

I. INTRODUCTION¹

Unfortunately, the threat of facing a legal malpractice claim is becoming an increasing reality for all lawyers. Recent studies and statistics support the general assumption among lawyers that legal malpractice claims are on the rise.² Legal malpractice is a catch-all phrase that refers to any cause of action where a client or third party is seeking recovery from an attorney for damages allegedly incurred during the course of some legal representation. Because legal malpractice covers a wide array of claims, this paper will define and explain the basics of the cause of action, address the recent court decisions and developments related to legal malpractice, and offer some practical tips practitioners should follow in order to avoid a malpractice claim.

II. THE BASIC 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. Like other tort actions 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. The attorney-client relationship is fiduciary in nature. Thus, a legal malpractice claim often involves a separate cause of action for breach of fiduciary duty.

¹ A special thanks to my partner Alistair Dawson and associates Sally Piskun and Mo Taherzadeh, for their contributions to this article.

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

Regardless of the theory alleged, the ultimate issue in a legal malpractice case is whether there has been a breach of duty. The duty implicated is that which an attorney owes a client, and before any duty arises, there must first be an attorney-client relationship.³

While legal malpractice actions may include any or all such causes of action, Texas courts are reluctant to allow such "fracturing" of claims. This issue is discussed later in section V.⁴

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.⁵ The formation of the relationship does not depend on the payment of a fee.⁶ 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.⁷ The test of whether the attorney-client relationship was formed is the reasonable expectation of the client in light of all the surrounding circumstances.⁸

1. The Potential Client

Generally, an attorney owes a duty of care only to clients *after* the relationship has been established. However, situations exist where attorneys owe a duty of care to individuals before the attorney-client relationship begins, or even to individuals who will never become

³ *Sutton v. Estate of McCormick*, 47 S.W.3d 179 (Tex. App.—Corpus Christi 2001, no pet.).

⁴ See *infra*, *Burrow v. Arce*, 997 S.W.2d 229, 241 (Tex. 1999).

⁵ See *National Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 147 (Tex. 1996).

⁶ *Prigmore v. Harware Mut. Ins. Co.*, 225 S.W.2d 897, 899 (Tex. Civ. App.—Amarillo 1949, no writ).

⁷ See *Nolan v. Freeman*, 665 F.2d 738, 739 n.3 (5th Cir. 1982).

⁸ See *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1992, writ denied).

clients. While not a “legal malpractice” lawsuit, *B.F. Goodrich Co. v. Formosa Plastics Corp.*, addressed duties owed to potential clients. The plaintiff, Goodrich, attempted to disqualify the defendant’s law firm, claiming that the defense counsel had a conflict of interest because prior to the representation of the defendant, the defense counsel was one of five attorneys considered and interviewed for representation of Goodrich.⁹ Although the court concluded that no relationship had been formed due to the limited nature of the initial interview, the court further held 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.”¹⁰ In such instances, the lawyer must treat the information obtained from a potential client as confidential, even if no attorney-client relationship is ever formed.

2. Who is the Client—Business Entities

Determining who the client is seems like an easy proposition. However, when representing an organization the question becomes more difficult. Generally, an attorney owes a duty of care only to those in privity with him.¹¹ The privity requirement has lead Texas courts to conclude that an attorney does not owe a duty of care to third parties.¹² Therefore, a lawyer employed or retained by an organization represents the entity, not the individuals related to the entity.¹³ The following are examples of who is the client when an attorney is representing a business entity.

• **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.¹⁴

➤ **Recent Case: Corporations:** In *Scherrer v. Haynes and Boone, L.L.P.*, the court found that the plaintiff, a shareholder of the corporation represented by the defendants, could not maintain a legal malpractice claim against the law firm—even if its advice had caused him harm—because he did not have privity with the allegedly offending attorneys.¹⁵ In other words, a shareholder in a corporation cannot, under Texas law, maintain a legal malpractice case against the lawyers of the corporation

• **Partnerships:** A lawyer who represents a partnership represents the entity, not the individual partners, unless the circumstances show otherwise.¹⁶ 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.¹⁷

While Texas generally adheres to the strict privity rule, the requirement has been relaxed in certain circumstances. These circumstances are discussed in more detail in Section VI of this paper. However, 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

⁹ *B.F. Goodrich Co. v. Formosa Plastics Corp.*, 638 F. Supp. 1050 (S.D. Tex. 1986).

¹⁰ *Id.* at 1052.

¹¹ *Dickey v. Jansen*, 731 S.W.2d 581,582 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.).

¹² *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996).

¹³ 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).

¹⁴ See *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990); *Hamlin v. Guterthuth*, 909 S.W.2d 114, 116 (Tex. App.—Houston [14th Dist.] 1995, writ denied). See also *Gamboia v. Shaw*, 956 S.W.2d 662, 665 (Tex. App.—San Antonio 1997, no pet.) (declining to adopt plaintiff’s theory that attorney can be held liable to corporation’s shareholders for the negligent performance of duties owed to the corporation itself).

¹⁵ *Scherrer v. Haynes and Boone, L.L.P.*, No. 01-99-01164-CV (Tex. App.—Houston [1st Dist.] Feb. 7, 2002, no pet.) (not designated for publication), 2002 WL 188825 at *3.

¹⁶ ABA Formal Op. 91-361 (7/12/91).

¹⁷ *Hopper v. Frank*, 16 F.3d 92 (5th Cir. 1994).

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.”¹⁸ Second, Texas courts have repeatedly held that a violation of the state bar rules does not create a private cause of action.¹⁹ 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.²⁰

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.²¹

¹⁸ Tex. Disciplinary R. Prof'l Conduct preamble § 15.

¹⁹ See *Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.*, 779 S.W.2d 474, 479 (Tex. App.—El Paso 1989, writ denied).

²⁰ *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).

²¹ 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.

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.²²

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.²³

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.²⁴ 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.²⁵ 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.”²⁶

1. Attorney's Negligence and Resulting Damages is a Question of Fact

The determination of an attorney's negligence and the amount of damages

460 (1996); see also *In re Dresser Indus.*, 972 F.3d 540, 542-45 (5th Cir. 1992).

²² See *id.*

²³ See generally Nathan M. Crystal, *Professional Responsibility* 14 (2nd ed. 2000).

²⁴ *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989).

²⁵ *Rhodes v. Batilla*, 848 S.W.2d 833, 843 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

²⁶ *Cosgrove*, 774 S.W.2d at 665.

proximately caused by that negligence are usually questions of fact.²⁷ 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.”²⁸ 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.”²⁹

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

Not much discussion is required here. Suffice it to say, ignorance of the law, even in good faith, is no defense.³⁰ The following cases best illustrate the point:

- 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.³¹
- An attorney can be liable for erroneously failing to verify a pleading. Denial of the existence of a partnership requires a verified denial. The attorney’s failure to verify the pleading deprived the client of a meritorious defense. Such a failure can be the basis of a legal malpractice claim.³²
- An attorney may be liable for damages to a client resulting from the attorney’s incorrect interpretation of a statute. For example, an attorney was held liable for preparing an

agreement in violation of a statute where the statute was unambiguous.³³

3. Attorney Not Liable For Unilateral Acts of Legal Secretary

Employers are liable for the negligent acts of their employees if the employees’ actions fall within the course and scope of their employment.³⁴ Attorneys are not immune from the vicarious liability that is associated with being an employer. However, a recent case has limited some attorney liability for the unilateral acts of an employee. In *Moser v. Davis*, the plaintiff attempted to prove his attorney’s negligence by introducing evidence concerning the conduct of the lawyer’s secretary.³⁵ The attorney had been retained to draft reciprocal wills for the plaintiff and her husband. However, the attorney had not completed the wills because the plaintiff could not decide on who the beneficiaries of a trust would be.

While the attorney was out of town, the plaintiff called the attorney’s office and told the legal secretary that she had decided on the beneficiary designation. The legal secretary informed the plaintiff that the attorney was out of town. Despite this information, the plaintiff insisted that the wills be completed immediately. The secretary decided to insert the beneficiaries’ names in the wills drafted by the attorney. The attorney was never contacted about the secretary’s actions and before he returned, the wills were signed and executed.

Upon the death of the plaintiff’s husband, several drafting errors were discovered and the trust assets did not pass to the intended beneficiaries. The plaintiff filed suit against the attorney claiming legal malpractice. The jury found for the defendant attorney, and the appellate court affirmed the decision. The court of appeals found that the plaintiff failed to prove that the attorney had granted his secretary the

²⁷ *Millhouse v. Wiesenthal*, 775 S.W.2d 626, 627 (Tex. 1989).

²⁸ Rhodes, 848 S.W.2d at 840 (internal quotations omitted).

²⁹ *Schlager v. Clements*, 939 S.W.2d 183, 187 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

³⁰ 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.

³¹ *Haussecker v. Childs*, 935 S.W.2d 930, 934 (Tex. App.—El Paso 1996), *aff’d*, 974 S.W.2d 31 (Tex. 1998).

³² *Heath v. Herron*, 732 S.W.2d 748, 751 (Tex. App.—Houston [14th Dist.] 1987 writ denied).

³³ *Mosaga, S.A. v. Baker & Botts*, 780 S.W.2d 3, 5 (Tex. App.—Eastland 1989, no writ).

³⁴ *Baptist Memorial Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998).

³⁵ *Moser v. Davis*, 79 S.W.3d 162 (Tex. App.—Amarillo 2002, no pet.).

authority to draft legal documents. Further the court held that the secretary's duties were limited to typing wills under the supervision of the attorney, receiving information from the clients to provide to the attorney, executing documents *at the discretion of the attorney*, and occasionally explaining wills to clients. The court also suggested that malpractice claims based on actions taken by a lawyer's support staff without the knowledge of the lawyer would rarely be successful.

4. Being Inexperienced and Having Differences of Opinion With Client Does Not Automatically Make a Lawyer Guilty of Malpractice

Lehrer v. Supkis was an unusual legal malpractice case with an overly litigious plaintiff.³⁶ Plaintiff Lehrer hired two lawyers to represent him in a divorce proceeding. Unhappy with the divorce decree, Lehrer hired Supkis to represent him in a legal malpractice suit against his former divorce lawyers. Supkis negotiated a settlement agreement, pursuant to which the parties filed a joint motion to dismiss. Predictably, Lehrer became displeased with the settlement arrangement, so he ordered Supkis to move for a new trial. After the motion was denied, Lehrer filed suit against Supkis, alleging legal malpractice under negligence, breach of fiduciary duty, and DTPA theories.³⁷

The jury found for the defendant, Supkis, on all counts. On appeal, the court observed that there was sufficient evidence in the record to justify the jury verdict. Specifically, the court explained that the mere fact that Supkis had never tried a case involving divorce or legal malpractice before Lehrer's case, as well the fact that Supkis was not board certified in family law, did not prove that Supkis was somehow *de facto* negligent.³⁸ In fact, Supkis had produced evidence showing that Lehrer had been pleased with Supkis' representation and had even asked

Supkis to represent in yet another legal malpractice suit.³⁹

Lehrer also claimed that Supkis had committed malpractice by refusing to follow Lehrer's request that he pursue discovery of the personal financial records of one of Lehrer's divorce lawyers.⁴⁰ Supkis had refused, believing that inquiries into the divorce lawyer's personal financial affairs would prompt the trial judge to sanction Lehrer and Supkis for discovery abuse. The court noted that Supkis' decision was reasonably prudent under the circumstances, even if the client wanted to take a different course of action. Consequently, a mere difference of opinion between Supkis and his client could not justify a finding of legal malpractice.⁴¹

5. 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 advise 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.⁴²

³⁹ *Id.*

⁴⁰ Lehrer's theory was that his divorce lawyer had overcharged him because she did not have enough clients to maintain her practice. *Id.* at *3.

⁴¹ Lehrer was involved in yet another malpractice case this year. Once again, Lehrer sued an attorney who had previously represented him in a legal malpractice case. Lehrer lost this case as well, this time for failing to produce any evidence that either (a) Paris had committed malpractice or (b) Paris' alleged malpractice caused Lehrer to lose the underlying lawsuit. *Id.* at *2-3.

⁴² *Holland v. Hayden*, 901 S.W.2d 763 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

³⁶ *Lehrer v. Supkis*, No. 01-00-00112-CV (Tex. App.—Houston [1st Dist.] Feb. 28, 2002, no pet.), (not designated for publication) 2002 WL 356394.

³⁷ *Id.* at *1-2.

³⁸ *Id.* at *3.

- 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.⁴³
- c) Attorney liable for advising client to get a “paper divorce” to prevent IRS collection attempts.⁴⁴
- d) Attorneys owed a duty to clients to make full and fair disclosure of every facet of proposed settlement, especially in class action.⁴⁵

6. Expert Testimony as Proof of Legal Malpractice

A plaintiff in a legal malpractice action is required to present expert testimony regarding the standard of care and proximate cause.⁴⁶ However, courts have held that where the attorney’s breach was so obvious that the trier of fact can find negligence as a matter of common knowledge no expert testimony was required.⁴⁷ Legal malpractice claims based on an attorney’s failure to file an action before the statute of limitations has run is the most common example of cases that do not require expert testimony.⁴⁸

⁴³ *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989) 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.

⁴⁴ *Rhodes v. Batilla*, 848 S.W.2d 833, 840, (Tex. App. – Houston [14th Dist.] 1993, writ denied).

⁴⁵ *Blayed v. General Motors Corp.*, 881 S.W.2d 422, 436 (Tex. App.—Texarkana 1994), *aff’d*, 916 S.W.2d 949 (Tex. 1996).

⁴⁶ *Ramsey v. Reagan*, NO. 03-01-00582-CV (Tex. App.—Austin, January 16, 2003, no pet. h.), (not designated for publication), 2003 Tex. App. LEXIS 276 at *4; *Omwuteaka v. Gill*, 908 S.W.2d 276, 281 (Tex. App.—Houston [1st Dist.] 1995, no writ).

⁴⁷ *Mazuca v. Schumann*, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied); *Lopez v. Yates*, NO. 14-01-00649-CV (Tex. App.—Houston [14th Dist.] Nov. 21, 2002, no pet.), (not designated for publication) 2002 Tex. App. LEXIS 8229.

⁴⁸ *Id.* at 97.

a) Expert Witnesses Must Perform Independent Investigation

In *Bell v. Phillips*, plaintiff Bell originally hired defendant on a contingency basis to pursue claims against her ex-husband’s employer.⁴⁹ After nine years of litigation, with no settlement in sight, Phillips withdrew from the case. Bell subsequently sued Phillips for legal malpractice, breach of fiduciary duty, and DTPA violations. The trial judge awarded summary judgment in favor of Phillips.⁵⁰

On appeal, the central issue was whether the deposition testimony of Bell’s expert witness was sufficient to create a fact issue of whether Phillips had breached the standard of care for a reasonable and prudent attorney. The court noted that Bell’s expert had relied primarily on information provided by Bell— he had not reviewed any of the pleadings, correspondence, deposition transcripts, motions, or any expert reports in the underlying litigation.⁵¹ Moreover, Bell’s expert never performed an independent investigation to determine if Bell had a valid claim in the underlying litigation. Observing that “[a]n expert witness testifying on the... proper standard of legal care... would not rely solely on the factual assertions of an interested party in forming an opinion,” the court held that Bell’s expert’s testimony was insufficient to raise any fact issues concerning legal malpractice.⁵²

7. 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

⁴⁹ *Bell v. Phillips*, No. 14-00-01189-CV (Tex. App.—Houston [14th Dist.] April 18, 2002, no pet.), (not designated for publication) 2002 WL 576036 (Bell’s ex-husband had assigned his contract claims against his employer to her pursuant to their property settlement)

⁵⁰ *Id.* at *1-2.

⁵¹ *Id.* at *5.

⁵² *Id.* at *6.

