ATTORNEY LIABILITY/ATTORNEY MALPRACTICE

CHAPTER 28

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I. Introduction[1]

Lawyers conduct their day to day activities in large part insulated from the critique and judgment of non-lawyers. That fact changes when, according to the (former) client, something serious has gone wrong, and the client, or a third party, files a legal malpractice claim. Recent studies and statistics support the general assumption among lawyers that legal malpractice claims are on the rise.[2] To that end, the scope of this article is broad. First, this article will focus on the term *legal malpractice*. Legal malpractice is a catch-all phrase that encompasses a group of causes of action by which clients and third parties attempt to recover damages from lawyers. Second, this article will discuss some of the recent changes that have taken place in Texas legal malpractice law. This article then will conclude with what this author believes are practical tips for avoiding malpractice claims.

II. The Law of Legal Malpractice

Legal malpractice based on professional negligence compensates clients and other plaintiffs for injury caused by a lawyer's action or inaction. Legal actions against lawyers are rooted in two common law causes of action. Like a tort action for negligence, the plaintiff in a legal malpractice claim must establish that the defendant owed a duty to the plaintiff and that there has been a breach of that duty. Generally, that translates into showing that the lawyer acted without reasonable care. Other elements of a negligence cause of action, such as proximate cause and damages, must also be proven.

A legal malpractice action can also be based on an action for a breach of contract. That contract can be created in a written instrument, or it can be implied from the conduct of the parties. From the creation of that relationship—*i.e.*, the creation of an agency relationship—it follows that the attorney client relationship imposes the duties of a fiduciary upon the attorney. Regardless of the theory alleged, the ultimate issue in a legal malpractice case is whether there has been a breach of duty. This issue—also known as "fracturing"—is discussed in section IV. *See also Burrow v. Arce*, *infra*.

III. The Attorney-Client Relationship

A. Creation of the Relationship

In Texas, an attorney-client relationship is created when the parties manifest, whether explicitly or implicitly by their conduct, an intention to create the attorney-client relationship. *See National Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 147 (Tex. 1996). The formation of the relationship does not depend on the payment of a fee. *Prigmore v. Harware Mut. Ins. Co.*, 225 S.W.2d 897, 899 (Tex. Civ. App.—Amarillo 1949, no writ). From these general principles it follows that a fiduciary relationship can be established even when an attorney merely enters into a discussion with a potential client. *See Nolan v. Freeman*, 665 F.2d 738, 739 n.3 (5th Cir. 1982). The test of whether the attorney-client relationship was formed is the reasonable expectation of the client in light of all the surrounding circumstances. *See Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1992, writ denied).

B. "Beauty Pageant"

In *B.F. Goodrich Co. v. Formosa Plastics Corp.*, 638 F. Supp. 1050 (S.D. Tex. 1986), plaintiff Goodrich attempted to disqualify the opposing side's law firm because their attorney was one of five attorneys interviewed and considered for representation—hence the "beauty pageant." The court concluded no relationship had been formed, mainly because "Goodrich basically designed and controlled

[1] The authors wishes to acknowledge the assistance of Mo Taherzadeh, as associate at Beck, Redden & Secrest, for his assistance in the preparation of this article.

[2] *See* A.B.A. STANDING COMM. ON LAWYER'S PROF'L LIAB., *Profile of Legal Malpractice Claims 1996-1999 Study* 5 (April 2001) (hereinafter, "ABA Study").

the structure of each interview.... Only Goodrich attorneys met with the candidates and those attorneys regulated what information was furnished to each candidate." *Id.* at 1052. Most important, however, was the court's holding that the "fact that the attorney-client relationship had not yet been established does not mean that the [defendant's] firm owed no duty whatever to Goodrich." *Id.* In such instances, then, the lawyer must treat the information obtained from even a potential client as confidential, even if no attorney client relationship is ever formed.

C. Who is the Client—Corporate Entities

In terms of delineating who the client is, representing legal entities poses distinct problems for lawyers. 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 an attorney-client relationship with the attorney. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12, *reprinted* in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 2002) (Tex. State Bar R. art. X, § 9) ("A lawyer employed or retained by an organization represents the entity.") The following are general principles regarding the client in corporations and limited partnerships.

• **Corporations**: Rendering legal services to a corporation generally does not, by itself, create a duty for the attorney to the corporation's investors, its officers and directors, and its shareholders. *See Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990); *Hamlin v. Gutermuth*, 909 S.W.2d 114, 116 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

• **Limited Partnerships**: 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. *Hopper v. Frank*, 16 F.3d 92 (5th Cir. 1994).

As discussed at the end of this article, to help avoid confusion and malpractice actions, the attorney should clearly set out in a written agreement which persons or entities are or are not the lawyer's client.

IV. Attorney's Liability

The two most common bases for a lawyer's liability are negligence and actual or constructive breaches of one's fiduciary duties to a client. Of course, every lawyer is always liable for such intentional torts as fraud, malicious prosecution, wrongful attachment or levy, and civil conspiracy. Statutes, both state and federal, also provide bases for legal malpractice claims. And, finally, there are the ethical rules and standards which have long governed the professional responsibilities of lawyers, and which will be discussed first because they establish many of standards that govern lawyers.

A. The Texas Disciplinary Rules of Professional Conduct—Prima Facie Evidence of the Standard of Care

The Texas Disciplinary Rules of Professional Conduct govern the professional responsibilities of attorneys. The Rules are extensive in scope and, thus, will not be discussed in detail here. Rather, a few general observations regarding their impact on malpractice claims will be noted.

First, a "[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 client has been breached." TEX. DISCIPLINARY R. PROF'L CONDUCT preamble § 15. Second, Texas courts have repeatedly held that a violation of the state bar rules does not create a private cause of action. *See Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley*, Inc., 779 S.W.2d 474, 479 (Tex. App.—El Paso 1989, writ denied). Finally, and despite the previous statement, Texas courts have continued to use those same ethical rules as standards of conduct for attorneys in legal malpractice cases. *Avila v. Havana Painting Co.*, 761 S.W.2d 398, 400 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (noting that the code of attorney conduct required attorney to deliver client funds

promptly, and failure to do so gave rise to cause of action in tort).

Practice in federal court is similar. Thus, though each federal court has its own rules of admission and practice, those rules often follow those of the state in which the federal courts sits. *See* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460 (1996); *see also In re Dresser Indus.*, 972 F.3d 540, 542-45 (5th Cir. 1992).

The ABA's Model Rules of Professional Conduct, adopted in 1983 (the "Model Rules"), are also influential in setting standards of conduct. The Model Rules are based on the ABA's Model Code of Professional Responsibility, adopted in 1969. Though the Model Rules will not be discussed here, it should be noted that most state and federal courts base their rules of professional conduct on the Model Rules. *See id.*

In addition to the above rules, bar associations, whether national or local, regularly issue ethics advisory opinions that are not binding on courts. However, good faith reliance on an opinion could be used in defense of a disciplinary or malpractice claim. *See generally* NATHAN M. CRYSTAL, *Professional Responsibility* 14 (2nd ed. 2000).

B. Negligence

Negligence is the failure to do that which a reasonable attorney practicing in the same locality would do, or not do, under the same circumstances. *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989). Said differently, negligence is when a client claims that a lawyer mishandled a legal matter. Lawyers who practice in a specialized field, such as securities or tax, are held to the standard of care normally exercised by specialists. *Rhodes v. Batilla*, 848 S.W.2d 833, 843 (Tex. App.—Houston [14th Dist.] 1993, writ denied). As can be expected, the standard of care allows for some latitude in strategy. Thus, "[i]f an attorney makes a decision which a reasonably prudent attorney could make in the same or similar circumstances, it is not an act of negligence even if the result is undesirable." *Cosgrove*, 774 S.W.2d at 665.

1. Attorney's Negligence and Resulting Damages is a 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. *Millhouse v. Wiesenthal*, 775 S.W.2d 626, 627 (Tex. 1989). However, after the jury makes its factual determinations, the court 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." *Rhodes*, 848 S.W.2d at 840 (internal quotations omitted). Moreover, "[a]lthough proximate cause in a legal malpractice action is usually a question of fact, it may be determined as a matter of law if the circumstances are such that reasonable minds could not arrive at a different conclusion." *Schlager v. Clements*, 939 S.W.2d 183, 187 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

2. An Attorney is Required to Know the Clearly Defined Rules of Law

Not much discussion is required here. Suffice to say, ignorance of the law, even a good faith one, is no defense.[3] The following two cases best illustrate the point:

a. 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. *Haussecker v. Childs*, 935 S.W.2d 930, 934 (Tex. App.—El Paso 1996), *aff'd*, 974 S.W.2d 31 (Tex. 1998).
b. An attorney may be liable for damages to a client resulting from the attorney's incorrect interpretation of a statute. For

[3] The ABA Study lists "Failure to Know/Properly Apply Law" as the reason cited for the highest number of alleged attorney errors. *See* ABA Study at 12.

example, an attorney was held liable for preparing an agreement in violation of statute where the statute was unambiguous. *Mosaga, S.A. v. Baker & Botts*, 780 S.W.2d 3, 5 (Tex. App.—Eastland 1989, no writ).

3. Acts or Omissions by the Attorney that Resulted in Damages to the Client

These act or omissions can include inaction or delay, such as allowing the client's cause of action to become barred by the statute of limitations, erroneous advice or opinion, the failure to advice the client of relevant information, the improper preparation of legal documents, or other omissions. The following cases are but a small sample of the many cases recognizing a cause of action for an attorney's acts or omissions:

a. Attorney liable for failure to answer a lawsuit filed against client and his subsequent failure to overturn the resulting default judgment entered against client. *Holland v. Hayden*, 901 S.W.2d 763 (Tex. App.—Houston [14th Dist.] 1995, writ denied).
b. Attorney liable for filing suit against passenger rather than driver, alleging wrong location of accident, and failed to correct error before expiration of statute of limitations. *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989).[4]
c. Attorney liable for advising client to get a "paper divorce" to prevent IRS collection attempts. *Rhodes*, 848 S.W.2d at 840.
d. Attorneys owed a duty to clients to make full and fair disclosure of every facet of proposed settlement, especially in class action. *Bloyed v. General Motors Corp.*, 881 S.W.2d 422, 436 (Tex. App.—Texarkana 1994), *aff'd*, 916 S.W.2d 949 (Tex. 1996).

4. Damages

To obtain damages in a legal malpractice suit, the client must prove not only that the underlying suit would have been successful but for the malpractice of the attorney, but he must also establish the amount of damages he would have recovered had he been successful—this is also referred to as the "suit within a suit." *Fireman's Fund Am. Ins. Co. v. Patterson & Lamberty, Inc.*, 528 S.W.2d 67, 69-70 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e). He must also show that the judgment would have been collectible. *Cosgrove*, 774 S.W.2d at 665-66. In a case in which the client was a defendant and the client alleges he would have been successful but for the attorney's malpractice, the client must prove he had a meritorious defense. *Heath v. Herron*, 732 S.W.2d 748, 753 (Tex. App.—Houston [14th Dist.] 1987, writ denied). The *Heath* court, however, affirmed a judgment against an attorney for malpractice based on expert "settlement value." This suggests that Texas courts my allow recovery without the need to show success in the underlying suit.

The "suit within a suit" scenario leads to a few peculiar situation:

> [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 in question.

Lynch v. Munson, 61 S.W. 140, 142 (Tex. Civ. App.—1901, no writ). No less strange is the fact that the attorney must then take the position that the earlier suit would have been unsuccessful even if it had been handled properly, assuming it was not. *See Mathew v. McCoy*, 847 S.W.2d 397, 401 (Tex. App.—

[4] In contrast, *see Medrano v. Reyes*, 902 S.W.2d 176, 178 (Tex. App.—Eastland 1995, no writ), holding that law firm was not liable to file a wrongful death action prior to running of limitations period when the firm set a letter to the clients, the clients retained new counsel, and the letter was received twenty-one months before end of limitations period.

Houston [14th Dist.] 1993, no writ) (noting that defending against legal malpractice claim by arguing doctors in the underlying suit did not commit medical malpractice after pursuing medical malpractice claim is permissible). In *Joachim v. Chambers*, 815 S.W.2d 234, 240-41 (Tex. 1991), the attorney-defendants went so far as to have the judge who presided over the underlying suit testify in the malpractice suit. The trial judge refused to strike the judge's testimony, and the court of appeals declined to reverse the trial judge. In granting the writ of mandamus, the supreme court noted, among others, that the judge's "testimony for defendants confers his very considerable prestige as a judicial officer in support of defendants' position." *Id.* at 239.

5. The Court Relies On Plaintiff's Own Pleadings and Expert's Testimony To Characterize Claims as Malpractice Claims

In *Mecom v. Vinson & Elkins*, No. 01-98-00280-CV (Tex. App.—Houston [1st Dist.] May 10, 2001, pet. dism'd) (not designated for publication), 2001 WL 493426, the plaintiffs alleged numerous causes of actions involving estate planning legal services. In affirming the trial court's characterization of the client's claims as legal malpractice, the court relied upon the testimony of the *client's own expert*. The expert, an attorney, testified that the lawyers "failed to discharge [their] duty of care." *Id.* at *10. The court further noted that its "conclusion that this is a legal malpractice action is further supported by [the plaintiff's] own description of her claims and her expert's testimony that V & E breached their duties and the standard of care as attorneys …." *Id.* at *11.

6. When Attorney Negates An Element of The Legal Malpractice Claim, Summary Judgment For The Attorney Is Proper On The Additional Causes Of Action When They Arise From The Same Set of Facts

In *McDermott v. Nelsen*, No. 01-98-01323-CV (Tex. App.—Houston [1st Dist.] April 26, 2001, no pet.) (not designated for publication) 2001 WL 423287, the trial court instructed a verdict against Nelsen, the client, on his legal malpractice claims because of the lack of expert testimony at trial. But the court permitted the case to go to the jury on Nelsen's negligence, gross negligence, and DTPA claims. In reversing and rendering judgment for McDermott, the court of appeals stated, "Texas courts do not permit the fracturing of the malpractice claim into other causes of actions." *Id.* at *3.

C. Breach of Fiduciary Duty

The relationship of attorney and client is one of the highest trust and confidence. *See Smith v. Dean*, 240 S.W.2d 789, 791 (Tex. Civ. App.—Waco 1951, no writ). In furtherance of that relationship, the attorney has a duty to represent his client with undivided loyalty, to preserve the client's confidences, and to disclose to the client any information that might prevent the fulfillment of these obligations. *See NCNB Texas Nat'l Bank v. Coker*, 765 S.W.2d 398, 399 (Tex. 1989); *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552, 559 (Tex. 1973). This duty applies equally to prospective clients—*i.e.*, preliminary consultations between the potential client and the attorney. *Nolan v. Foreman*, 665 F.2d 738, (5th Cir. 1982).

Failure to disclose important information is the most common form of the attorney's breach of fiduciary duty. There must be complete disclosure of all information which may impact the quality of the attorney's representation, including an explanation of its legal significance. *See Employers Cas. Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973) ("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."); *Bloyed v. General Motors Corp.*, 881 S.W.2d 422, 436 (Tex. App.—Texarkana 1994), *aff'd*, 916 S.W.2d 949 (Tex. 1996) (holding that attorneys owed a duty to clients to make full disclosure of every facet of proposed settlement, especially in class action).

1. Fee Forfeiture As Damages for Breach for Fiduciary Duty

A lawyer who is found to have acted in violation of his duty to a client may be required to forfeit some or all of the his compensation for the matter. Fee forfeiture is not required in every case where an attorney breaches a fiduciary duty. *Burrow v. Arce*, 997 S.W.2d 229, 241 (Tex. 1999). The remedy of fee forfeiture is an equitable one and is highly dependent on the facts of the underlying breach of fiduciary duty. *Id.* The ultimate decision on the amount of any fee forfeiture must be made by the court. *Id.* at 245. The court must determine whether forfeiture is equitable and just. *Id.* Also, unlike other causes of action, the supreme court has held that proof that the attorney's breach of duty harmed the client is not a prerequisite to recovering fees paid. *Id.* This is because it "is the agent's disloyalty, not any resulting harm that violates the fiduciary relationship and thus impairs the basis for compensation." *Id. Burrow v. Arce* is discussed fully in section IV, C, 4.

2. Potential Conflicts

The prohibition against conflicts of interests seeks to insure clients that their lawyers will represent them with undivided loyalty. A client is entitled to be represented by a lawyer whom the client can trust. Because these principles form an important part of a fiduciary relationship, conflicts are often the source of a breach of attorney's duty to his client. Conflicts of interest come in many forms. *See generally* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, 1.08 & 1.09. They include adverse representation against a current client, multiple representation of clients in a single matter, representation against a former client, advocate-witness conflicts, and conflicts involving the lawyer's own personal or financial interest. The Texas Disciplinary Rules require counsel to refuse to accept or continue employment if such representation would involve a "substantially related" matter that would 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. *Id.* 1.06(b), 1.15(a)(1). In *Goffney v. Rabson*, 56 S.W.3d 186, 193-94 (Tex. App.—Houston [14th Dist.] 2001, pet. granted) the court stated: "Breach of fiduciary duty bay an attorney most often involves the attorney's failure to disclose conflicts of interest, failure to deliver funds belonging to the client, placing personal interests over the client's interests, improper use of client confidences, taking advantages of the client's trust, engaging in self-dealing, and making misrepresentations." *Id.* at 193-94.

The test for determining conflict is whether competent representation of one client will or is likely to affect adversely the exercise of the attorney's competent representation of another client is For example, in *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.), the court of appeals held that it was reversible error for trial judge to deny an attorney's motion to withdraw from representing the owner's of a truck when one of the passengers, who was also an employee of the truck's owner, contended that he was in the course of his employment during events that led up to the collision and which led to the passenger/employee's sustaining damages. *Vickery v. Vickery*, (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (opin'n on reh'g), 1997 WL 751995 (not designated for publication), presents a more obvious conflict situation. There, the husband, himself an attorney, hired an attorney, who also happened to be his friend, to represent his wife in their divorce. In a jury trial, the jury found that the attorney who handled the divorce breached her fiduciary duty to the wife. The jury also found that the husband had also breached his fiduciary duty to his wife. The court of appeals noted, "To the extent that [the husband] was advising [the wife] of the legal aspects of a transaction by which he would benefit, [he] assumed the 'high duty of an attorney to his client.'" *Id.* at *34-35. In *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 980 S.W.2d 738, 743 (Tex. App.—San Antonio 1998), *rev'd on other grounds*, 22