, 510 S.W.2d 405, 406–07 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.) (holding presumption of unfairness did not apply to deed transferred to attorney from client where, although attorney had taken care of the client's and the client's family's legal affairs for many years as needed, the execution of the deed did not arise out of any current or past legal representation between the parties); *cf.* Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 159 (Tex. 2004) (attorney's fiduciary duties to client extend only to dealings within scope of attorney-client relationship); Greenberg Traurig of N.Y., P.C. v. Moody, 161 S.W.3d 56, 78 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding that law firm did not have fiduciary obligation to disclose to client implications of arbitration provision in retainer agreement for new representation, despite law firm's representation of client in several past matters).

question.[1394] As long as the attorney and client have an existing attorney-client relationship, the Rule and its presumption of unfairness will apply.

Under Rule 1.08 an attorney may, however, accept a gift from a client if the transaction satisfies the general standards of fairness. For example, simple gifts such as those given at holidays or as a token of appreciation are permitted.[1395] But an attorney must not "prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."[1396] Thus, if a gift is so substantial that it requires preparation of a legal instrument such as a will or conveyance, the client should be advised that he must seek independent counsel.[1397] Although there is some authority suggesting that this requirement is satisfied if the client chooses to consult non-lawyer advisors such as accountants or tax advisors,[1398] the comments to the Texas Rule 1.08 advise that the client "should have the detached advice that another *lawyer* can provide."[1399] Unlike the ABA Model Rule,[1400] however, Texas Rule 1.08 does not require the lawyer to actually advise the client in writing

[1394] *Rosas*, 335 S.W.3d at 318; *see also In re Pace*, 456 B.R. at 281–82.

[1395] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08 cmt. 3.

[1396] *Id.* R. 1.08(b).

[1397] *Id.*; *see also* Radin v. Opperman, 407 N.Y.S.2d 303, 305 (N.Y. App. Div. 1978). The *Radin* court held:

> A lawyer should not suggest to his client that a gift be made to himself, or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

Id. (quoting State Bar Of New York, Ethical Consideration on Code of Professional Responsibility, EC 5-5 (1970)).

[1398] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 cmt. f (2000) ("The client must be encouraged and have a reasonable opportunity to obtain independent legal advice before entering into the transaction. There is no requirement that the client actually consult another lawyer. A client might determine to consult another trusted adviser, such as an accountant, a tax adviser, or a business person, or to consult no one at all.").

[1399] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08 cmt. 3. (emphasis added)

[1400] MODEL RULES OF PROF'L CONDUCT R. 1.8(a)(2) (2015).

of the desirability of seeking independent counsel. The Texas Rule merely requires that the client be given a "reasonable opportunity" to seek such advice.[1401]

As always, it is the client's "right to select the attorney of their choice."[1402] In addition, courts "review all business dealings between a lawyer and a client using the strict scrutiny standard."[1403] Thus, the independent counsel should be truly independent and selected by the client. In one case, for example, a Maryland court found a violation of an equivalent rule based on an insufficient showing that the lawyer consulted by the client was truly independent of the first lawyer.[1404]

Under Rule 1.08(c), before an attorney concludes all aspects of the matter giving rise to his employment, he must not make or negotiate an agreement with a client or former client to give the attorney literary or media rights to such matter based on information relating to the representation.[1405] However, a lawyer representing a client in a transaction concerning literary property is not prohibited from agreeing the attorney's fee shall consist of a share in ownership in the property if the arrangement conforms with the requirements regarding attorney's contingent fees.[1406]

Rule 1.08(d) concerns financial assistance to a client. The Rule generally prohibits a lawyer from "provid[ing] financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings,"[1407] but there are two exceptions to this prohibition. First, a lawyer "may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on

[1401] TEX. DISCIPLINARY RULES PROF'L CONDUCT R 1.08(a)(2).

[1402] Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739, 744 (Tex. App.—Austin 1995, writ denied).

[1403] MacFarlane v. Nelson, No. 03-04-00488-CV, 2005 WL 2240949, at *8 (Tex. App.—Austin Sept. 15, 2005, pet. denied) (mem. op.) (citing State Bar of Tex. v. Dolenz, 3 S.W.3d 260, 266 (Tex. App.—Dallas 1999, no pet.)).

[1404] Attorney Grievance Comm'n v. Saridakis, 936 A.2d 886, 896 (Md. 2007) (holding lawyer violated rule prohibiting lawyers from preparing wills that gave lawyer testamentary gift, even though client consulted with another lawyer, because the other lawyer shared office space with the attorney who drafted the will and the will was executed without the other lawyer present).

[1405] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08(c).

[1406] *Id.* R. 1.08 cmt. 4.

[1407] *Id.* R. 1.08(d).

the outcome of the matter."[1408] Second, a lawyer representing an indigent client "may pay court costs and expenses of litigation on behalf of the client."[1409] Few Texas cases have ever interpreted Rule 1.08(d),[1410] but that may soon change. In recent years, scholars and commentators have increasingly focused on the issue of litigation financing as lawyers and "alternative litigation financing" lenders employ increasingly innovative methods for financing a client's lawsuit.[1411] It remains to be seen whether any of these methods run afoul of the disciplinary rules.

Two of the remaining subsections of Rule 1.08 address lawyer compensation. Rule 1.08(e) prohibits a lawyer from accepting "compensation for representing a client from [a person] other than the client unless:

> (1) the client consents;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by [the rule regarding client's confidential interests]."[1412]

[1408] *Id.* R. 1.08(d)(1).

[1409] *Id.* R. 1.08(d)(2).

[1410] In 1996, the Fort Worth Court of Appeals held that Rule 1.08(d) expressly permitted a lawyer to assist a client with posting a cost bond or obtaining an expert opinion, as required by statute to maintain a healthcare liability claim. Odak v. Arlington Mem'l Hosp. Found., 934 S.W.2d 868, 870–71 (Tex. App.—Fort Worth 1996, writ denied).

[1411] *See, e.g.*, Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 407 (2017); Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 393 (2016); Tara E. Nauful, *Third-Party Litigation Financing Do We Need It? Is It Worth the Risks?*, AM. BANKR. INST. J, May 2016 at 16; Lyndon F. Bittle & Richard A. Blunk, *Market Watch Shifting Tides in Commercial Alternative Litigation Finance*, 78 TEX. B.J. 776, 777 (2015); Ani-Rae Lovell, *Protecting Privilege: How Alternative Litigation Finance Supports an Attorney's Role*, 28 GEO. J. LEGAL ETHICS 703, 704–05 (2015); James M. Fischer, *Litigation Financing: A Real or Phantom Menace to Lawyer Professional Responsibility?*, 27 GEO. J. LEGAL ETHICS 191, 192 (2014).

[1412] TEX. DISCIPLINARY R. PROF'L CONDUCT R. 1.08(e)(1)–(3); *see also In re* Disciplinary Proceedings Against Buchanan, No. 4:07-MC-020-A, 2007 WL 3287353, at *10–11 (N.D. Tex. Nov. 6, 2007) (finding counsel violated Rule 1.08(e), among others, by representing one criminal co-defendant at the behest of other criminal co-defendants); *see generally* COMM. ON INTERPRETATION OF THE CODE OF PROF'L RESPONSIBILITY, State Bar of Tex., Op. 348 (1969) ("An attorney

Furthermore, Rule 1.08(h) prohibits a lawyer from acquiring a "proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

> (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
>
> (2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04."[1413]

§ 2 Breach of Fiduciary Duty

The relationship between the attorney and client is highly fiduciary in nature.[1414] Dealings between attorney and client "are subject to the same scrutiny, intendments[,] and imputations as a transaction between an ordinary trustee and his cestui que trust."[1415] The general rule is "he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that

appointed to defend an indigent defendant in a criminal case may accept partial fee from the family, as well as from the Court, as long as full disclosure is made."); COMM. ON INTERPRETATION OF THE CODE OF PROF'L RESPONSIBILITY, State Bar of Tex., Op. 417 (1984) (stating that an attorney "may accept employment from collection agency provided: (1) he received all fees paid to agency by the creditor for legal services rendered by the attorney, (2) he does not permit the agency to direct or interfere with his representation of the creditor, and (3) he acts as attorney for the creditor rather than the agency").

[1413] TEX. DISCIPLINARY R. PROF'L CONDUCT R. 1.08(h)(1)–(2); *see also* Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 559, 563–64 (Tex. 2006) (holding that law firm's termination fee provision was "directly forbidden" by Rule 1.08(h), where provision provided that upon the client's termination of the law firm, the client agrees "to immediately pay the Firm the then present value of the Contingent Fee described, plus all Costs then owed to the Firm, plus subsequent legal fees"); *see generally* COMM. ON INTERPRETATION OF THE CODE OF PROF'L RESPONSIBILITY, State Bar of Tex., Op. 449 (1988) (stating that an attorney, representing a client in a property dispute, who acquires, as security for the payment of attorney fees, an undivided fee simple interest in the disputed property in good faith and with client's consent, does not violate the rule of professional responsibility). *But see* State v. Baker, 539 S.W.2d 367, 372 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (purchasing of property on behalf of a client at sheriff's sale and using that title to secure further compensation from client's debtors for himself, without notification to, and consent of, client, constitutes breach of this rule).

[1414] *See, e.g.*, Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 159 (Tex. 2004); Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988); Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964).

[1415] *Archer*, 390 S.W.2d at 739.

confidence . . . ."[1416] This rule applies "equally to all persons standing in confidential relations with each other."[1417]

As long as the attorney-client relationship is in existence, the general rule "applies to a contract or other transaction relating to compensation . . . ."[1418] Although an attorney may contract with his client for compensation during the attorney-client relationship, "and a fair and reasonable settlement of the compensation to be paid is valid and enforceable, if executed freely, voluntarily, and with full understanding by the client," because of the fiduciary relationship, the courts jealously scrutinize all contracts for compensation between them made while the relationship exists.[1419]

The burden of showing the fairness and reasonableness of a contract between an attorney and his client is on the attorney because "[t]here is a presumption of unfairness or invalidity attaching to [such a] contract . . . ."[1420] *Keck, Mahin & Cate v. National Union Fire Insurance Company of Pittsburgh* illustrates this principle.[1421] In that case, insurers acting as equitable subrogees sued the attorneys who had represented the insured in an underlying matter, alleging that the attorneys' negligence caused an excessive settlement.[1422] The attorneys asserted that the insurer's claims were precluded by a release agreement, executed between the attorneys and the insured during the representation, in which the insured agreed to release the attorneys from all existing and future claims or causes of action based on the legal representation.[1423] In response, the insurers argued that the release was invalid as a contract executed between the

[1416] *Id.* (quoting JOSEPH STORY, EQUITY JURISPRUDENCE § 311 (7th ed. 1857)).

[1417] *Id.*

[1418] *Id*.

[1419] *Id*.

[1420] *Id.*; *see also* Keck, Mahin & Cate v. Nat'l Union Ins. Co. of Pittsburgh, 20 S.W.3d 692, 699 (Tex. 2000); Willis v. Maverick, 760 S.W.2d 642, 646 (Tex. 1988); *In re* Estate of Miller, 446 S.W.3d 445, 453 (Tex. App.—Tyler 2014, orig. proceeding); Gammon v. Henry I. Hank Hodes & Diagnostic Experts of Austin, Inc., No. 03-13-00124-CV, 2015 Tex. App. LEXIS 4235, at *12 (Tex. App.—Austin Apr. 24, 2015, pet. denied) (mem. op.); Robinson v. Garcia, 804 S.W.2d 238, 248 (Tex. App.—Corpus Christi 1991, writ denied).

[1421] 20 S.W.3d at 699.

[1422] *Id.* at 695–96.

[1423] *Id.* at 696–97.

attorneys and their clients during the existence of an attorney-client relationship.[1424]

The Texas Supreme Court reiterated the general rule that contracts executed between attorneys and clients during an attorney-client relationship are closely scrutinized.[1425] Further, the Supreme Court noted that Texas Disciplinary Rule of Professional Conduct 1.08(g) forbids attorneys from making "an agreement that prospectively limits the attorney's malpractice liability to the client unless (1) the agreement is permitted by law, and (2) the client is independently represented in making the agreement."[1426] Thus, the release was presumptively invalid.[1427] To rebut the presumption, the attorneys needed to prove that (1) the release was "fair and reasonable" and (2) the insured-client "was informed of all material facts relating to the release."[1428] Although the attorneys had advised the insured-client in writing to seek independent counsel, the court determined that this "bare recitation" was inadequate to rebut the presumption as a matter of law, and remanded the matter for trial.[1429]

An attorney should be extraordinarily cautious in becoming involved in a business transaction with a client. If he or she chooses to do so, a full disclosure should be made to the client of the differing interests, making certain that the transaction is fair and reasonable to the client, and encouraging the client to seek the advice of independent counsel. In addition, the attorney should obtain the written consent of the client to the transactions and, ideally, a written acknowledgment that the foregoing steps have been taken by the attorney.

CHAPTER VIII: OTHER CAUSES OF ACTION

A legal malpractice cause of action against an attorney has been traditionally predicated on theories of negligence, breach of fiduciary duty,

[1424] *Id.* at 698–99.

[1425] *See Archer*, 390 S.W.2d at 739.

[1426] *Keck, Mahin & Cate*, 20 S.W.3d at 699 (citing TEX. DISCIPLINARY. R. PROF. CONDUCT R. 1.08(g)).

[1427] *Id.*; *see also* Nat'l Union Fire Ins. Co. of Pittsburgh v. Keck, Mahin & Cate, 154 S.W.3d 714, 724 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (explaining that consequence of violating Rule 1.08(g) was presumption of unfairness, not invalidity as a matter of law).

[1428] *Keck, Mahin & Cate*, 20 S.W.3d at 699.

[1429] *Id.*

and to a lesser extent, fraud.[1430] However, there are additional theories of recovery that dissatisfied clients may use to impose liability on Texas attorneys.

§ 1 Texas Deceptive Trade Practices-Consumer Protection Act

The Texas Deceptive Practices–Consumer Protection Act[1431] (DTPA) "protects consumers against false, misleading, and deceptive business practices, unconscionable actions, [and failures to disclose] . . . in the conduct of any trade."[1432] The Legislature has instructed courts to construe the Act "liberally" to achieve this goal.[1433] The elements of a DTPA claim are: "(1) the plaintiff is a consumer; (2) the defendant engaged in false, misleading, or deceptive acts; and (3) these false, misleading, or deceptive acts constituted a producing cause of the consumer's damages."[1434] Furthermore, the false, misleading, or deceptive acts must have been relied on by the consumer.[1435] A violation of the DTPA subjects the offender to reasonable attorney's fees and even treble damages.[1436]

Before it was amended in 1995, the Texas Deceptive Practices–Consumer Protection Act[1437] was widely applied to attorney misconduct.[1438]

[1430] *See, e.g.*, Rogers v. Zanetti, 518 S.W.3d 394, 399 (Tex. 2017) (negligence); Burrow v. Arce, 997 S.W.2d 229, 229 (Tex. 1999) (breach of fiduciary duty); Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P., 422 S.W.3d 821, 827 (Tex. App.—Dallas 2014, no pet.) (fraud); *see also supra* Chapter IV, § 3.

[1431] TEX. BUS. & COM. CODE ANN. §§ 17.41–17.63 (West 2011).

[1432] *Id.* §§ 17.44, 17.46(a).

[1433] *Id.* § 17.44(a); Daugherty v. Jacobs, 187 S.W.3d 607, 613 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

[1434] *Daugherty*, 187 S.W.3d at 614.

[1435] TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(B).

[1436] *Id.* § 17.50(b)(1), (d); Jackson Law Office v. Chappell, 37 S.W.3d 15, 23–24 (Tex. App.—Tyler 2000, pet. denied); Am. Nat'l Ins. Co. v. Paul, 927 S.W.2d 239, 246 (Tex. App.—Austin 1996, writ denied); Lone Star Ford, Inc. v. Hill, 879 S.W.2d 116, 119 (Tex. App.—Houston [14th Dist.] 1994, no writ); Nationwide Mut. Ins. Co. v. Holmes, 842 S.W.2d 335, 342 (Tex. App.—San Antonio 1992, writ denied); Wilson v. Rice, 807 S.W.2d 836, 837 (Tex. App.—Waco 1991, writ denied); Satellite Earth Stations E., Inc. v. Davis, 756 S.W.2d 385, 386–87 (Tex. App.—Eastland 1988, writ denied).

[1437] TEX. BUS. & COM. CODE ANN. §§ 17.41–17.63.

[1438] *See* Latham v. Castillo, 972 S.W.2d 66, 68 n.2, 70 (Tex. 1998) (applying pre-1995 version of statute); DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (holding DTPA applied "to the purchase or acquisition of legal services;" the court reasoned that an "attorney sells legal services and client purchases them" and, therefore, the

The contemporary version of the statute, however, does not apply to claims for damages based on "the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill."[1439] This protection also extends to claims brought against "any entity that could be found to be vicariously liable for the person's conduct," such as an attorney's law firm.[1440] As a consequence of this "professional services" exemption, complaints based on the quality of a lawyer's legal services generally sound in negligence as malpractice claims, not as DTPA violations.[1441]

Nevertheless, the DTPA still applies to certain types of attorney conduct such as misrepresentations of material fact, a failure to disclose information, certain unconscionable acts, or breach of an express warranty that cannot be characterized as advice, judgment, or opinion.[1442] At least one commentator has concluded that these exceptions "substantially reduce the significance of the exemption" for professional services.[1443]

For a client to recover for attorney misconduct occurring *after* the 1995 amendment to the DTPA, they must now prove the attorney either committed a violation of Section 17.46(b)(24) (failure to disclose), breached an express warranty, or committed an unconscionable act unrelated to his professional advice, judgment, or opinion.[1444] In addition, the client must show the attorney's conduct was the "producing cause" of the damage suffered.[1445] A "producing cause" is a "substantial factor which

attorney's client is a "consumer" within the meaning of the DTPA); *see also* Thompson v. Vinson & Elkins, 859 S.W.2d 617, 625 n.7 (Tex. App.—Houston [1st Dist.] 1993, writ denied); John Robert Forshey, Comment, *Applicability of the Texas Deceptive Trade Practices Act to Attorneys*, 30 BAYLOR L. REV. 65, 68–69 (1978); *see generally* Patricia A. Swanson, Comment, *The Texas Deceptive Practices Consumer Protection Act: Application to Professional Malpractice*, 8 ST. MARY'S L.J. 763 (1977).

[1439] TEX. BUS. & COM. CODE ANN. § 17.49(c).

[1440] *Id.* § 17.49(d).

[1441] *See* Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., PC, 284 S.W.3d 416, 439 (Tex. App.—Austin 2009, no pet.); James V. Mazuca & Assocs. v. Schumann, 82 S.W.3d 90, 94–96 (Tex. App.—San Antonio 2002, pet. denied); Stafford v. Lunsford, 53 S.W.3d 906, 910 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

[1442] TEX. BUS. & COM. CODE ANN. § 17.49(c)(1)–(4).

[1443] Richard M. Alderman, *The Texas Deceptive Trade Practices Act 2005: Still Alive and Well*, 8 J. TEX. CONSUMER & COM. L. 74, 77 (2000).

[1444] TEX. BUS. & COM. CODE ANN. § 17.46(b)(24).

[1445] *See* Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 117 (Tex. 2004); Doe v. Boys Clubs of Greater Dall., Inc., 907 S.W.2d 472, 478, 481 (Tex. 1995) ("The elements of a DTPA claim

brings about the injury and without which the injury would not have occurred."[1446] In contrast to proximate causation, "foreseeability" is not an element of producing cause.[1447] Thus, the Texas Supreme Court has recognized, "the producing cause inquiry is conceptually identical to that of cause in fact."[1448]

A. Unconscionability

Section 17.50 of the DTPA allows a consumer to recover where an "unconscionable action or course of action by any person" constitutes a producing cause of economic damages or damages for mental anguish.[1449] "Unconscionable action or course of action" means "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience or capacity of the consumer to a grossly unfair degree."[1450] "Unconscionability under the DTPA is an objective standard for which scienter is irrelevant."[1451] To prove unconscionability, a claimant must show that the attorney took advantage of her knowledge, such that "the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated."[1452]

To avoid the professional services exemption of Section 17.49(c), the unconscionable action or course of action "cannot be characterized as advice, judgment, or opinion."[1453] Although it applied the pre-1995 version of the DTPA without the professional services exemption, the Texas Supreme Court's decision in *Latham v. Castillo* provides an example of unconscionable conduct that could not be characterized as an attorney's

are: (1) plaintiff is consumer, (2) defendant engaged in false, misleading, or deceptive acts, and (3) defendants' acts were producing cause of consumer's damages.").

[1446] *Doe*, 907 S.W.2d at 481; McLeod v. Gyr, 439 S.W.3d 639, 649 (Tex. App.—Dallas 2014, pet. denied); Holliday v. Weaver, 410 S.W.3d 439, 443 (Tex. App.—Dallas 2013, pet. denied); Hoover v. Larkin, 196 S.W.3d 227, 232 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

[1447] *Doe*, 907 S.W.2d at 481.

[1448] Transcon. Ins. Co. v. Crump, 330 S.W.3d 211, 223 (Tex. 2010) (citing Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 161 (Tex. 1995)).

[1449] *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(3).

[1450] *Id.* § 17.45(5).

[1451] Ins. Co. of N. Am. v. Morris, 981 S.W.2d 667, 677 (Tex. 1998).

[1452] Bradford v. Vento, 48 S.W.3d 749, 760 (Tex. 2001) (quoting *Ins. Co. of N. Am.*, 981 S.W.2d at 677).

[1453] TEX. BUS. & COM. CODE ANN. § 17.49(c)(3).

advice, judgment, or opinion.[1454] In *Latham*, the clients sued their attorney for unconscionable conduct under the DTPA because he affirmatively represented to them that he had filed and was actively prosecuting a medical malpractice claim on their behalf, when in fact he had failed to file the claim within the statute of limitations.[1455] Rejecting the defendant attorney's argument that the plaintiffs were asserting a "dressed-up legal malpractice claim" based on his negligent failure to file and prosecute the clients' lawsuit, the court reasoned:

> If the Castillos had only alleged that Latham negligently failed to timely file their claim, their claim would properly be one for legal malpractice. However, the Castillos alleged and presented some evidence that Latham affirmatively misrepresented to them that he had filed and was actively prosecuting their claim. It is the difference between negligent conduct and deceptive conduct. To recast this claim as one for legal malpractice is to ignore this distinction.[1456]

Accordingly, the court ruled that in such a situation the DTPA does not require a plaintiff to prove the requisite legal malpractice "suit within a suit" elements when suing an attorney under the DTPA.[1457]

Thus, as one court has explained, false statements concerning "the facts of [an attorney's] representation of [the client] and the facts regarding her case" cannot "be characterized as merely providing advice, judgment, or opinion."[1458] By contrast, when an attorney has not affirmatively misrepresented a material fact, courts hold that an attorney's actions do not constitute "unconscionable conduct" under the DTPA.[1459]

[1454] Latham v. Castillo, 972 S.W.2d 66, 68 n.2 (Tex. 1998) (explaining that pre-1995 version of DTPA applied to the case, which arose from facts before 1995 amendments).

[1455] *Id.* at 67.

[1456] *Id.* at 69.

[1457] *Id.*

[1458] Bellows v. San Miguel, No. 14-00-00071-CV, 2002 WL 835667, at *8 (Tex. App.—Houston [14th Dist.] May 2, 2002, pet. denied) (mem. op., not designated for publication) (holding attorney committed unconscionable conduct actionable under the DTPA by, among other things, falsely telling client about adverse evidence which did not exist, causing client to settle case against her will).

[1459] Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C., 284 S.W.3d 416, 439 (Tex. App.—Austin 2009, no pet.) (holding failure to disclose attorney's alcohol and substance problems sounds in negligence and would be improperly fractured by asserting a DTPA claim);

B. Breach of Implied Warranty

The professional services exemption in Section 17.49(c) does not apply to "breach of an express warranty that cannot be characterized as advice, judgment, or opinion," but there is no similar exception for *implied* warranties.[1460] Thus, the professional services exemption precludes claims against attorneys for breach of implied warranties.[1461]

In any event, a DTPA claim against an attorney for breach of implied warranty is not viable even in the absence of the professional services exemption. The DTPA itself does not establish any implied warranties, so a consumer must rely on warranties expressly created by contract or those implied by statute or common law.[1462] A warranty, whether express or implied, must be established independently of the DTPA.[1463] In 1995, the Supreme Court of Texas held that there is no implied warranty for real estate developers to perform future services in a good and workmanlike

Ersek v. Davis & Davis, P.C., 69 S.W.3d 268, 274–75 (Tex. App.—Austin 2002, pet. denied) (holding DTPA claim based on law firm's "misrepresentations regarding its competency to adequately represent [claimant] in underlying medical malpractice action" was improperly fractured negligence claim); James V. Mazuca & Assocs. v. Schumann, 82 S.W.3d 90, 94–96 (Tex. App.—San Antonio 2002, pet. denied) (en banc) (holding attorney did not commit unconscionable conduct by nonsuiting client's suit with prejudice to refile in Arizona, then failing to refile before limitations ran, because attorney "made no misrepresentations, only bad judgments"); Goffney v. Rabson, 56 S.W.3d 186, 192–93 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (holding client's allegation that attorney abandoned her on day of trial was not unconscionable conduct); Greathouse v. McConnell, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (complaint that lawyer misrepresented that legal services would be of competent quality was not unconscionable conduct).

[1460] *See* TEX. BUS. & COM. CODE ANN. § 17.49(c) (West 2011).

[1461] *See id.*

[1462] *See* Parkway Co. v. Woodruff, 901 S.W.2d 434, 438 (Tex. 1995); Purina Mills, Inc. v. Odell, 948 S.W.2d 927, 935 n.8 (Tex. App.—Texarkana 1997, writ denied); Clark Equip. Co. v. Pitner, 923 S.W.2d 117, 127 n.14 (Tex. App.—Houston [14th Dist.] 1996, writ denied); Green Tree Acceptance, Inc. v. Pierce, 768 S.W.2d 416, 418 (Tex. App.—Tyler 1989, no writ); Miller v. Spencer, 732 S.W.2d 758, 759 (Tex. App.—Dallas 1987, no writ); La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984); Archibald v. Act III Arabians, 741 S.W.2d 957, 959 (Tex. App.—Houston [14th Dist.] 1987, no writ), *rev'd*, 755 S.W.2d 84 (Tex. 1988) (concluding the DTPA does not create any warranties, and warranty sued upon must be established independently of the Act).

[1463] *See Parkway Co.*, 901 S.W.2d at 438; *La Sara Grain Co.*, 673 S.W.2d at 565; Contractors Source, Inc. v. Amegy Bank N.A., 462 S.W.3d 128, 138 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

manner.[1464] Two years later, in 1997, the Texas Supreme Court held that there is no implied warranty for professional accounting services.[1465] Following these holdings, subsequent courts have consistently stated that Texas law generally does not recognize a cause of action for breach of implied warranty of professional services,[1466] which includes legal services.[1467]

C. Laundry List Provisions

A client may recover under the DTPA for damages caused by "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce . . . ."[1468] Section 17.46 of the DTPA lists at least thirty-one acts that are "false, misleading or deceptive acts or practices."[1469] Because of the Section 17.49(c) exemption for professional services, however, only two provisions of that "laundry list" presently apply to attorneys.

First, under Subsection 17.46(24), attorneys are liable for "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed."[1470] Consequently, attorneys who, for example, overpromote their areas of specialization or fail to advise a prospective client of facts that may be germane to the client's attorney retention decision may be exposed to DTPA liability.[1471]

[1464] *See Parkway Co.*, 901 S.W.2d at 439–40.

[1465] *See* Murphy v. Campbell, 964 S.W.2d 265, 269 (Tex. 1977).

[1466] CCE, Inc. v. PBS & J Constr. Servs., Inc., 461 S.W.3d 542, 553 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (stating that there is no implied warranty for engineering firm's services); Garland Dollar Gen. LLC v. Reeves Dev., LLC, No. 3:09-CV-0707-D, 2010 WL 4259818, at *7 (N.D. Tex. Oct. 21, 2010) (mem. op.) (stating that there is no implied warranty for architect's services).

[1467] Rangel v. Lapin, 177 S.W.3d 17, 24–25 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

[1468] TEX. BUS. & COM. CODE ANN. § 17.46(a) (West 2011).

[1469] *Id.* § 17.46(b).

[1470] *Id.* § 17.46(b)(24); *see also id.* § 17.49(c)(2) (excepting a failure to disclose information in violation of Section 17.46(b)(24) from the professional services exemption).

[1471] *See* Tracy Walters McCormack & Christopher John Bodnar, *Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155, 158, 200 (2010) (contending that a lawyer's failure to disclose his or her lack of trial experience to a prospective client may be a misrepresentation).

Second, under Subsection 17.46(26), attorneys remain liable for "selling, offering to sell, or illegally promoting" certain annuities for public employees.[1472]

D. Privity

The DTPA allows a consumer to recover against a third party with whom there is no privity of contract, if the transaction was consummated for the benefit of the third party.[1473] Thus, in appropriate circumstances, the rule of strict privity in attorney malpractice actions may be circumvented in a DTPA action if the aggrieved party can qualify as a "consumer."

To qualify as a "consumer" eligible to sue under the DTPA, the plaintiff "must have sought or acquired goods or services by purchase or lease," and those "goods or services . . . must form the basis of the complaint."[1474] A plaintiff may establish consumer status merely by seeking to acquire services, even if the services were never actually acquired.[1475] The "key principle in determining consumer status is that the goods or services purchased must be an objective of the transaction, not merely incidental to it."[1476]

In *Parker v. Carnahan*, a former wife sued attorneys whom her husband had hired, alleging that the attorneys had violated the DTPA by, among other things, failing to advise her of her potential liability under a joint tax return and failing to advise her to seek independent legal counsel.[1477] The court of appeals observed that the DTPA definition of "consumer" superficially appeared to exclude an ex-wife because "it is conclusively proven that she did not seek a service and did not personally purchase or

[1472] TEX. BUS. & COM. CODE ANN. § 17.49(c)(5) (excepting a violation of Section 17.46(b)(26) from the professional services exemption). As of the time of publication, there have been no reported decisions addressing this provision.

[1473] *See* Kennedy v. Sale, 689 S.W.2d 890, 892–93 (Tex. 1985); *accord* Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 815 (Tex. 1997) (purchasing corporation was "consumer" of auditing services under DTPA even if it did not pay for audit); Bus. Staffing, Inc. v. Viesca, 394 S.W.3d 733, 743 (Tex. App.—San Antonio 2012, no pet); Serv. Corp. Int'l v. Aragon, 268 S.W.3d 112, 117 (Tex. App.—Eastland 2008, pet denied).

[1474] Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 351–52 (Tex. 1987).

[1475] Nast v. State Farm Fire & Cas. Co., 82 S.W.3d 114, 122 (Tex. App.—San Antonio 2002, no pet.).

[1476] Villarreal v. Wells Fargo Bank, N.A., 814 F.3d 763, 768 (5th Cir. 2016) (quoting Maginn v. Nw. Mortg., Inc., 919 S.W.2d 164, 166 (Tex. App.—Austin 1996, no writ)).

[1477] 772 S.W.2d 151, 153 (Tex. App.—Texarkana 1989, writ denied).

lease any service from . . . the attorneys . . . ."[1478] Nevertheless, after analyzing the leading case of *Kennedy v. Sale*,[1479] the court determined that the former wife could be a "consumer" under the DTPA if:

> 'the goods or services sought or acquired by the consumer form the basis of her complaint.' The only distinction which can be drawn between Kennedy and our present situation is that Kennedy concerned a situation in which an insurance policy was purchased by an employer specifically for the benefit of the employee. In the present case, the services were expressly purchased for the husband and service was also rendered to the plaintiff. We find that this distinction would not preclude [the former wife] from being a consumer under the DTPA.[1480]

The court of appeals reversed the summary judgment for the defendant-attorneys and "remanded the case for trial on the issue of whether the attorneys were negligent in failing to advise [the former wife] that they were not representing her interests . . . ."[1481]

Similarly, in *NationsBank of Texas, N.A. v. Akin, Gump, Hauer & Feld, L.L.P.*, the court held that a bank acting as the executor of an estate qualified as a "consumer" where the bank asserted a DTPA claim against the law firm that represented the estate.[1482] Furthermore, in *Marshall v. Quinn-L Equities, Inc.*, the court held limited partnership interests in real estate purchased by the plaintiffs were not goods, but instead were securities and intangibles,[1483] and therefore, the plaintiffs were not

[1478] *Parker*, 772 S.W.2d at 158.

[1479] 689 S.W.2d 890 (Tex. 1985).

[1480] *Parker*, 772 S.W.2d at 158–59 (quoting *Kennedy*, 689 S.W.2d at 893).

[1481] *Id.* at 59 (citations omitted); *see also* Perez v. Kirk & Carrigan, 822 S.W.2d 261, 268 (Tex. App.—Corpus Christi 1991, writ denied) (holding insured was "consumer" as beneficiary of legal services purchased by employer or insurer); Marshall v. Quinn-L Equities, Inc., 704 F. Supp. 1384, 1393–94 (N.D. Tex. 1988) (denying law firm's motion for summary judgment on DTPA claim, even though it was not in privity with the investors).

[1482] *See* NationsBank of Texas, N.A. v. Akin, Gump, Hauer & Feld, L.L.P., 979 S.W.2d 385, 391 (Tex. App.—Corpus Christi 1998, pet. denied); *see also* Head v. Finley, No. 2-03-296-CV, 2004 WL 1699895, at *3–4 (Tex. App.—Fort Worth July 29, 2004, pet. denied) (mem. op.) (holding plaintiff was "consumer" in connection with trust's purchase of house because plaintiff was settlor of trust and home was purchased for her sole benefit).

[1483] 704 F. Supp. at 1392–93.

consumers under the DTPA.[1484] However, the defendant law firm was not entitled to summary judgment on the issue of whether the investors purchased or leased "services" to qualify them as "consumers" under the DTPA.[1485] In concluding that a law firm could be liable to investors for an unconscionable course of action even though the firm was not in privity with the investors, the court decided that "services related to the sale of a security (which does not constitute a 'good') may still be services covered by the DTPA when such services are also objectives of the transaction."[1486]

The Texas Supreme Court revisited the privity issue in a professional context in *Arthur Andersen & Co. v. Perry Equipment Corp.*, where a purchasing corporation sued an accounting firm that prepared audited financial statements of the acquired corporation.[1487] Although the court rejected the "broad" notion that *any* stock purchaser could bring a DTPA claim against an auditor on the basis that "virtually every external audit benefits third parties," it nevertheless concluded that the stock purchaser was a consumer under the DTPA because (1) the purchaser specifically requested the audit in question; (2) the accounting firm knew the purchaser requested the audit and intended to rely on its accuracy; and (3) the accounting firm knew the purpose for which the audit was conducted.[1488]

On the other hand, courts hold that third-party plaintiffs do not qualify as "consumers" when an attorney's services were not purchased for the benefit of that third party.[1489] In *Fielder v. Able*, where the attorney for the

[1484] *Id.* at 1393.

[1485] *Id.* at 1393–94.

[1486] *Id.* at 1393.

[1487] 945 S.W.2d 812, 814 (Tex. 1997).

[1488] *Id.* at 815.

[1489] *See* Ortiz v. Collins, 203 S.W.3d 414, 424–25 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (holding former owner of home did not have "consumer" status to sue current owners' attorney for alleged misrepresentations made during negotiations to settle lawsuit between owners); Smithart v. Sweeney, No. 05-97-01901-CV, 2001 WL 804492, at *5–6 (Tex. App.—Dallas July 18, 2001, pet. denied) (mem. op.) (not designated for publication) (holding adult children of decedent were not "consumers" of attorneys who filed wrongful death suit on behalf of decedent's husband); Fielder v. Abel, 680 S.W.2d 655, 657–58 (Tex. App.—Austin 1984, no writ) (reversing judgment for plaintiffs, the sellers of real estate, on ground they were not "consumers" as required by DTPA and rejecting argument that attorney for purchasers enjoyed the benefits of the sale of real estate and therefore plaintiffs qualified as "consumers"); First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410, 417 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (reasoning client must purchase services from the attorney for him to be held liable under the DTPA and concluding "a buyer of an intangible was not a consumer within the meaning of the Act").

purchasers prepared a deed conveying more acreage than was agreed upon by the sellers, it was held that the sellers did not purchase the attorney's services; the purchasers did.[1490] Accordingly, the court concluded that the sellers did not meet the test of a consumer—namely, that the goods or services purchased or leased must form the basis of the complaint.[1491] Moreover, in *Smithart v. Sweeney*, the court held that the adult children of a decedent were not "consumers" able to assert a DTPA claim against attorneys who had filed a wrongful death claim on behalf of decedent's husband, because the attorneys had no authority to represent the children's interests.[1492]

Likewise, in *Vinson & Elkins v. Moran*, the court held that will beneficiaries were not consumers of an attorney's services under the DTPA because they were only "incidental" beneficiaries.[1493] The court explained that "the mere fact that . . . third parties are benefitted, or damaged, by the attorney's performance does not make the third parties consumers with rights to an action under the DTPA."[1494] Vital to the court's reasoning on this issue was the public policy concern that probate proceedings reach a stage of finality.[1495] The court wrote, "[i]f consumer status were conferred on estate beneficiaries, the existence of minor beneficiaries, residual beneficiaries, or others similarly situated could extend the period of time in which an action could be brought against attorneys hired by the executors for years after the representation ended and the estate was closed."[1496] Thus, in the public interest of bringing closure to probate matters, the court viewed narrowly the holdings in *Kennedy* and *Arthur Andersen*. As the same court of appeals explained two years later, "[i]t is the testator, not the beneficiaries, who hires an attorney to draft the testamentary documents which will carry out his intent."[1497]

[1490] *See* 680 S.W.2d 655, 656–58 (Tex. App.—Austin 1984, no writ).

[1491] *Id.* at 657–58.

[1492] No. 05-97-01901-CV, 2001 WL 804492, at *5–6 (Tex. App.—Dallas July 18, 2001, pet. denied) (mem. op.) (not designated for publication).

[1493] 946 S.W.2d 381, 408–09 (Tex. App.—Houston [14th Dist] 1997, writ dism'd by agr.); *accord* Guest v. Cochran, 993 S.W.2d 397, 407–08 (Tex. App.—Houston [14th Dist.] 1999, no pet.); Querner v. Rindfuss, 966 S.W.2d 661, 668 (Tex. App.—San Antonio 1998, pet. denied).

[1494] *Vinson*, 946 S.W.2d at 408.

[1495] *Id.* at 408–09.

[1496] *Id.* at 408.

[1497] *Guest*, 993 S.W.2d at 408.

E. Damages

To maintain a DTPA action, the client must establish that she suffered economic damages or damages for mental anguish as a result of the attorney's impermissible act.[1498] Once the existence of damages has been established, the aggrieved client may recover:

> (1) the amount of economic damages found by the trier of fact;[1499]
>
> (2) mental anguish damages if the trier of fact finds that the conduct of the defendant was committed knowingly or intentionally;[1500]
>
> (3) reasonable and necessary attorney's fees and court costs.[1501]

Under Subsection 17(b)(1) of the Act, the amount of economic damages are subject to trebling if the defendant's culpable conduct was committed *knowingly*.[1502] If the defendant committed the culpable act *intentionally*, then the client is entitled to trebled economic *and* mental anguish damages.[1503]

Theoretically, an aggrieved client may be entitled to a punitive damage recovery on a tort claim in addition to a treble damage recovery under the DTPA if the the pleadings, proof, and jury findings reflect that the damages on which the punitive award is based are different and unrelated to the damages recovered under the DTPA.[1504] Nevertheless, a plaintiff cannot recover *both* treble damages under the DTPA and exemplary damages if the

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[1498] *See* TEX. BUS. & COM. CODE ANN. § 17.50(a) (West 2011).

[1499] *Id.* § 17.50(b)(1).

[1500] *Id.*; *see also* Main Place Custom Homes, Inc. v. Honaker, 192 S.W.3d 604, 625 (Tex. App.—Fort Worth 2006, pet. denied) ("A finding that the defendant acted knowingly is a prerequisite to an award for mental anguish under the DTPA.").

[1501] TEX. BUS. & COM. CODE ANN. § 17.50(d); *see also* McLeod v. Gyr, 439 S.W.3d 639, 652–53 (Tex. App.—Dallas 2014, pet. denied) (reviewing award of attorney's fees for violation of DTPA).

[1502] TEX. BUS. & COM. CODE ANN. § 17.50(b)(1).

[1503] *Id.*

[1504] *See, e.g.*, St. Gelais v. Jackson, 769 S.W.2d 249, 259–60 (Tex. App.—Houston [14th Dist.] 1988, no writ) (allowing plaintiffs to recover both treble damages under the DTPA and exemplary damages at common law).

acts complained of caused the same damages.[1505] To hold otherwise would allow a double recovery, which is prohibited.[1506] When a plaintiff fails to elect between alternative measures of damages, a court ordinarily will render the judgment affording the greatest recovery.[1507]

F. Limitations

Suits under the DTPA "must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."[1508] Furthermore, the limitations period "may be extended for a period of 180 days if the plaintiff proves that the failure to timely commence the action was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action."[1509] In effect, the Legislature has codified a discovery rule and fraudulent concealment rule into the DTPA. Thus, in *Underkofler v. Vanasek*, the Texas Supreme Court held that the common-law *Hughes* tolling rule in legal malpractice cases does not apply to DTPA claims: "We defer to the Legislature's explicit policy determination that only two exceptions apply to the statute of limitations for these statutory claims, and we will not rewrite the statute to add the *Hughes* tolling rule as a third."[1510] Likewise, the DTPA's allowance

[1505] *See* Holland v. Hayden, 901 S.W.2d 763, 767 n.8 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (citing Birchfield v. Texarkana Mem'l Hosp., 747 S.W.2d 361, 367 (Tex. 1987)); *see also* Bus. Staffing, Inc. v. Jackson Hot Oil Serv., 401 S.W.3d 224, 245 (Tex. App.—El Paso 2012, pet. denied).

[1506] *See Holland*, 901 S.W.2d at 767 n.8. In *Birchfield*, the plaintiff was unable to recover both exemplary damages and the treble damages under the DTPA because the jury found that the defendant's deceptive act or practice as well as its acts of negligence were the proximate or producing cause of the same damages. 747 S.W.2d at 367. As a result, the court ruled that an award of punitive damages and statutory treble damages would be necessarily predicated upon the same findings of actual damages and would amount to a double recovery of punitive damages. *Id.*

[1507] *See* Ins. Alliance v. Lake Texoma Highport, LLC, 452 S.W.3d 57, 78–79 (Tex. App.—Dallas 2014, pet. denied); Parkway Co. v. Woodruff, 901 S.W.2d 434, 441 (Tex. 1995).

[1508] TEX. BUS. & COM. CODE ANN. § 17.565.

[1509] *Id.*

[1510] 53 S.W.3d 343, 346 (Tex. 2001); *accord* Ulrickson v. Hibbs, No. 2-02-161-CV, 2003 WL 22514689, at *3 (Tex. App.—Fort Worth Nov. 6, 2003, no pet.) (mem. op.); Eiland v. Turpin, Smith, Dyer, Saxe & McDonald, 64 S.W.3d 155, 165 (Tex. App.—El Paso 2001, no pet.); Massey v. Royall, No. 14-00-00177-CV, 2001 WL 1136025, at *3 (Tex. App.—Houston [14th Dist.] Sept.

of a 180-day extension for fraudulent concealment displaces the potentially unlimited tolling provided by common-law fraudulent concealment.[1511]

§ 2 Bad Faith

In the seminal case of *Arnold v. National County Mutual Fire Insurance Co.*, the Texas Supreme Court recognized a common law duty of good faith and fair dealing in the insurance context.[1512] The breach of this duty may give rise to a cause of action in tort and the right to recover both actual and punitive damages.[1513] The court said a duty of good faith and fair dealing may arise as a result of a "special relationship between the parties governed or created by a contract."[1514] The court recognized that this cause of action in tort does not extend to every contract.[1515] "In the insurance context [however,] a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining . . . [the] insurance company has exclusive control over the [transaction] . . . ."[1516]

27, 2001, pet. denied) (mem. op.) (not designated for publication); Davenport v. Verner & Brumley, P.C., No. 05-98-01240-CV, 2001 WL 969249, at *2 (Tex. App.—Dallas Aug. 28, 2001, no pet.) (mem. op.) (not designated for publication).

[1511] Gonzalez v. Sw. Olshan Found. Repair Co., LLC, 400 S.W.3d 52, 58 (Tex. 2013).

[1512] 725 S.W.2d 165, 167 (Tex. 1987); *see, e.g.*, Tex. Mut. Ins. Co. v. Ruttiger, 381 S.W.3d 430, 446 (Tex. 2012); Union Bankers Ins. Co. v. Shelton, 889 S.W.2d 278, 283 (Tex. 1994); Liberty Mut. Fire Ins. Co. v. Crane, 898 S.W.2d 944, 949 (Tex. App.—Beaumont 1995, no writ); *see also* Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 71 (Tex. 1997) (citing Aranda v. Ins. Co. of N. Am., 748 S.W.2d 210, 212 (Tex. 1988), *overruled by* Tex. Mut. Ins. Co. v. Ruttiger, 381 S.W.3d 430 (Tex. 2012)).

[1513] *See Arnold*, 725 S.W.2d at 168.

[1514] *Id.* at 167; *see also* Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984) (holding "[t]he fiduciary duty arises from the relationship of the parties and not from the contract").

[1515] *See Arnold*, 725 S.W.2d at 167.

[1516] *Id.* ("This court has declined to impose an implied covenant of good faith and fair dealing in every contract . . . ." (emphasis omitted)); *see* Exxon Corp. v. Atl. Richfield Co., 678 S.W.2d 944, 947 (Tex. 1984) ("There can be no implied covenant as to a matter specifically covered by the written terms of a contract" and "[t]he agreement made by the parties and embodied in the contract itself cannot be varied by an implied good-faith-and-fair-dealing covenant."); *see also* English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983) (rejecting the theory that there is an implied covenant of good faith and fair dealing in every contract).

Although Texas courts have refused to impose a common law duty of good faith and fair dealing in franchiser-franchisee,[1517] mortgagor-mortgagee,[1518] distributor-distributee,[1519] employer-employee,[1520] and contractor-contractee situations,[1521] Texas courts have not conclusively determined the viability of a bad faith claim in the legal malpractice context. When Texas courts face this issue, the pivotal question will be whether the attorney-client relationship is the type of "special relationship" that should give rise to such a tort. Since the fiduciary relationship between an attorney and his client already gives rise to increased obligations on the part of the attorney, it is questionable whether an additional obligation is warranted or necessary. Indeed, in some cases, courts have determined that a client's bad faith claims were improperly "fractured" claims for legal malpractice.[1522]

[1517] *See* Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 596 (Tex. 1992).

[1518] *See* Fed. Deposit Ins. Corp. v. Coleman, 795 S.W.2d 706, 709 (Tex. 1990); Falcon Int'l Bank v. Cantu, No. 13-13-00577-CV, 2015 WL 1743396, at *12 (Tex. App.—Corpus Christi Apr. 16, 2015, pet. denied) (mem. op.); Johnson v. Bank of Am., N.A., No. 09-12-00477-CV, 2014 WL 5490935, at *16 (Tex. App.—Beaumont Oct. 30, 2014, no pet.) (mem. op.); Lovell v. W. Nat'l Life Ins. Co., 754 S.W.2d 298, 302–03 (Tex. App.—Amarillo 1988, writ denied).

[1519] *See* S. Plains Switching, Ltd. v. BNSF Ry., 255 S.W.3d 690, 702–03 (Tex. App.—Amarillo 2008, pet. denied); Adolph Coors Co. v. Rodriguez, 780 S.W.2d 477, 481 (Tex. App.—Corpus Christi 1989, writ denied).

[1520] *See* City of Midland v. O'Bryant, 18 S.W.3d 209, 216 (Tex. 2000) (stating that it "decline[d] to impose a duty of good faith and fair dealing on employers in light of the variety of statutes that the Legislature has already enacted to regulate employment relationships"); Day & Zimmerman, Inc. v. Hatridge, 831 S.W.2d 65, 71 (Tex. App.—Texarkana 1992, writ denied); McClendon v. Ingersoll-Rand Co., 757 S.W.2d 816, 819–20 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 779 S.W.2d 69 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990), *aff'd*, 807 S.W.2d 577 (Tex. 1991); Lumpkin v. H & C Commc'ns, Inc., 755 S.W.2d 538, 540 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

[1521] *See* Jhaver v. Zapata Off-Shore Co., 903 F.2d 381, 385 (5th Cir. 1990); Saucedo v. Horner, 329 S.W.3d 825, 831–32 (Tex. App.—El Paso 2010, no pet.); Electro Assocs., Inc. v. Harrop Constr. Co., Inc., 908 S.W.2d 21, 22 (Tex. App.—Houston [1st Dist.] 1995, writ denied); City of San Antonio v. Forgy, 769 S.W.2d 293, 295–98 (Tex. App.—San Antonio 1989, writ denied).

[1522] *See* Greathouse v. McConnell, 982 S.W.2d 165, 171–72 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding client's claim for breach of duty of good faith and fair dealing was improperly "fractured" legal malpractice claim); *see also* Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C., 284 S.W.3d 416, 431–32 (Tex. App.—Austin 2009, no pet.) (collecting cases and discussing dichotomy between complaints based on duty of care and complaints based on duty of loyalty).

Furthermore, the "unequal bargaining power" that serves as one of the underpinnings of the imposition of the duty of good faith and fair dealing is absent. A party is generally free to select the counsel of his or her choice.

§ 3 Tortious Interference with Existing Contracts

Attorneys occasionally are charged with the allegation that, in the representation of their client, they have tortiously interfered with a third party's contract.[1523]

Texas recognizes two types of tortious-interference claims: interference with an existing contract, and interference with a prospective contract or business relationship.[1524]

To maintain a claim for tortious interference with an *existing* contract, a plaintiff must prove: "(1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff's injury, and (4) caused actual damages or loss."[1525] The elements of a claim for interference with a *prospective* contract or business relationship are: "(1) a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result."[1526] "Interference includes conduct that prevents performance of a contract or makes performance of a contract impossible, more burdensome, more difficult, or less valuable to the person entitled to performance."[1527] However, "merely inducing a contract obligor to do what it has a right to do is not actionable interference."[1528]

[1523] *See, e.g.*, Schimmel v. McGregor, 438 S.W.3d 847, 861 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

[1524] El Paso Healthcare Sys., Ltd. v. Murphy, 518 S.W.3d 412, 421 (Tex. 2017).

[1525] Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc., 29 S.W.3d 74, 77 (Tex. 2000); ACS Investors, Inc. v. McLaughlin, 943 S.W.2d 426, 430 (Tex. 1997).

[1526] Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 923 (Tex. 2013).

[1527] AKB Hendrick, LP v. Musgrave Enters., Inc., 380 S.W.3d 221, 236 (Tex. App.—Dallas 2012, no pet.).

[1528] *ACS Investors, Inc.*, 943 S.W.2d at 430.

The primary distinction between the two causes of action is whether the defendant's conduct was independently tortious. Tortious interference with a *prospective* business relationship requires the defendant's conduct to be independently tortious or unlawful; interference with an *existing* contract does not.[1529]

Nevertheless, the issue of whether the defendant's conduct was improper is relevant to both types of claims. As an affirmative defense to tortious interference with an *existing* contract, a defendant may assert that interference with the contract was legally justified.[1530] Legal justification is a defense when "one is privileged to interfere with another's contract" either by "a bona fide exercise of his own rights" or "if he has an equal or superior right in the subject matter to that of the other party."[1531] The defense of legal justification "only protects good faith assertions of legal rights."[1532] For tortious interference with a *prospective* contract or relationship, by contrast, the plaintiff bears the burden to prove that the defendant's conduct was independently tortious or unlawful.[1533] Thus, the "concepts of justification and privilege are subsumed in the plaintiff's proof," so justification and privilege are defenses "only to the extent they are defenses to the independent tortiousness of the defendant's conduct."[1534]

Under present Texas law, there are serious obstacles to a successful tortious interference claim against an attorney. Historically, Texas courts generally held that an attorney's legitimate representation of their client's interests does not constitute unjustifiable interference by the attorney with another's contract.[1535] After the Texas Supreme Court's 2015 decision in

[1529] *Compare Coinmach Corp.*, 417 S.W.3d at 923 (identifying the elements of a claim for tortious interference with prospective relations), *with* Butnaru v. Ford Motor Co., 84 S.W.3d 198, 207 (Tex. 2002) (identifying the elements of a claim for tortious interference with existing contracts).

[1530] *See, e.g.*, *Butnaru*, 84 S.W.3d at 207; *Prudential Ins.*, 29 S.W.3d at 77–78.

[1531] El Paso Healthcare Sys., Ltd. v. Murphy, 518 S.W.3d 412, 420 (Tex. 2017) (citing Sterner v. Marathon Oil Co., 767 S.W.2d 686, 691 (Tex. 1989)).

[1532] *Id.* (citing Victoria Bank & Tr. Co. v. Brady, 811 S.W.2d 931, 939 (Tex. 1991)).

[1533] Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 726 (Tex. 2001).

[1534] *Id.* at 726–27 (Tex. 2001) (citing *Prudential Ins.*, 29 S.W.3d at 82); *see also* McConnell v. Coventry Health Care Nat'l Network, No. 05-13-01365-CV, 2015 WL 4572431, at *6 (Tex. App.—Dallas July 30, 2015, pet. denied) (mem. op.).

[1535] Boundy v. Dolenz, No. CIV.A.3:96-CV-03010G, 2002 WL 31415998, at *6 (N.D. Tex. Oct. 21, 2002), *aff'd sub nom.* U.S. *ex rel.* Boundy v. Dolenz, 87 F. App'x 992 (5th Cir. 2004) (holding that attorney was protected from tortious interference claim based on conduct in investigation in furtherance of bringing a *qui tam* action against physician for violations of False

Cantey Hanger, LLP v. Byrd, it is doubtful that a plaintiff could ever maintain suit against an attorney for tortious interference based on the attorney's representation of a client. In *Cantey Hanger*, the court held that attorneys are immune from liability for actions committed as part of the discharge of their duties to their client, even if the acts were independently fraudulent.[1536] Although the limits of the attorney immunity doctrine after *Cantey Hanger* are still being tested, the court's robust statement of attorney immunity should protect attorneys from any tortious interference claim based on an attorney's actions taken in representation of their client. Indeed, in *U.S. Bank Nat. Assoc. v. Sheena*, just two months after *Cantey Hanger* was decided, the court relied on the doctrine of attorney immunity to affirm a trial court's summary judgment that a non-client take nothing on its tortious interference claim against an attorney.[1537]

§ 4 Civil Conspiracy

Historically, an attorney who knowingly assisted a client in defrauding a non-client could be liable as a co-conspirator.[1538] In *Likover v. Sunflower Terrace II, Ltd.*, the leading case in this area, the buyer of an apartment complex sued the seller and the seller's attorney for conspiring to defraud the buyer in connection with the sale.[1539] A jury found the attorney guilty of

Claims Act); Manders v. Manders, 897 F. Supp. 972, 978 (S.D. Tex. 1995) (holding attorney was immune from tortious interference claim based on filing of *lis pendens* because attorney's filing of *lis pendens* on behalf of client was absolutely privileged under Texas law); Maynard v. Caballero, 752 S.W.2d 719, 721 (Tex. App.—El Paso 1988, writ denied) (holding that defendant in criminal case could not assert tortious interference claim against attorney for co-defendant because attorney's representation of his client was "privileged").

[1536] 467 S.W.3d at 483–84; *see also* Youngkin v. Hines, No. 16-0935, 2018 WL 1973661, at *4 (Tex. Apr. 27, 2018) (affirming the attorney immunity doctrine).

[1537] U.S. Bank Nat'l Assoc. v. Sheena, 479 S.W.3d 475, 481 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

[1538] Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ); *see* Bourland v. State, 528 S.W.2d 350, 353–58 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (holding attorney liable as conspirator because of involvement in promotion of investment opportunities); *see also* Ross v. Arkwright Mut. Ins. Co., 892 S.W.2d 119, 132 (Tex. App.—Houston [14th Dist.] 1994, no writ) (where attorneys sued former clients and law firms representing them in connection with prior malpractice suit on theory of civil conspiracy); Bernstein v. Portland Sav. & Loan Ass'n, 850 S.W.2d 694, 706 (Tex. App.—Corpus Christi 1993, writ denied) (holding mere knowledge and silence to be insufficient to prove conspiracy, and "because of the attorney's duty to preserve client confidences, there must be indications that the attorney agreed to the fraud").

[1539] 696 S.W.2d at 468.

civil conspiracy to defraud and commit economic duress in connection with settlement negotiations in a dispute over a real estate partnership.[1540] The court concluded that in order to hold the attorney liable as a co-conspirator, the evidence must show:

> (1) [the attorney] had knowledge of the object and purpose of the conspiracy;
>
> (2) there was an understanding or agreement to inflict a wrong against, or injury on, [the injured party];
>
> (3) there was a meeting of minds on the object or cause of action; and
>
> (4) there was some mutual mental action coupled with an intent to commit the act that resulted in the injury.[1541]

The evidence was sufficient to hold the attorney liable for conspiring with the investor to use economic duress to extract money from the partnership.[1542]

The attorney in *Likover* contended he owed no duty to the partnership, a non-client third party.[1543] The court rejected this argument, explaining that while an "attorney has no general duty to the opposing party," he is nevertheless "liable for injuries to third parties when his conduct is fraudulent or malicious."[1544] Consequently, lack of privity is not a defense to this type of action by a non-client.[1545]

Following *Likover*, several Texas cases concluded that an attorney may be liable for conspiring with a client to defraud or maliciously injure others,[1546] even where the attorney's fraudulent conduct occurred in the

[1540] *Id.* at 471.

[1541] *Id.* at 472; *see also* Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854, 856–57 (Tex. 1968). In *Nortex*, the buyer of oil and gas leases claimed that the oil well servicing company was involved in a conspiracy which damaged the buyer. The court held defendant was not a conspirator since the evidence did not support an inference that the company had actual knowledge of the violation, or that the company intended to participate in any such wrongdoing. *Id.*

[1542] *See Likover*, 696 S.W.2d at 473–74.

[1543] *Id.* at 472.

[1544] *Id.*

[1545] *Id.* (citing Poole v. Hous. & T.C. Ry., 58 Tex. 134, 137 (1882)).

[1546] James v. Easton, 368 S.W.3d 799, 802 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); Toles v. Toles, 113 S.W.3d 899, 910–11 (Tex. App.—Dallas 2003, no pet.); IBP, Inc. v.

context of litigation.[1547] After the Supreme Court of Texas's 2015 decision in *Cantey Hanger, LLP v. Byrd*, however, attorney liability for conspiring with a client has been significantly limited.[1548] Attorneys are now immune from liability for their actions committed as part of the discharge of their duties to their client, even if the acts were independently fraudulent,[1549] so long as the attorney's conduct was not "foreign to the duties of an attorney."[1550]

In cases where attorney immunity does not apply, plaintiffs face the traditional challenges of proving each element of a conspiracy claim. For example, the attorney must have engaged in wrongful conduct for a conspiracy claim to exist.[1551] In *Ross v. Arkwright Mutual Insurance Company*, attorneys sued former clients and the law firms representing them in a prior legal malpractice action, asserting, inter alia, a claim for civil conspiracy.[1552] Essentially, the attorneys claimed the former clients and their counsel were conspiring to maliciously prosecute and defame them.[1553] The court in *Ross* affirmed summary judgment for the clients and their counsel on the malicious prosecution and defamation claims.[1554] Thereafter, the *Ross* court affirmed summary judgment on the civil conspiracy claim because there were no "wrongs" to support the conspiracy.[1555] The court reasoned first that a conspiracy must consist of wrongs that would have been actionable against the conspirators

Klumpe, 101 S.W.3d 461, 470 (Tex. App.—Amarillo 2001, pet. denied); Lesikar v. Rappeport, 33 S.W.3d 282, 318 (Tex. App.—Texarkana 2000, pet. denied).

[1547] JJJJ Walker, LLC v. Yollick, 447 S.W.3d 453, 468 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (stating that "it is well established that an attorney can be held liable for his own fraudulent conduct even though it was performed on a client's behalf"); *James*, 368 S.W.3d at 803 (stating that, if an attorney engages in fraudulent or malicious conduct in the course of representing his client, an opposing party may assert intentional tort claims against the attorney based upon this conduct); *see also* Lackshin v. Spofford, No. 14-03-00977-CV, 2004 WL 1965636, at *3 (Tex. App.—Houston [14th Dist.] Sept. 7, 2004, pet. denied) (mem. op.).

[1548] *See* 467 S.W.3d 477, 485 (Tex. 2015).

[1549] *Id.* at 483–84.

[1550] U.S. Bank Nat'l Assoc. v. Sheena, 479 S.W.3d 475, 480–81 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

[1551] Ross v. Arkwright Mut. Ins. Co., 892 S.W.2d 119, 132 (Tex. App.—Houston [14th Dist.] 1994, no writ).

[1552] *Id.*

[1553] *See id.*

[1554] *Id.*

[1555] *Id.*

individually.[1556] Next, the court pointed out that, if an act by one person is not actionable, then the same act cannot be actionable if done pursuant to an agreement between several persons.[1557] Therefore, since summary judgment was granted on the malicious prosecution and defamation claims, there were no "wrongs" underlying the conspiracy, and summary judgment was also proper on the conspiracy claim.[1558]

§ 5 Malicious Prosecution; Abuse of Process

"Abuse of Process" and "Malicious Prosecution" are similar, but distinct, causes of action. As one court has explained:

> A claim for abuse of process requires (1) an illegal, improper, or "perverted" use of the process, neither warranted nor authorized by the process, (2) an ulterior motive or purpose in exercising such use, and (3) damages as a result of the illegal act. The "critical aspect" of an abuse of process claim is the improper use of the process *after it has been issued.* In other words, abuse of process applies to a situation where a properly issued service of process is later used for a purpose for which it was not intended. If the claim is that wrongful intent or malice caused the process *to be issued initially,* the claim is one for malicious prosecution, not for abuse of process.[1559]

A plaintiff or "opposing party" must overcome several difficult obstacles to maintain a claim for abuse of process against an attorney. First, the tort of abuse of process requires some act or threat not authorized by process; there is no liability where a defendant has done nothing more than carry out the process to its authorized conclusion.[1560] Merely maintaining a civil lawsuit, even with bad intentions, does not support an action for abuse of process.[1561] Second, to recover for abuse of process a claimant must

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[1556] *Id.*

[1557] *Id.*

[1558] *Id.*

[1559] Martinez v. English, 267 S.W.3d 521, 528–29 (Tex. App.—Austin 2008, pet. denied) (citations omitted); *see also* Hunt v. Baldwin, 68 S.W.3d 117, 130 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (discussing difference between claims).

[1560] Davis v. West, 433 S.W.3d 101, 111 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); Detenbeck v. Koester, 886 S.W.2d 477, 480 (Tex. App.—Houston [1st Dist.] 1994, writ dism'd).

[1561] *Detenbeck*, 886 S.W.2d at 481.

demonstrate "special damages," that is, some physical interference with the claimant's property in the form of an arrest, attachment, injunction, or sequestration.[1562] For purposes of the special injury requirement, "[i]t is insufficient that a party has suffered the ordinary losses incident to defending a civil suit, such as inconvenience, embarrassment, discovery costs, and attorney's fees."[1563] The special injury requirement "assures good faith litigants access to the judicial system without fear of intimidation by a countersuit" and avoids vexatious litigation.[1564]

Plaintiffs face other significant challenges in bringing a claim for malicious prosecution. To maintain a cause of action for "malicious prosecution," a plaintiff must establish "(1) the institution or continuation of civil proceedings against the plaintiff; (2) by or at the insistence of the defendant; (3) malice in the commencement of the proceeding; (4) lack of probable cause for the proceeding; (5) termination of the proceeding in plaintiff's favor; and (6) special damages."[1565]

It is "frequently said that actions for malicious prosecution are not favored in the law," but as the Texas Supreme Court has observed, "aphorism is far too vague to serve as an analytical tool."[1566] To the extent there is a public policy against claims for malicious prosecution, that policy is reflected in the elements of the claim.[1567] The malice and "special injury" elements, in particular, prevent successful claims in most cases.

[1562] Pitts & Collard, L.L.P. v. Schechter, 369 S.W.3d 301, 332–33 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see also* Tex. Beef Cattle Co. v. Green, 921 S.W.2d 203, 209 (Tex. 1996).

[1563] *Tex. Beef Cattle*, 921 S.W.2d at 208.

[1564] *Id.* at 209; *see also* Martin v. Trevino, 578 S.W.2d 763, 766 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (stating that malicious prosecution claim requires proof that plaintiff "suffers some interference, by reason of the suit, with his person or property"); Bossin v. Towber, 894 S.W.2d 25, 34 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (holding that process not abused where trial subpoena never served and writ of attachment was used for its proper purpose); *Detenbeck*, 886 S.W.2d at 481 (holding that the mere procurement or issuance of process with a malicious intent, or without probable cause, is not actionable; there must be an improper use of the process after its issuance).

[1565] Graber v. Fuqua, 279 S.W.3d 608, 617 n.9 (Tex. 2009) (quoting *Tex. Beef Cattle*, 921 S.W.2d at 207).

[1566] Browning-Ferris Indus., Inc. v. Lieck, 881 S.W.2d 288, 291 (Tex. 1994).

[1567] *Id.* ("As with any other cause of action, if the elements of malicious prosecution are proved, liability is established. What is distinctive about malicious prosecution is that there is little room for error in applying the law. Even a small departure from the exact prerequisites for liability may threaten the delicate balance between protecting against wrongful prosecution and encouraging reporting of criminal conduct.").

As the name of the tort suggests, malice is an essential element of a claim for malicious prosecution. A plaintiff cannot recover for damages caused by incorrect or mistaken prosecution that was not malicious.[1568] Malice is defined as "ill will or evil motive, or such gross indifference or reckless disregard for the rights of others as to amount to a knowing, unreasonable, wanton, and willful act."[1569] It can be proved by direct or circumstantial evidence,[1570] but the required malice must have existed at the time the allegedly tortious prosecution began.[1571] "Evidence suggesting malice after the commencement of the proceeding is not probative on this element."[1572]

To prevail on a claim for malicious prosecution, a plaintiff must also show they suffered "special damages" as a result of the wrongful prosecution.[1573] Courts call this element the "special injury" requirement."[1574] "Special" damages or injury are distinguished from "ordinary losses incident to defending a civil suit, such as inconvenience, embarrassment, discovery costs, and attorney's fees."[1575] Rather, to satisfy the special injury requirement, the plaintiff must show "actual interference" with their "person (such as an arrest or detention) or property (such as an attachment, appointment of receiver, a writ of replevin or an

[1568] Luce v. Interstate Adjusters, Inc., 26 S.W.3d 561, 566 (Tex. App.—Dallas 2000, no pet.); *see also* Murphy USA, Inc. v. Rose, No. 12-15-00197-CV, 2016 WL 5800263, at *7 (Tex. App.—Tyler Oct. 5, 2016, no pet.) (mem. op.) ("[A] plaintiff cannot avoid the strict elements of a malicious prosecution action by labeling it negligence."); ITT Consumer Fin. Corp. v. Tovar, 932 S.W.2d 147, 155–56 (Tex. App.—El Paso 1996, writ denied) ("We hold that a plaintiff cannot avoid the strict elements of a malicious prosecution claim by labeling it negligence."); Wal-Mart Stores, Inc. v. Medina, 814 S.W.2d 71, 73–74 (Tex. App.—Corpus Christi 1991, writ denied) (same).

[1569] *Luce*, 26 S.W.3d at 566.

[1570] *Id.*

[1571] *Id.* at 566–67.

[1572] *Id.*

[1573] Graber v. Fuqua, 279 S.W.3d 608, 617 n.9 (Tex. 2009).

[1574] Airgas-Sw., Inc. v. IWS Gas and Supply of Tex., Ltd., 390 S.W.3d 472, 478 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (citing Ross v. Arkwright Mut. Ins. Co., 892 S.W.2d 119, 128 (Tex. App.—Houston [14th Dist.] 1994, no writ)).

[1575] *Id.* (quoting Tex. Beef Cattle Co. v. Green, 921 S.W.2d 203, 208 (Tex. 1996)). Notably, the term "special damages" has different meanings in other contexts. *See, e.g.*, Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 767 (Tex.1987) (business disparagement); Williams v. Jennings, 755 S.W.2d 874, 884 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (slander of title).

injunction)."[1576] Put another way, "physical interference" is the type of interference necessary to satisfy the special injury requirement.[1577] Thus, courts have refused to hold that the special injury requirement is satisfied by consequential damages resulting from the underlying lawsuit, such as attorney's fees and costs, mental anguish, loss of personal or professional reputation, loss of business and contracts, increased insurance premiums, or loss of ability to obtain credit.[1578] "But once the special injury hurdle has been cleared, that injury serves as a threshold for recovery of the full range of damages incurred as a result of the malicious litigation."[1579]

Although the Restatement (Second) of Torts and other jurisdictions omit the special injury requirement as an element of malicious prosecution,[1580] it is firmly entrenched in Texas law. "Texas has long been one of those jurisdictions unwilling to dispense with the special injury requirement, and its courts have consistently rebuked litigants' attempts to have that requirement altered or abrogated."[1581] For over a century, Texas courts have recognized that the special injury requirement "assures good faith litigants access to the judicial system without fear of intimidation by a countersuit for malicious prosecution" and "prevents successful defendants in the initial proceeding from using their favorable judgment as a reason to institute a new suit based on malicious prosecution, resulting in needless and endless vexatious lawsuits."[1582]

[1576] Sharif-Munir-Davidson Dev. Corp. v. Bell, 788 S.W.2d 427, 430 (Tex. App.—Dallas 1990, writ denied) (holding that recording of notice of *lis pendens* was not an "actual seizure" of property and therefore insufficient to satisfy the special injury requirement).

[1577] *Airgas-Sw.*, 390 S.W.3d at 479.

[1578] Finlan v. Dall. Indep. Sch. Dist., 90 S.W.3d 395, 406 (Tex. App.—Eastland 2002, pet. denied) (reputation and loss of ability to obtain credit); Toranto v. Wall, 891 S.W.2d 3, 5 (Tex. App.—Texarkana 1994, no writ) (attorney's fees); *Ross*, 892 S.W.2d at 128 (attorney's fees); Butler v. Morgan, 590 S.W.2d 543, 544–45 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd) (mental anguish, loss of business and contracts, and increased insurance premiums); Haygood v. Chandler, No. 12-02-00239-CV, 2003 WL 22480560, at *5 (Tex. App.—Tyler Oct. 31, 2003, pet. denied) (mem. op.) (mental anguish, loss of business and contracts, and increased insurance premiums).

[1579] *Tex. Beef Cattle*, 921 S.W.2d at 208.

[1580] RESTATEMENT (SECOND) OF TORTS § 674 (AM. LAW INST. 1977); W. Page Keeton et al., PROSSER & KEETON ON THE LAW OF TORTS 889 (5th ed. 1984).

[1581] *Airgas-Sw.*, 390 S.W.3d at 482 (citations omitted).

[1582] *Tex. Beef Cattle*, 921 S.W.2d at 209 (quoting Martin v. Trevino, 587 S.W.2d 763, 768 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)).

In *Haygood v. Chandler*, the special injury rule precluded a physician's association's claims for malicious prosecution against a patient and the patient's attorneys based on an unsuccessful medical malpractice suit.[1583] In that case, the only damages claimed by the association and its physician as a result of the earlier litigation were "lost fees, increased malpractice insurance costs, lost employment contracts, embarrassment, and mental anguish."[1584] Because there was no evidence that the physician was detained and no evidence that any property of the association had been seized, the court of appeals held that no evidence satisfied the special injury requirement.[1585]

§ 6 Defamation

As a general rule, Texas recognizes an "absolute privilege" for statements made prior to, or in contemplation of, a judicial proceeding, as long as the communications bear "some relationship" to the judicial proceeding.[1586] Communications during the course of judicial and quasi-judicial proceedings are likewise privileged.[1587] The privilege applies to statements made by "anyone," including judges, jurors, counsel, or witnesses.[1588]

The judicial proceedings privilege is "tantamount to [judicial] immunity; where there is an absolute privilege, no civil action or damages for oral or written communications will lie, even though the language is false and uttered or published with express malice."[1589] It is based on the

[1583] 2003 WL 22480560, at *5.

[1584] *Id.*

[1585] *Id.*

[1586] *See* McCrary v. Hightower, 513 S.W.3d 1, 6–7 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *see also* Shell Oil Co. v. Writt, 464 S.W.3d 650, 654–55 (Tex. 2015); Senior Care Res., Inc. v. OAC Senior Living, LLC, 442 S.W.3d 504, 512–13 (Tex. App.—Dallas 2014, no pet.); 5-State Helicopters, Inc. v. Cox, 146 S.W.3d 254, 259 (Tex. App.—Fort Worth 2004, pet. denied); Thomas v. Bracey, 940 S.W.2d 340, 343 (Tex. App.—San Antonio 1997, no writ); City of Brady v. Bennie, 735 S.W.2d 275, 278–79 (Tex. App.—Eastland 1987, no writ).

[1587] *McCrary*, 513 S.W.3d at 6.

[1588] *Id.*

[1589] *Id.* (quoting Wilkinson v. USAA Fed. Savs. Bank Tr. Servs., No. 14-13-00111-CV, 2014 WL 3002400, at *6 (Tex. App.—Houston [14th Dist.] July 1, 2014, pet. denied) (mem. op.)); *see also* BancPass, Inc. v. Highway Toll Admin., L.L.C., 863 F.3d 391, 397 (5th Cir. 2017) (exercising jurisdiction over interlocutory appeal from denials of summary judgment based on a claim of judicial proceedings privilege because judicial proceedings privilege is "not only a means

public policy that it is "in the interest of public welfare that all persons should be permitted to utter their sentiments and speak their thoughts freely and fearlessly upon all questions and subjects."[1590] As the Texas Supreme Court has explained, the "administration of justice requires full disclosure from witnesses, unhampered by fear of retaliatory suits for defamation."[1591]

Although some courts in other jurisdictions hold that attorneys have an absolute privilege to make defamatory statements to the news media if it relates to impending litigation,[1592] the better view is to the contrary.[1593] Indeed, nearly a hundred years ago a Texas court cautioned that the privilege "cannot be enlarged into a license to go about in the community and make false and slanderous charges against his court adversary and escape liability for damages caused by such charges on the gound that he had made similar charges in his court pleadings."[1594]

Nevertheless, Texas courts liberally extend the judicial proceedings privilege to statements made outside of a courtroom, even if the statements were made before the judicial proceeding began, so long as there is some "relationship between the correspondence and the proposed or existing judicial proceeding." [1595] This determination is made "by considering the

of prevailing on the merits, but an entitlement not to stand trial or face the other burdens of litigation." (quotations omitted)).

[1590] Russell v. Clark, 620 S.W.2d 865, 868 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

[1591] James v. Brown, 637 S.W.2d 914, 917 (Tex. 1982) (per curiam).

[1592] *See* Johnston v. Cartwright, 355 F.2d 32, 37 (8th Cir. 1966) (holding that an absolute privilege protects an attorney who makes statements to the press concerning impending litigation); *see also* Green Acres Tr. v. London, 688 P.2d 658, 671 (Ariz. Ct. App. 1983) (holding attorneys have an absolute privilege to make defamatory statements to the news media concerning impending litigation provided they have some relation to the litigation).

[1593] *See* Asay v. Hallmark Cards, Inc., 594 F.2d 692, 697–98 (8th Cir. 1979) ("Publication to the news media is not ordinarily sufficiently related to a judicial proceeding to constitute a privileged occasion."); Bradley v. Hartford Accident & Indem. Co., 106 Cal. Rptr. 718, 723 (Cal. Ct. App. 1973) (concluding privilege does not protect defamatory statements made in complaint and reported by the news media because they "were filed as part of a conspiracy for the sole purpose of having the defamations contained therein republished by the news media"), *overruled*, Silberg v. Anderson, 786 P.2d 365, 374 (Cal. 1990); *see also* Jacobs v. Adelson, 325 P.3d 1282, 1289 (Nev. 2014); Kennedy v. Cannon, 182 A.2d 54, 58 (Md. 1962) (holding that a privilege does not extend to statements made to the press).

[1594] De Mankowski v. Ship Channel Dev. Co., 300 S.W. 118, 122 (Tex. Civ. App.—Galveston 1927, no writ).

[1595] Crain v. Smith, 22 S.W.3d 58, 63 (Tex. App.—Corpus Christi 2000, no pet.); *see also* Daystar Residential, Inc. v. Collmer, 176 S.W.3d 24, 27–29 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (holding privilege extended to lawyer's statements concerning client's alleged injuries

entire communication in context, resolving all doubts in favor of its relevancy."[1596] Courts permit a broad application of the "some relation" requirement. As one court has described it, the standard "is not 'relevance' but a lesser standard: the statement must only bear 'some relation to the proceeding,' and all doubt should be resolved in favor of 'some relation.'"[1597]

In cases where the judicial proceedings privilege does not afford protection, it is typically because the purpose or subject-matter of the communication in question is too attenuated from a specific judicial proceeding.[1598] Furthermore, courts stress that the privilege only applies when the communication has some relation to *a particular judicial proceeding*, as opposed to the concept of legal action more broadly.[1599]

§ 7 Civil RICO

Congress enacted the Racketeer Influenced and Corrupt Organizations Congress Act (RICO) to "halt organized crime's infiltration of the American economy by creating 'enhanced sanctions and new remedies'

made to news media in press release); Dall. Indep. Sch. Dist. v. Finlan, 27 S.W.3d 220, 238–40 (Tex. App.—Dallas 2000, pet. denied) (same); Thomas v. Bracey, 940 S.W.2d 340, 344 (Tex. App.—San Antonio 1997, no writ) (holding privilege covered lawyer's cease-and-desist letter to party not currently involved in pending judicial proceeding); Hill v. Herald-Post Publ'g Co., Inc., 877 S.W.2d 774, 782–84 (Tex. App.—El Paso 1994), *rev'd in part on other grounds*, 891 S.W.2d 638, 639 (Tex. 1994) (extending privilege to delivery of pleadings in pending litigation to news media after suit was filed); Russell v. Clark, 620 S.W.2d 865, 870 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) (holding privilege extended to lawyer's letter to corporation's shareholders seeking evidence for use in pending litigation).

[1596] *Crain*, 22 S.W.3d at 63; *see also Russell*, 620 S.W.2d at 870.

[1597] Odeneal v. Wofford, 668 S.W.2d 819, 820 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (quoting *Russell*, 620 S.W.2d at 869).

[1598] *See Daystar*, 176 S.W.3d at 27–28 (requiring that communication further attorney's representation, but noting Texas authority to the contrary); *Thomas*, 940 S.W.2d at 343 (stating that communication must be in furtherance of attorney's representation in pending or proposed judicial proceeding in which attorney is employed); *see also* BancPass, Inc. v. Highway Toll Admin., L.L.C., 863 F.3d 391, 403 (5th Cir. 2017) ("Although there is some conflict among Texas appellate courts, Texas caselaw as a whole suggests that the purpose—and not just the general subject matter—of a pre-judicial-proceeding communication should bear some relation to the contemplated litigation.").

[1599] *BancPass*, 863 F.3d at 402 (applying Texas law); *see also* McCrary v. Hightower, 513 S.W.3d 1, 7 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("While it is apparent from [the record] that the lawsuit . . . was actually filed, the pleadings do little to affirmatively establish any nexus between [the allegedly defamatory] statements . . . and that particular lawsuit.")

against defendants who engage in racketeering activity to operate or gain control of business enterprises."[1600] But Congress did not limit the scope of RICO to persons connected with organized crime,[1601] or even to activities commonly thought of as racketeering.[1602] Instead, Congress focused on particular activities and provided remedies against persons engaging in them.

RICO lists four possible violations under 18 U.S.C. § 1962(a), (b), (c), and (d). As summarized by the Fifth Circuit, these subsections state that:

> (a) a person who has received income from a pattern of racketeering activity cannot invest that income in an enterprise;
>
> (b) a person cannot acquire or maintain an interest in an enterprise through a pattern of racketeering;
>
> (c) a person who is employed by or associated with an enterprise cannot conduct the affairs of the enterprise through a pattern of racketeering activity; and
>
> (d) a person cannot conspire to violate subsections (a), (b), or (c).[1603]

Accordingly, RICO claims share three common elements: "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise."[1604] An enterprise is any "legal entity" or "group of individuals associated in fact."[1605] An enterprise has engaged in a pattern of racketeering activity if it has committed at least two acts of racketeering activity within ten years that are (1) related and (2) amount to or pose a threat of continued criminal activity.[1606] Predicate acts of racketeering activity include securities fraud, wire fraud, and fraud involving use of the mails.[1607] Non-criminal acts such

[1600] Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1101 (1982) (citing Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (Statement of Findings and Purpose).

[1601] *See* United States v. Campanale, 518 F.2d 352, 363–64 (9th Cir. 1975).

[1602] *See* United States v. Thordarson, 646 F.2d 1323, 1328 n.10 (9th Cir. 1981).

[1603] Abraham v. Singh, 480 F.3d 351, 354–55 (5th Cir. 2007).

[1604] *Id.* at 355.

[1605] 18 U.S.C. § 1961(4) (2012).

[1606] *Id.* § 1961(5); St. Germain v. Howard, 556 F.3d 261, 263 (5th Cir. 2009) (per curiam).

[1607] 18 U.S.C. § 1961(1)(B), (1)(D).

as violations of the disciplinary rules of professional conduct, however, do not suffice.[1608]

RICO provides for treble damages to "any person injured in his business or property by reason of a violation of . . . [18 U.S.C. § 1962]."[1609] Thus, non-clients have increasingly named attorneys as RICO defendants, especially in securities cases.[1610] An attorney may be exposed to treble damages if a private litigant can demonstrate that the attorney was part of, or assisted, an "enterprise" that was engaged in a "pattern of racketeering activity," as those terms are defined in the RICO statute.[1611] These provisions and the definitions they employ are exceptionally vague. The most commonly alleged of these criminal acts are mail fraud, wire fraud, and fraud in the sale of securities.

The mail and wire fraud statutes prohibit the use of the mails or the wires in the furtherance of a fraudulent scheme.[1612] Nevertheless, courts have resisted the use of the mail fraud statutes to impose broad civil RICO liability on attorneys. For example, the Second Circuit requires a claimant alleging mail and wire fraud to prove that a defendant had fraudulent intent.[1613] Furthermore, ordinary litigation activity that uses the wires or

[1608] *St. Germain*, 556 F.3d at 263.

[1609] 18 U.S.C. § 1964(c) (authorizing recovery of treble damages, including reasonable attorney's fees); European Cmty. v. RJR Nabisco, Inc., 764 F.3d 149, 150 (2d Cir. 2014) (acknowledging potential for recovery of treble damages); Republic of Iraq v. ABB AG, 768 F.3d 145, 163 (2d Cir. 2014) (same); Ideal Steel Supply Corp. v. Anza, 652 F.3d 310, 321 (2d Cir. 2011) (same); Abston v. Johnson, No. 93-1725, 1994 WL 397912, at *1 (5th Cir. July 15, 1994) (per curiam) (same).

[1610] *See St. Germain*, 556 F.3d at 261 (former clients sued lawyer and law firms with which lawyer was associated for RICO violations arising out of prior legal representation); Crowe v. Henry, 115 F.3d 294, 294 (5th Cir. 1997) (owner of land and money sued his attorney, attorney's law firm, and firm's insurer, alleging claims under RICO and state law, based on scheme to defraud him of his property); Azrielli v. Cohen Law Offices, 21 F.3d 512, 512 (2d Cir. 1994) (purchasers of stock in a corporation formed to purchase an apartment building brought action against sellers, their counsel, and related parties for violations of Securities Exchange Act and RICO); Baumer v. Pachl, 8 F.3d 1341, 1343 (9th Cir. 1993) (investors in a limited partnership brought action against attorney and certified real estate appraiser, alleging RICO violations); Smith v. Ayres, 977 F.2d 946, 946 (5th Cir. 1992) (shareholder of a family corporation sued other shareholders and an attorney for the corporation alleging securities fraud and RICO violations).

[1611] 18 U.S.C. § 1961(4) & (5).

[1612] *See* 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud).

[1613] United States v. Novak, 443 F.3d 150, 156 (2d Cir. 2006); S.Q.K.F.C., Inc. v. Bell Atl. Tricon Leasing Corp., 84 F.3d 629, 633 (2d. Cir. 1996).

mail generally does not constitute a predicate act of mail fraud for RICO liability.[1614]

Predicate acts supporting a civil RICO claim, which are based on allegations of fraud, must meet the pleading requirements of Federal Rule of Civil Procedure 9(b).[1615] Federal Rule of Civil Procedure 9(b) particularity, at a minimum, requires a plaintiff to allege the time, place, and the contents of the representation upon which the fraud is based, as well as the identity of the person making the representation, and the objective of the fraud.[1616] Attorneys are entitled to know the substance of the specific RICO claim being made, including the "pattern of racketeering activity," and the "enterprise" they as "persons" were "employed by" or "associated with."[1617] To establish a "pattern of racketeering acvtivity," a plaintiff must show "two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity."[1618] And to show the existence of an enterprise, a plaintiff must plead and prove "the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name."[1619] The Fifth Circuit has strictly required pleading and proof of the RICO enterprise, and, as a result, has affirmed the dismissal of a number of suits which failed to allege the requirements for an "enterprise."[1620]

[1614] Smith v. HSBC Bank USA, N.A., No. 2:15-CV-70, 2017 WL 3840273, at *5 (S.D. Ga. Sept. 1, 2017); Absolute Power Sys., Inc. v. Cummins, Inc., No. 15-8539, 2016 WL 6897782, at *5 (D.N.J. Nov. 23, 2016) (citing Nolan v. Galaxy Sci. Corp., 269 F. Supp. 2d 635, 643 (E.D. Pa. 2003)); FindTheBest.com, Inc. v. Lumen View Tech. LLC, 20 F. Supp. 3d 451, 460 (S.D.N.Y. 2014) (citing Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq., 758 F. Supp. 2d 153, 172 (E.D.N.Y. 2010) (allegation that former clients and their malpractice attorneys engaged in "litigation activities" in furtherance of "phony" and "frivolous" legal malpractice suit stated claim for malicious prosecution, not predicate act of mail fraud for RICO claim)); Daddona v. Gaudio, 156 F.Supp.2d 153, 164 (D. Conn. 2000) (pleading that attorneys used mail in furtherance of scheme to maintain control over assets in bankruptcy proceeding did not sufficiently state a predicate act, as required to avoid dismissal of RICO suit).

[1615] *See* Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1138–39 (5th Cir. 1992).

[1616] *Id.* at 1139.

[1617] St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 439 (5th Cir. 2000).

[1618] Zastrow v. Hous. Auto Imports Greenway Ltd., 789 F.3d 553, 560 (5th Cir. 2015); Abraham v. Singh, 480 F.3d 351, 355 (5th Cir. 2007).

[1619] Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001).

[1620] *See* Whelan v. Winchester Prod. Co., 319 F.3d 225, 229–30 (5th Cir. 2003) (affirming dismissal of civil RICO claim where plaintiff failed to allege facts which demonstrate the required "enterprise"); ISystems v. Spark Networks, Ltd., No. 10-10905, 2012 WL 3101672, at *4 (5th Cir.

In *Reves v. Ernst & Young*, the United States Supreme Court held that the activities of an accounting firm did not satisfy the test for RICO liability under the statutory provision which makes it unlawful "for any person employed by or associated with [an interstate] enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."[1621] The accounting firm had engaged in activities relating to the evaluation of a gasohol plant, but in so doing had relied upon existing records in preparing its audit reports.[1622] The Court concluded that the firm did not "participate in management or operation" of the business, and therefore, was not liable.[1623]

After *Reves*, the weight of authority among the federal circuit courts is that an attorney does not "conduct" an enterprise's affairs by rendering ordinary legal services.[1624] Thus, plaintiffs are more likely to assert liability against accountants, attorneys, and other professionals on the basis of conspiracy rather than RICO.

§ 8 Aiding and Abetting Violations of Federal Securities Laws

The primary antifraud provision of the federal securities laws is contained in Section 10(b) of the Securities Exchange Act of 1934.[1625] While other provisions of the Act allow for administrative and injunctive proceedings by the Securities and Exchange Commision, Section 10(b) creates a private right of action allowing private plaintiffs to sue for securities fraud.[1626] Section 10(b) makes it unlawful to use manipulation or deception "in connection with the purchase or sale of any security" if such conduct is "in contravention of such rules and regulations as the [Securities

Mar. 21, 2012) (same); Guidry v. Bank of LaPlace, 954 F.2d 278, 282 (5th Cir. 1992) (affirming dismissal); Manax v. McNamara, 842 F.2d 808, 811 (5th Cir. 1988) (same).

[1621] 507 U.S. 170, 172 (1993) (quoting 18 U.S.C. § 1962(c) (1984)).

[1622] *Id*. at 170.

[1623] *Id.* at 184–86.

[1624] Zastrow v. Hous. Auto Imports Greenway, Ltd., 789 F.3d 553, 562 n.7 (5th Cir. 2015); *see also* RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP, 682 F.3d 1043, 1051 (D.C. Cir. 2012); Walter v. Drayson, 538 F.3d 1244, 1247–49 (9th Cir. 2008); Handeen v. Lemaire, 112 F.3d 1339, 1348–49 (8th Cir. 1997); Azrielli v. Cohen Law Offices, 21 F.3d 512, 521 (2d. Cir. 1994); Baumer v. Pachl, 8 F.3d 1341, 1344 (9th Cir. 1993); Nolte v. Pearson, 994 F.2d 1311, 1317 (8th Cir. 1993).

[1625] 15 U.S.C. § 78j(b) (2012).

[1626] Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 & n.9 (1971).

and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[1627]

In the leading case of *Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, the United States Supreme Court held that a private plaintiff may not maintain an action against those who "aid and abet" the "manipulative or deceptive" conduct of a primary violator of Section 10(b) of the Securities Exchange Act.[1628] The Court's rationale was that the text of Section 10(b) did not expressly prohibit aiding and abetting so a private cause of action did not exist.[1629] The Court made clear, however, that attorney and other "secondary actors" in the securities market may be liable as a primary violator under Rule 10(b)-5 if they "employ[] a manipulative device or make[] a material misstatement (or omission) on which a purchaser or seller of securities relies . . . assuming *all* of the requirements for primary liability under Rule 10b-5 are met."[1630]

After *Central Bank*, courts developed two approaches to secondary actor liability.[1631] One line of cases applied a "substantial participation" test, in which secondary actors could be liable for statements made by others if the actor sufficiently "participated" in the making of the statement.[1632] Another line of cases held that a defendant must make the material misstatement or omission to be a primary violator; secondary actors were not liable for merely reviewing or approving documents containing fraudulent statements.[1633]

[1627] 15 U.S.C. § 78j(b).

[1628] 511 U.S. 164, 183 (1994).

[1629] *Id.* at 191.

[1630] *Id.*

[1631] *See* Gary M. Bishop, *A Framework for Analyzing Attorney Liability Under Section 10(b) and Rule 10b-5*, 10 U.N.H. L. REV. 193, 202–03 (2012) (providing a thorough discussion of the caselaw following *Central Bank*).

[1632] *See, e.g.*, *In re* Software Toolworks, Inc., 50 F.3d 615, 628 n.3 (9th Cir. 1994) (holding that complaint sufficiently alleged primary liability against accounting firm that extensively reviewed and "played a significant role in drafting and editing" letters to SEC containing misrepresentations); *see also* Carley Capital Grp. v. Deloitte & Touche, L.L.P., 27 F. Supp. 2d 1324, 1334 (N.D. Ga. 1998) (adopting standard that secondary actor can be primarily liable "when it, acting alone or with others, creates a misrepresentation even if the misrepresentation is not publicly attributed to it").

[1633] *See, e.g.*, Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1205–07 (11th Cir. 2001) (requiring that alleged misstatement or omission be "publicly attributable to the defendant at the time the plaintiff's investment decision was made"); Wright v. Ernst & Young LLP, 152 F.3d 169,

In 2008, the United States Supreme Court in *Stoneridge Investment Partners, LLV v. Scientific-Atlanta, Inc.* sought to resolve the conflict as to "when, if ever, an injured investor may rely upon § 10(b) to recover from a party that neither makes a public misstatement nor violates a duty to disclose but does participate in a scheme to violate § 10(b)."[1634] In that case, investors sued entities that had agreed to sham purchase and sale transactions with a corporation; the sham transactions fooled the corporation's auditor, allowing the corporation to publish misleading financial statements that inflated the price of its shares.[1635] Invoking a theory of "scheme liability," the plaintiff-investors argued that the entities should be liable, even though they did not make a public misrepresentation, because they "engaged in conduct with the purpose and effect of creating a false appearance of material fact to further a scheme to misrepresent [the corporation's] revenue."[1636] The Court rejected that theory, explaining that "scheme liability" would "revive in substance the implied cause of action against all aiders and abettors" that the Court had rejected in *Central Bank of Denver*.[1637] Ultimately, the Court held that because "[n]o member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant times," the plaintiff "cannot show reliance upon any of respondents' actions except in an indirect chain that we find too remote for liability."[1638]

Following the Supreme Court's holding that a plaintiff must, in fact, rely on the secondary actor's deceptive conduct to to establish the required causal connection between the defendant's misrepresentation and the plaintiff's injury, courts have imposed rigorous reliance requirements in securities cases against law firms. For instance, the Fifth Circuit has held that the deceptive statement or misrepresentation must have been explicitly attributed to a law firm at the time of a plaintiff's investment for a plaintiff to satisfy the reliance element and maintain a Section 10(b) claim against

175 (2d Cir. 1998) ("[A] secondary actor cannot incur primary liability under the [Securities] Act for a statement not attributed to that actor at the time of its dissemination.").

[1634] 552 U.S. 148, 156 (2008) (citing Simpson v. AOL Time Warner, Inc., 452 F.3d 1040, 1043 (9th Cir. 2006); Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc., 482 F.3d 372, 392 (5th Cir. 2007)).

[1635] *Stoneridge Investment*, 552 U.S. at 153–56.

[1636] *Id.* at 159–60.

[1637] *Id.* at 162–63.

[1638] *Id.* at 159.

the firm.[1639] Thus, to maintain a Section 10(b) claim against a law firm, a plaintiff must allege that they actually knew of the law firm's role in the transaction before they made their investment.[1640] Under this test, attorneys and law firms generally will not be liable for advising clients on securities transactions.

§ 9 Aiding and Abetting Violations of Texas Securities Laws

Unlike the federal securities laws, the Texas Securities Act establishes both primary and secondary liability for securities violations.[1641] Section 33F(2) of the Texas Securities Act provides:

> A person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer.[1642]

This statutory provision differs markedly from the "aider and abettor" liability concept that has developed in the federal courts. For example, unlike the federal standard which requires actual awareness and conscious intent, the Texas Securities Act imposes liability for "reckless disregard for the truth or the law."[1643] Thus, the Texas Act allows a lower threshold of scienter to impose aider and abettor liability.

Although the Texas Securities Act ostensibly provides for broader liability than do the federal securities laws, recent developments concerning the "attorney immunity" doctrine in Texas may nevertheless shield attorneys from such liability. In *Cantey Hanger, LLP v. Byrd*, the Texas

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[1639] *See* Affco Invs. 2001, L.L.C. v. Proskauer Rose, L.L.P., 625 F.3d 185, 194–95 (5th Cir. 2010); *see also In re* DVI, Inc. Secs. Litig., 639 F.3d 623, 649 (3d Cir. 2011) (holding plaintiff investors could not invoke the fraud on the market presumption of reliance to impose liability on law firm where firm's deceptive conduct was not publicly attributed to it); Pac. Inv. Mgmt. Co. v. Mayer Brown LLP, 603 F.3d 144, 148 (2d. Cir. 2010) (holding that secondary actors such as lawyers cannot be liable for § 10(b) violation without "explicit attribution to the firm" at the time the statement was disseminated), *cert. denied*, 546 U.S. 1018 (2011).

[1640] *Affco Invs. 2001*, 625 F.3d at 195.

[1641] Navarro v. Grant Thornton, LLP, 316 S.W.3d 715, 720 (Tex. App.—Houston [14th Dist.] 2010, no pet.)

[1642] TEX. REV. CIV. STAT. ANN. art. 581–33F(2).

[1643] *Id.*

Supreme Court held that "[f]raud is not an exception to attorney immunity" under Texas law.[1644] As explained by the court, attorneys are immune from civil liability to non-clients for actions taken as part of the "discharge of the lawyer's duties in representing his or her client," even if the attorney's conduct is fraudulent.[1645] Although attorney immunity historically has extended only to actions "taken in connection with representing a client *in litigation*,"[1646] the majority opinion in *Cantey Hanger* observed that this "is not universally the case."[1647]

By suggesting that attorneys might enjoy immunity for actions taken in representing clients beyond the litigation context, *Cantey Hanger* opens the possibility that attorneys could assert the attorney immunity defense to claims for securities violations under the Texas Securities Act. In *Troice v. Proskauer Rose, L.L.P.*, for example, plaintiffs sued an attorney and the law firms where he worked, alleging they aided and abetted the securities fraud committed by their client, Allen Stanford.[1648] The lawyer defendants moved to dismiss plaintiff's complaint on several grounds, including that they were entitled to attorney immunity under Texas law.[1649] After the district court denied the defendants' motion to dismiss, the Fifth Circuit reversed and rendered judgment that the case be dismissed with prejudice based on attorney immunity.[1650] The plaintiffs argued on appeal that attorney immunity did not apply to the lawyers' conduct *outside* the litigation context, but the Fifth Circuit explicitly refused to address the argument "because plaintiffs waived it by not raising it below."[1651]

Thus, it is currently an open question whether attorney immunity is a viable defense to violations of the Texas Securities Act. The argument that attorney immunity is limited strictly to litigation conduct is questionable following *Cantey Hanger* and its rationale.[1652]

[1644] 467 S.W.3d 477, 484 (Tex. 2015).

[1645] *Id.* at 481–82.

[1646] *Id.* at 481.

[1647] *Id.* at 482 n.6; *see also id.* at 489 n.3 (Green, J., dissenting) (interpreting the majority opinion as "suggest[ing] that this form of attorney immunity applies outside of the litigation context").

[1648] 816 F.3d 341, 344 (5th Cir. 2016).

[1649] *Id.* at 344.

[1650] *Id.* at 350.

[1651] *Id.* at 349.

[1652] Santiago v. Mackie Wolf Zientz & Mann, P.C., No. 05-16-00394-CV, 2017 WL 944027, at *4 (Tex. App.—Dallas Mar. 10, 2017, no pet.) (mem. op.) (holding that immunity extended to

attorney's actions in foreclosure proceedings *before* litigation ever began); LJH, Ltd. v. Jaffe, No. 4:15-cv-00639, 2017 WL 447572, at *2−3 (E.D. Tex. Feb. 2, 2017) (mem. op.) (granting summary judgment on attorney immunity in favor of law firm for claims of fraud, negligent misrepresentation, conversion, conspiracy, and money had and received, allegedly committed while engaging in drafting and negotiating contracts for client); Farkas v. Wells Fargo Bank, N.A., No. 03-14-00716-CV, 2016 WL 7187476, at *8 (Tex. App.—Austin Dec. 8, 2016, no pet.) (mem. op.) (holding that appellant had waived argument that immunity applies only to attorneys involved in litigation, but "not[ing]" the possibility that immunity extends beyond the litigation context).