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SUMMARY OF TEXAS LEGAL MALPRACTICE

I. SCOPE OF ARTICLE

This paper provides an overview of Texas legal malpractice law. It addresses who can sue, when to sue, and what to sue for, and, finally, some tips on how to avoid being sued.

II. WHO CAN SUE – PRIVITY

A. Privity Rule

As a general rule, persons outside the attorney-client relationship do not have a cause of action for injuries they sustain due to an attorney’s negligence. Generally, in the absence of privity, an attorney owes no duty to third-party non-clients. See e.g., Gamboa v. Shaw, 956 S.W.2d 662 (Tex. App.—San Antonio 1997, no writ) (lawyer representing a corporation does not have fiduciary duty to shareholders of corporation because lawyer not in privity with shareholders). Draper v. Garcia, 793 S.W.2d 296, 301 (Tex. App.—Houston [14th Dist.] 1990, no writ)(insurer not in privity with attorney insured hired to handle insured’s claims).

The privity rule protects attorneys in a class action lawsuit from legal malpractice claims of nonclients. There is no implied attorney-client relationship; therefore, there is no privity between them until the class is certified. Gillespie v. Scherr, 987 S.W.2d 129, 131 (Tex. App.—Houston [14th Dist.] 1998, n. pet. h.). Even if the attorney’s work was intended to benefit the potential class members, the attorney owes no precertification duty to potential class members that are the subject of a legal malpractice claim. Id. at 131-132.

B. Policy Behind Privity Rule

Texas courts have advanced several policy concerns in favor of the privity rule. First, liability to non-clients can hamper an attorney’s vigorous representation of his own client. As one court states: “The attorney’s preoccupation or concern with the possibility of claims based on mere negligence (as distinguished from fraud) by any with whom his client might deal would prevent him from devoting his entire energies to his client’s interest.” Bell v. Manning, 613 S.W.2d 335, 339 (Tex. Civ. App.—Tyler 1981, writ ref’d n.r.e.); see also American Centennial Ins. v. Canal Ins., 843 S.W.2d 480, 485 (Tex. 1992)(“Texas courts have been understandably reluctant to permit a malpractice action by a nonclient because of the potential interference with the duties an attorney owes to the client.”).

A second concern is that liability to non-clients may “tend to encourage a party to contractual negotiations to forego personal legal representation and then sue counsel representing the other contracting party for negligent misrepresentation if the resulting contract later proves disfavorable in some respect.” Bell v. Manning, 613 S.W.2d at 339. Furthermore, “[i]t is obvious that opening attorney-client contracts to third party scrutiny would entail a vast range of potential liability.” Dickey v. Jansen, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.). Despite these policy concerns, the Texas Supreme Court has opened the door to allow suits by nonclients for an attorney’s negligent misrepresentations. (See Section III.B below).

C. Privity Rule in Will Cases

In Dickey, the intended beneficiaries under a testator’s testamentary trust brought suit against the testator’s attorney for negligent preparation of the trust. The court of appeals held that the intended beneficiaries were not in privity with the testator’s attorney, and lack of privity precluded the action. The Texas Supreme Court upheld the decision. Justice Evans of the Houston First Court of Appeals, provided a strong dissent in favor of creating an exception to the privity rule when third parties are the intended beneficiaries of the services sought by the client. Id. at 583-84 (Evans, J., dissenting).

In Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex. App.—Houston [1st Dist.] 1993, writ denied), the court of appeals citing the lack of privity between the residual
beneficiaries of the will and estate’s law firm, dismissed the plaintiffs’ theories of negligence and breach of fiduciary duty. The court also dismissed the will beneficiaries’ DTPA claim holding the will beneficiaries were not consumers who directly sought or acquired any “goods or services” from the firm.

In 

In Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996), the Texas Supreme Court held that only the trustee, not the trust beneficiary, is a client of the trustee’s attorney. While the trustee still has a fiduciary duty to the beneficiary, any communication between the trustee and his attorney is protected (from the beneficiary) because of the attorney-client privilege. Id. In Barcello v. Elliot, 923 S.W.2d 575 (Tex. 1996) (states 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.”

D. Assignment of Legal Malpractice Claims

In Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref’d). Zuniga, the client had a judgment taken against him. The client claimed the judgment was the result of his attorney’s malpractice. To avoid personal liability, the client assigned his legal malpractice claim to his opponent. The court held that this legal malpractice claim could not be assigned.

To allow such assignments would serve two principles: enabling the defendant-client to extricate himself from liability, and in funding the original plaintiff’s judgment. But to 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 to each set of lawyers and clients which would embarrass and demean the legal profession.

Id. at 317. The Texas Supreme Court subsequently refused to grant the application for writ of error in Zuniga, effectively adopting the court of appeals decision prohibiting the assignment of legal malpractice claims in Texas. In State Farm Fire & Casualty Co. v. Gandy, 925 S.W.2d 696 (Tex. 1996), the Supreme Court discussed Zuniga and its underlying rationales. The Court cited with approval the holding in Zuniga that the assignment of the legal malpractice cause of action was invalid. Id. at 708.

A recent case gave the Texas Supreme Court the chance to decide whether legal malpractice claims in Texas are assignable in other fact situations. Mallios v. Barker, 11 S.W.3d 157 (Tx. 2000). Because of the specific facts of the Mallios case, the Texas Supreme Court declined to decide this issue.

In Mallios, the plaintiff was seriously injured in a motorcycle accident. The plaintiff became intoxicated in a bar, and he left the bar on his motorcycle. In attempting to elude the police, the plaintiff had an accident.

The plaintiff sued the owner of the bar contending he was so obviously intoxicated that he was a clear danger to himself and others. The plaintiff sued the company his attorney believed owned the bar. The attorney obtained a default judgment for over one million dollars. The judgment was not collectable.

A financier who was in the business of purchasing judgments contacted the plaintiff. The financier discovered that the attorney had sued the wrong entity. The company the attorney had sued did not own the bar. In the interim, limitations ran on any claim against the entity that owned the bar.

The financier and the plaintiff entered into an assignment agreement. Under this agreement, the financier would pay legal fees for
the plaintiff to sue the attorney. If there was any recovery, the financier would first be repaid all attorneys’ fees. After the legal fees were repaid, the financier and the plaintiff would then share any additional funds on a 50/50 basis.

The plaintiff, with the financier’s funding, subsequently sued the attorney. The attorney moved for summary judgment holding that the claim was barred due to an improper assignment of a legal malpractice claim. The trial court granted summary judgment. The Texas Supreme Court reversed the trial court and remanded the case for further proceedings.

In an opinion joined by five justices (Justices Gonzales, Phillips, Enoch, Hankinson and O’Neill), the court stated:

Even assuming [the lawyer] is correct that the agreement between [the plaintiff] and [the financier] violates Texas Public policy, an issue we do not decide today, the question remains whether that invalidity would entitle [the lawyer] to a take nothing judgment on [the plaintiff’s] malpractice claim. Here, [the plaintiff] is the alleged assignor, and assuming there was a partial assignment, [the assignor] still retained a portion of his claim. [The attorney] does not dispute that [the plaintiff] had the right to sue [the attorney] before [the plaintiff’s] agreement with [the financier]. And even if we were to reach the issue of the agreement’s validity and determine that [the lawyer] is correct that it is an invalid assignment, that would not vitiate [the plaintiff’s] right to sue [the attorney]. Thus, either way, summary judgment was improper and [the plaintiff] may continue his suit.

The Mallios opinion shows that a disagreement exists on the court as to whether or not the assignability of legal malpractice claims is always prohibited. Four justices (Justice Hecht, joined by Justice Owen, Baker and Abbott) issued a concurring opinion which vigorously argued that under the Mallios facts the assignment of legal malpractice claims should not be allowed. Two justices (Justice Enoch and Chief Justice Phillips) issued a second concurring opinion which vigorously argued that under the same facts the assignment of legal malpractice claims should be allowed.


Despite the opportunity, the Texas Supreme Court has not squarely decided the issue of whether a bankruptcy trustee can sell and assign a bankruptcy estate’s legal malpractice claim. Douglas v. Delp, 987 S.W.2d 879 (Tex. 1999). The court of appeals had implied that it was error to allow the trustee to assign the claim, but the Court did not reach the issue. It did, however, rule that the person filing for bankruptcy does not have standing to challenge the assignment of the legal malpractice claim outside of the bankruptcy proceeding. Id. at 882.

In summary, a defendant who has a judgment against him cannot assign his malpractice claim to escape that judgment. It is not clear where else assignments of legal malpractice claims are prohibited.

E. When Privity Is Not Required

1. Negligent Misrepresentation

    Again, the general rule is a person who is not in privity with an attorney cannot sue for legal malpractice. McCamish, Martin, Brown,
& Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 792 (Tex. 1999). At the same time, an attorney may be subject to a negligent misrepresentation claim even if there is no legal malpractice claim; therefore, it is possible for a non-client to have a claim for negligent misrepresentation against an attorney even if he may lack standing to sue for legal malpractice. Id. The Texas Supreme Court limited liability under this theory to situations in which the attorney is aware of the non-client and intends for the non-client to rely on the information provided. Id. at 794 ("cause of action is available only when information is transferred by an attorney to a known party for a known purpose"). The Court suggested that an attorney may avoid, or at least minimize, liability to a non-client by stating: "(1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as to the scope and accuracy" of the information forming the basis of the attorney’s representation. Id. Since the Appling decision, negligent misrepresentation has been the most popular theory which plaintiffs have alleged against attorneys they are not in privity with.

2. Failure to Advise That No Attorney-Client Relationship Exists

Privity is not a defense when a non-client sues an attorney when the circumstances would lead the non-client to believe the attorney has undertaken the representation. See, e.g., Cantu v. Butron, 921 S.W.2d 344, 351 (Tex. App.—Corpus Christi 1996, writ denied); Byrd v. Woodruff, 891 S.W.2d 689, 700 (Tex. App.—Dallas 1994, writ denied); Perez v. Kirks & Carrigan, 822 S.W.2d 261, 265-66 (Tex. App.—Corpus Christi 1991, writ denied) ("An agreement to form an attorney-client relationship may be implied from the conduct of the parties . . . the relationship does not depend upon the payment of a fee, but may exist as a result of rendering services gratuitously."); Parker v. Carnahan, 772 S.W.2d 151, 157 (Tex. App.—Texarkana 1989, writ denied); Kotzur v. Kelly, 791 S.W.2d 254, 257-58 (Tex. App.—Corpus Christi 1990, no writ) ("An attorney-client relationship may be implied from the conduct of the parties . . . further, 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.").

An attorney should clearly state in writing that the attorney does not represent a person who may have cause to believe that attorney represents him. A plaintiff's attorney should tell a potential client in writing that they are not taking that person's case and when the statute of limitations runs on the case. A defense attorney should also tell co-defendants in writing that the attorney does not represent the co-defendants and that the co-defendants need to seek their own attorney to protect their interests.

3. Fraud

Privity is not a defense to fraud directed against a third party. Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ). In Likover, a non-client sued an attorney for conspiracy to defraud. The court rejected the attorney's non-duty argument: "An attorney has no general duty to the opposing party, but he is liable to third parties when his conduct is fraudulent or malicious. He is not liable for breach of a duty to the third party, but he is liable for fraud." Id. at 472.

Fraud is based on a misrepresentation of a material fact, with the intent that the person or entity to whom the misrepresentation is made will rely upon it. Trenholm v. Ratliff, 646 S.W.2d 927, 930 (Tex. 1983).

Recently, state and federal regulatory agencies have sued attorneys who make allegedly fraudulent statements to those regulators on behalf of clients. Being sued by the FDIC or the State Securities Commission or any regulatory agency presents special problems. See The Review of Litigation/Symposium: Summer 1993.

4. Texas Deceptive Trade Practices — Consumer Protection Act (“DTPA”)

A "consumer" may recover against a third party under the DTPA without privity of
contract when the transaction was consummated for the benefit of the third party. See, e.g., Arthur Andersen & Co. v. Perry Equipment Corp., 945 S.W.2d 812 (Tex. 1997); Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 649 (Tex. 1996); Kennedy v. Sale, 689 S.W.2d 890 (Tex. 1985); Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705 (Tex. 1983). One Texas court has held that a third party may recover under the DTPA against an attorney if the third party qualifies as a "consumer." Parker v. Carnahan, 772 S.W.2d 151, 158-59 (Tex. App.—Texarkana 1989, no writ); see also IV.D, infra; but see, Thompson v. Vinson & Elkins, supra, (beneficiaries of a trust held to not be consumers of services of the attorney whom the trustee hired).

Tort reform legislation in Texas blocks most professional liability under the DTPA. The Texas Business and Commerce Code § 17.49 (c) provides:

This subsection does not apply to a claim 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. The exemption does not apply to:

(1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;

(2) a failure to disclose information in violation of Section 17.46(b)(2);

(3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; or

(4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion.

However, this DTPA exemption will not stop DTPA liability for (1) failing to timely file a claim, (2) self dealing in client funds, or (3) failing to inform a client of his contractual rights, provided the plaintiff proved that he or she was a “consumer” of the attorney’s services.

F. Attorney Liability to Insurer

Since American Centennial Ins. v. Canal Ins., 843 S.W.2d 480, 484 (Tex. 1992), it has been clear that an excess insured can sue an attorney employed by a primary insurer for negligence in defending a case. When excess insurance is involved, the defense counsel should ask the excess carrier in writing at the start of the litigation if the excess insurer wishes to be kept informed of the progress of the litigation.

The whole area of the liability of a defense counsel hired by an insurance company to represent an insured is not simple. See, E. Pryor and C. Silva, Defense Lawyers’ Professional Responsibilities Part I – Excess Exposure Cases, 78 TEX.L.REV. 607 (2000). An insurance company is not liable for the legal malpractice of an independent attorney it appoints to represent its insured. State Farm Mutual Auto Ins. Co. v. Traver, 980 S.W.2d 625, 628 (Tex. 1998). In the real world, the insurance company who the client cannot sue tells the defense
counsel many times who the client can sue and what the attorney can and cannot do in the representation. A recent ethics opinion holds a lawyer violates the rules of professional conduct if he agrees with insurance company restrictions on the lawyer’s exercise of his or her independent professional judgment in representing the insured/client. Texas Ethics Opinion No. 533 (2000).

G. Person Convicted of Crime Cannot Sue Attorney

As a general matter a criminal defendant who has a final non-appealable conviction cannot sue his defense attorney for malpractice. “Because of public policy, we side with the majority of courts and hold that plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to this claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise. . . . [This is so because] it is the illegal conduct rather than the negligence of a convict’s counsel that is the cause in fact of any injuries flowing from the conviction.” Peeler v. Hughes & Luce, 909 S.W.2d 494, 497-498 (Tex. 1995)(emphasis added)(affirming summary judgment for defendants).

H. The “Litigation Privilege”

Texas courts have protected attorneys involved in litigation by fashioning a privilege which prevents most claims by opposing parties against those attorneys. In dismissing a wrongful garnishment claim by an opposing party against an attorney, the Fort Worth Court of Appeals stated:


Under Texas law, attorneys cannot be held liable for wrongful litigation conduct. A contrary policy would dilute the vigor with which Texas attorneys represent their client and would not be in the best interest of justice.
III. WHEN TO SUE – STATUTE OF LIMITATIONS

A. Legal Malpractice Statutes of Limitations

In Texas, a cause of action for legal malpractice is a tort. Generally, the two year statute of limitations applies. Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988); American Medical Electronics v. Korn, 819 S.W.2d 573, 576 (Tex. App.—Dallas 1991, writ denied). Unlike malpractice claims, fraud claims against attorneys will be governed by the four-year statute of limitations. See Williams v. Khalaf, 802 S.W.2d 651 (Tex. 1990).

Some plaintiffs have attempted to apply the four-year statute of limitations to legal malpractice claims by structuring their pleadings to allege breach of contract. The courts have consistently uncovered this “wolf in sheep’s clothing.” See American Medical Electronics, 819 S.W.2d at 576; Sledge v. Allsup, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ).

A breach of fiduciary duty claim avoids the two year statute of limitations. See Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999). Prior case law indicated that breach of fiduciary duty claims were governed by a two-year statute of limitation. In its 1999 session, the Texas legislature amended Tex. Civ. Prac. & Rem. Code, § 16.004(a)(5) to specifically hold that breach of fiduciary duty claims are subject to the four-year statute limitations. Section 2 of Act 1999, 76 Legislature, chapter 950.

B. When Cause Of Action Accrues And Limitations Begin to Run

The hard question regarding the applicable statute of limitations is not what limitation period applies, but when the cause of action accrues and limitations begin to run. When a cause of action accrues is a question of law for the court. Computer Assoc. Int’l, Inc. v. Altai, Inc., 918 S.W.2d 453 (Tex. 1994); Willis v. Maverick, 760 S.W.2d at 644; Black v. Wills, 758 S.W.2d 809, 815 (Tex. App.—Dallas 1988, no writ).

1. The Legal Injury Rule

Texas has adopted the legal injury rule. The legal injury rule provides that a legal malpractice cause of action accrues only when the negligence of the attorney results in damage to the client. Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988); American Medical Electronics v. Korn, 819 S.W.2d 573, 577 (Tex. App.—Dallas 1991, writ denied). Previously, Texas applied the occurrence rule which provided the legal malpractice cause of action accrued when the negligent act occurred, without regard to whether injury had occurred. Crawford v. Davis, 148 S.W.2d 905, 907 (Tex. Civ. App.—Eastland 1941, no writ); Fox v. Jones, 14 S.W. 1007 (Tex. Ct. App. 1889, no writ).

The legal injury rule avoids the problem of the legal malpractice action being barred before any damage occurs. However, it does not require that plaintiff’s damages be fully ascertained or even known. See Trinity River Authority v. URS Consultants, Inc., 889 S.W.2d 259, 262 (Tex. 1994); Jim Arnold Corp. v. Bishop, 928 S.W.2d 761, 768 (Tex. App.—Beaumont 1996, no writ). The legal injury rule only requires the existence of a “legal injury” that would support the filing of suit. Once this threshold requirement is met, the cause of action accrues and limitations begin to run. As a result, many legal malpractice actions may be time-barred before the client is aware of the injury or the necessity of filing a suit. J.H. Bauman, The Statue of Limitations for Legal Malpractice in Texas, 44 BAYLOR L. REV. 425, 431-36 (1992).

2. Tolling Provisions

Texas courts have adopted three tolling provisions to protect plaintiffs from the sometimes harsh application of the legal injury rule. Two are alive and well, one is not.

a. Duty to Disclose Rule a/k/a The Continuous Representation Rule

The continuous representation rule defers accrual or tolls the running of limitations while the allegedly negligent attorney continues to represent the client in the matter in which the negligence occurred. Id. at 437. The continuous
representation rule allows time for the negligent attorney to attempt to correct the situation, while preserving the client’s right to sue if the efforts are not successful. Id.

The Texas Supreme Court, however, disposed of the “duty to disclose/continuous representation” rule. Willis, 760 S.W.2d at 645-46 n. 3; see also Estate of Degley v. Vega, 797 S.W.2d 299, 303 n. 3 (Tex. App.—Corpus Christi 1990, no writ) (“In Willis the court expressly disapproved of this approach to accrual, holding that the discovery rule balances limitations policies better than simply tolling limitations during the attorney-client relationship”). It is important to note, however, in FDIC v. Nathan, 867 F. Supp. 512 (S.D. Tex. 1994), that Judge Harmon appeared to rely on the “continuous representation” rule to toll the running of limitations against the FDIC.

b. The Discovery Rule

The discovery rule applies to legal malpractice actions. The discovery rule provides 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 the claimant’s cause of action. Willis, 760 S.W.2d at 646; Gordon v. Ward, 822 S.W.2d 90, 93 (Tex. App.—Houston [1st Dist.] 1991, writ denied); American Medical Electronics, 819 S.W.2d at 577; Medical Protective Co. v. Groce, Locke & Hebdon, 814 S.W.2d 124, 127 (Tex. App.—Corpus Christi 1991, writ denied); RTC v. Boyar, Norton & Blair, 796 F. Supp. 1010, 1013 (S.D. Tex. 1992). The discovery rule protects clients injured by attorney malpractice whose injuries may not be discovered until after the formal legal injury rule has been satisfied.

The discovery rule is determined by the facts of each case. Jampole v. Matthews, 857 S.W.2d 57 (Tex. App.—Houston [1st Dist.] 1993, writ denied). “[T]he limitations period begins to run as soon as the plaintiff discovers or should discover any harm, however slight, resulting from the negligence of the defendant.” American Medical Electronics, 819 S.W.2d at 577 (emphasis in original). Hence, if the plaintiff discovers a minor injury but waits until the injury has become substantial to sue, and two years have expired since the discovery of the minor injury, the suit will be time barred. Id. at 577.

The discovery rule is a plea in avoidance. Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517 (Tex. 1988). A claimant seeking to avoid the statute of limitations has the burden of pleading the discovery rule, and has the burden at trial of establishing facts supporting application of the discovery rule. Id. at 518; Audry v. Dearman, 933 S.W.2d 182, 192 (Tex. App.—Houston [14th Dist.] 1996, writ denied); Gordon v. Ward, 822 S.W.2d 90, 94 (Tex. App.—Houston [1st Dist.] 1991, writ denied). Once the claimant pleads the discovery rule, however, the defendant can only obtain summary judgment based on limitations by showing that no issue of fact exists concerning the time when the plaintiff discovered or should have discovered the cause of action. Burns v. Thomas, 786 S.W.2d 266, 267 (Tex. 1990); Farah v. Mafrige & Kormanik, P.C., 927 S.W.2d 663, 676 (Tex. App.—Houston [1st Dist.] 1996, no writ); American Medical Electronics, 819 S.W.2d at 576; Medical Protective Co. v. Groce, Locke & Hebdon, 814 S.W.2d 124, 127 (Tex. App.—Corpus Christi 1991, writ denied). If the defendant moves for summary judgment and produces evidence of when plaintiff should have discovered the cause of action, the plaintiff, to avoid the summary judgment, must show that a person exercising reasonable diligence would not have discovered the cause within the statutory period. Smith v. Flinn, 968 S.W.2d 12 (Tex. App.—Corpus Christi 1998, n. pet. h.).


c. The Exhaustion Of Appeal Rule

The Texas Supreme Court has held that “when an attorney commits malpractice in the
prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted.” Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex. 1991).

The Court justified the “exhaustion of appeal” rule finding that without such a rule a client may be forced into adopting inconsistent litigation positions as to the underlying case and the malpractice case if an attorney makes a mistake in the course of representing the client. Hughes, 821 S.W.2d at 156; see also, Washington v. Georges, 837 S.W.2d 146, 147 (Tex. App.—San Antonio 1992, writ denied); Norwood v. Pro, 887 S.W.2d 177 (Tex. App.—Texarkana 1994, writ denied). This rule also applies in the bankruptcy context, as the statute of limitations is tolled during the pendency of an attorney’s representation of a client in a bankruptcy proceeding. Guillot v. Smith, 1999 WL 318840, *3 (Tex. App.—Houston [1st Dist.], May 20, 1999). The plaintiff has the burden of pleading and proving the applicability of the “exhaustion of appeal” rule to toll limitations. Hughes, 821 S.W.2d at 157; Stephenson v. Courtney, 919 S.W.2d 454, 464 (Tex. App.—Fort Worth 1996, writ denied).

Two cases concerning the exhaustion of appeal rule are presently pending at the supreme court. Paul B. Underkotter, Jr., et al. v. Hugh F. Vanasels, 1999 WL 314822 (Tex. App.—Dallas, writ grt’d) and Apex Towing Co., et al. v. William M. Tolin III, et al., 997 S.W.2d 903 (Tex. App.—Beaumont 1999, writ grt’d). In Underkotter, the Dallas Court of Appeals held the statute of limitations was tolled during the period after the attorney being sued withdrew and the client bringing the malpractice suit knew of the alleged malpractice and continued litigating the case with a new attorney. In Apex, the Beaumont Court of Appeals held that once the client hired a new attorney the statute of limitations was no longer tolled even though an appeal continued after the new attorney was hired.

C. Current Status Of Statute Of Limitations In Legal Malpractice Claims

Generally, the two-year limitations period is applicable to legal malpractice claims. The legal injury rule determines when the cause of action accrues and limitations begin to run. Two available tolling provisions may toll the limitations period: (1) the discovery rule, and (2) the “exhaustion of appeals” rule.

IV. WHAT TO SUE FOR – THEORIES OF LIABILITY

Traditionally, legal malpractice causes of action have been based upon theories of negligence, breach of fiduciary duty, and fraud.

A. Legal Malpractice

A legal malpractice action in Texas is based on negligence. Barcello, III v. Elliot, 923 S.W.2d 575, 580 (Tex. 1996). As with any other negligence action, the traditional elements of negligence apply and must be proven by the plaintiff. The plaintiff must prove: (1) there is a duty owed by the attorney to the client, (2) a breach of that duty, (3) that the breach proximately caused the client’s injury, and (4) damages occurred. Cosgrove v. Grimes, 774 S.W.2d 662, at 665 (Tex. 1989).

The cases involving the alleged mishandling of litigation have created a question of how causation should be established. To establish causation, “the client may be required to prove that he or she would have been successful in prosecuting or defending the underlying action, if not for the attorney’s negligence or other improper conduct.” See Joseph H. Koffler, Legal Malpractice Damages In a Trial Within a Trial – Critical Analysis of Unique Concepts: Areas of Unconsciousability, 73 MARQ. L. REV. 40-41 (1989). This means the plaintiff will conduct a “trial within a trial” which both the malpractice claim and the underlying claims are tried to the same jury, with the malpractice defendant forced to represent the opponent in the underlying action.” Id.; see also Patterson & Wallace v. Frazier, 93 S.W.2d 146 (Tex. 1906) (“The defendants were entitled to stand just where [the defendant in the underlying suit] would have
stood in the trial of the suit against her, and to have before the jury every fact that tended to lessen the damages.”); Gibson v. Johnson, 414 S.W.2d 235 (Tex. Civ. App.—Tyler 1967, writ ref’d n.r.e) cert. denied 390 U.S. 946 (1967).

Texas cases are not clear on how this case within a case should be submitted to the jury. In Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989), the trial court submitted a separate question as to whether or not the plaintiff would have prevailed at the prior trial but for the negligent conduct of the attorney. However, in Rhodes v. Batilla, 848 S.W.2d 833 (Tex. App.—Houston [14th Dist.] 1993, writ denied), a separate question as to whether the plaintiff would have prevailed at the prior IRS administrative level but for the negligent conduct of the attorney was omitted.

In Haynes & Boone v. Bowser Bouldin, 896 S.W.2d 179 (Tex. 1995), the Texas Supreme Court addressed the issue of causation in a legal malpractice context. The Supreme Court held that “to recover damages, a plaintiff must produce evidence from which the jury may reasonably infer that the damages sued for have resulted from the conduct of the defendant.” The court further held that the above requirement of proof is met when a jury is presented with pleading and proof that establishes a direct causal link between damages awarded, actions of the defendant, and the injury suffered.

Following Bowser, the Texarkana Court of Appeals in Mackie v. McKenzie, 900 S.W.2d 455 (Tex. App.—Texarkana 1995) held the lawyer being sued for malpractice was entitled to summary judgment because the plaintiff had failed to show damages. The court held there should be no recovery in the legal malpractice action because the client ultimately recovered more money than she would have had the attorney succeeded in the underlying suit. Hence, causation was not present. Id.

Texas courts have failed to clarify whether an objective or subjective standard should be used to prove the direct causal link. Many commentators and other states do recognize such a distinction. As stated in Mallen & Smith, Legal Malpractice, § 32.8 (1996):

Often “should” and “would” are used interchangeably. There is a difference because the objective of a trial-within-a-trial is to determine what the result should have been (an objective standard) not what the result would have been by a particular judge or jury (a subjective standard). The phrase “would have” been, however, does have the same meaning as “should have,” if the inquiry is what a reasonable judge or jury “would have” decided. In any event, what “could have” or “might have” been decided is speculative and is not the standard. (Emphasis original).

The language in many Texas cases suggests Texas adheres to a subjective standard of what a particular judge or jury would have done. See e.g., Cosgrove, 774 S.W.2d at 665 (plaintiff must show what “would have been recovered and collected . . . if the suit had been properly prosecuted”); Mackie, 900 S.W.2d at 445 (client must prove he “would have been successful”); MND Drilling Corp. v. Lloyd, 866 S.W.2d 29 (Tex. App.—Houston [14th Dist.] 1987, no writ) (“client must prove he would have been successful but for the negligence of his attorney”). However, none of these courts have directly confronted the distinction between an objective standard, i.e., what should have occurred, and a subjective standard, i.e., what a particular judge or jury would have done; indeed, the two standards are often muddled.

In an appellate legal malpractice claim, the plaintiff must prove that he would have prevailed on appeal in the underlying case but for the attorney’s negligence. Smith v. Heard, 980 S.W.2d 693 (Tex. App.—San Antonio 1998, n. pet. h.). The plaintiff must prove the “case within a case” in order to prove that the attorney’s negligence caused the damage; if the appeal would not have been successful, then the
attorney’s negligence could not have caused harm. Id. at 696. In Heard, the appellate court rejected the plaintiffs’ contention that attorney had negligently failed to challenge the trial court’s calculation of damages, as the trial court’s calculation was valid and would not have been error even if the attorney had properly appealed. Id. Similarly, the appellate court in the underlying case stated that the certification of the defendant’s expert witness was “patently immaterial,” thus any failure of the attorney to pursue this avenue of appeal could not have damaged the plaintiffs, thus barring a malpractice claim on this issue. Id.

The judge who tried an underlying lawsuit cannot offer his opinion on whether or not malpractice was committed. See Joachim v. Chambers, 815 S.W.2d 234, 238-39 (Tex. 1991); Mcduffie v. Blasingame, 883 S.W.2d 329, 334 (Tex. App.—Amarillo 1994, writ denied). But, opposing counsel in the underlying trial can offer such testimony and can testify as to whether such malpractice caused harm to the complaining party. Only one more reason to stay on good terms with opposing counsel.

While the Texas Supreme Court has upheld an award for mental anguish damages that occurred as a result of attorney negligence, the Court has not endorsed recovery of mental anguish damages in all legal malpractice cases. Douglas v. Delp, 987 S.W.2d 879, 884 (Tex. 1999); see Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989). Indeed, the Court recently held that a party could not recover for mental anguish damages that are a consequence of economic loss resulting from legal malpractice. Delp, 987 S.W.2d at 885. This rule is consistent with the majority of other states in recognizing that mental anguish is typically not a foreseeable result of legal malpractice, and that recovery should generally be limited to making the plaintiff whole for their economic loss.

B. Breach of Fiduciary Duty

The relation between attorney and client is fiduciary in nature and has been described as “one of uberrima fides, which means ‘most abundant good faith,’ requiring absolute and perfect candor, openness and honesty and the absence of any concealment or deception.” Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied); see also Hefner v. State, 735 S.W.2d 608, 624 (Tex. App.—Dallas 1987, writ ref’d); State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref’d n.r.e.) overruled on other grounds, 774 S.W.2d 662 (Tex. 1989).

Breach of fiduciary duty usually occurs when the attorney’s personal interests conflict with the interests of the client or when there is a conflict of interest between an attorney’s clients. See, e.g., Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988) (attorney failed to disclose critical information); Robinson v. Garcia, 804 S.W.2d 238 (Tex. App.—Corpus Christi 1991, no writ) (attorney failed to disclose information concerning effect of fee agreement).

Recently, there has been an increase in claims of breach of fiduciary duty in class action and mass tort cases. Generally these arise out of the amount of or calculation of attorneys’ fees. In a landmark decision, the Texas Supreme Court last year held that a client may obtain a forfeiture of attorney’s fees for an attorney’s breach of fiduciary duty even without showing actual damages. Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999).

The Arce case arose out of an explosion at a Phillips 66 Chemical Plant in 1989 that killed 23 workers and injured hundreds of others. Five plaintiffs’ attorneys filed a single suit on behalf of some 126 plaintiffs against Phillips. The case was subsequently settled for approximately $190 million. Out of this amount, the attorneys received a contingent fee of more than $60 million.

Later, forty-nine of the plaintiffs sued the five attorneys alleging professional misconduct and demanding a forfeiture of all fees the attorneys received. The plaintiffs alleged that the attorneys failed to fully investigate the case, failed to communicate settlement offers, entered into a illegal aggregate settlements on the plaintiffs’ behalf, improperly agreed to limit their law practice by not representing other persons involved in the same
incident and coerced some of the clients into accepting the settlement. The trial court granted summary judgment for the attorneys on the grounds that the settlement of the plaintiffs’ claims was fair and reasonable and thus the plaintiffs had suffered no actual damage as a result of any misconduct by the attorneys.

The Texas Supreme Court held that even though the plaintiff clients had suffered no damages, an attorney may be required to forfeit some or all of his fees if he breaches his fiduciary duty to the client. The court held that if there are any factual disputes which give rise to the claim, a jury is to decide those factual disputes. The court stated that, “Such factual disputes may include, without limitation, whether or when the misconduct complained of occurred, the attorneys’ mental state at the time, and the existence or extent of any harm to the client.” Id. p. 246.

After any necessary factual disputes have been resolved, it is then for the court to determine “[w]hether the attorneys’ conduct was a clear and serious breach of duty to his client and whether any of the attorneys’ compensation should be forfeited, and if so, what amount.” Id. In making this determination, the court is to consider the following factors:

1. The gravity and timing of the violation.
2. The willfulness involved in the violation.
3. The violation’s effect on the value of the lawyers’ work for the client.
4. Any other threatened or actual harm to the client.
5. The adequacy of other remedies.
6. The public interest in maintaining the integrity of the attorney-client relationships.

Id. 243. The first five factors come from §49 of the Proposed Restatement (Third) of the Law Governing Lawyers. The last factor, “The public interest in maintaining the integrity of attorney client relationships,” was added by the court. Id. 244.

Another important fee forfeiture case is Lopez v. Munoz, Hockema & Reed, L.L.P., 2000 WL 758457 (Tex. June 8, 2000). In the Lopez case, the lawyers signed a contingent attorney fee contract with a family for representation in a wrongful death lawsuit filed against Westinghouse Electric Corporation. The contract provided that the lawyers would receive 40% of any recovery that the Lopez family received. The contract provided that, “In the event of an appeal” the lawyers were to receive 45% of any recovery. The lawyers obtained a jury verdict and judgment for $25 million on behalf of the family.

After the judgment, the lawyers entered into serious settlement negotiations with Westinghouse. The lawyers indicated to Westinghouse that they would not settle for anything less than $15 million. The family contended that the lawyers and Westinghouse entered into an oral agreement on October 11, 1991 to settle the case for $15 million. On October 18, 1991, before the settlement agreement was finalized, Westinghouse filed a deposit in lieu of cost bond. A settlement agreement was finally signed on October 30, 1991.

Based on the filing of a cost bond, the lawyers contended they were entitled to a 45% contingency fee because the case had been appealed. The lawyers thus took a fee of $6,750,000. If the fee was only 40%, the lawyers were only entitled to $6,000,000.

The family subsequently sued the lawyers. The family contended that the lawyers should forfeit the entire fee because (1) the case was settled prior to the filing of the cost bond, (2) thus there was no appeal so (3) the lawyers overcharged the clients by $750,000. The plaintiffs contended that they were entitled to total fee forfeiture and rather than forfeiture of the 5% fee increase ($750,000) the lawyers obtained through the alleged appeal.

The Texas Supreme Court refused to decide the fiduciary duty issues in this case. See Lopez 2000 WL 758457. The Supreme Court
found that the defendants did not breach the fee contract with their clients. Since the breach of contract claim was dismissed, the Court held that the breach of fiduciary duty claim should also be dismissed. \(^{13}\) The Court also failed to rule on whether or not collecting an excessive fee would constitute a breach of fiduciary duty, and said, “[w]hether or not these theories have merit, they are not before us.” \(^{13}\)

A notable case following Arce  is Jackson Law Office, P.C. v. Chappell, 2000 WL 764202 (Tex. App.—Tyler May 31, 2000). The trial court used fee forfeiture to reduce damages awarded to a law firm. In Chappell, a law firm sued its client for refusal to pay fees and the client filed a counter-claim alleging breach of fiduciary duty and fee forfeiture. \(^{13}\) at 764203. The jury awarded the law firm damages, but also found that the firm had breached its fiduciary duty to the client. Although the jury did not award damages to the client, the trial court reduced the fees owed by $5,000, citing Arce as precedent that no damages were required for fee forfeiture. \(^{13}\) In summary, fee forfeiture was used as a type of remittur.

C. Fraud

An attorney may be liable for fraud or fraudulent concealment to either clients or non-clients. Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ); Hennigan v. Harris County, 593 S.W.2d 380, 383 (Tex. Civ. App.—Waco 1979, writ ref’d n.r.e.). The elements of fraud are: (1) misrepresentation of a material fact; (2) with intent to induce action or inaction; (3) reliance upon the misrepresentation by the plaintiff; and (4) resulting damage. Likover, 696 S.W.2d at 472; Hennigan, 593 S.W.2d at 383. Privity is not required for a third party to maintain a fraud action against an attorney. Likover, 696 S.W.2d at 472; see also II.D (1), supra.

D. Texas Deceptive Trade Practices – Consumer Protection Act (“DTPA”)

1. DTPA Applicable to Attorneys

The DTPA may be applied to attorneys. Lucas v. Nesbitt, 653 S.W.2d 883, 886 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.); Barnard v. Meconn, 650 S.W.2d 123, 125 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.); DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.), 612 S.W.2d 924 (Tex. 1981). In DeBakey, 605 S.W.2d at 633, the court held the DTPA applied to the purchase or acquisition of legal services. The court reasoned that an attorney sells legal services and the client purchases them. Therefore, an attorney’s client is a “consumer” under the DTPA.

2. Consumer Status

“Consumer” status establishes the requisite standing to bring a DTPA action. To establish “consumer” status under the DTPA, plaintiff has the burden of showing: (1) plaintiff acquired goods or services by purchase or lease, and (2) the goods or services purchased or leased form the basis of the complaint. Marshall v. Quinn-L Equities, Inc., 704 F.Supp. at 1393 (citing Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 539 (Tex. 1981)).

In determining the “consumer” status of third parties, Texas courts have split. One Texas court has interpreted “consumer” to include a third party if the transaction was consummated for the benefit of the third party. Parker v. Carnahan, 772 S.W.2d 151, 158-59 (Tex. App.—Texarkana 1989, no writ).

Other Texas courts have held that third parties do not qualify as DTPA “consumers.” See Roberts v. Burkett, 802 S.W.2d 42, 47-8 (Tex. App.—Corpus Christi 1990, no writ) (court denied “consumer” status because no purchase of legal services actually occurred, although legal services were sought and acquired gratuitously); Fielder v. Abel, 680 S.W.2d 655, 657 (Tex. App.—Austin 1984, no writ); First Mun. Leasing Corp. v. Bankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d
410, 417 (Tex. App.—Dallas 1983, writ ref’d n.r.e.).

3. DTPA Violations Applicable to Legal Services
   A plaintiff may recover under the DTPA if he proves the attorney: (1) committed a laundry list violation, (2) breached an express warranty, or (3) committed an unconscionable act. A plaintiff may not recover under the DTPA for breach of an implied warranty. Willis v. Maverick, 760 S.W.2d 642, 647 (Tex. 1988); Dyer v. Schafer, Gilliland, David, McCollum & Ashley, Inc., 779 S.W.2d 474, 479 (Tex. App.—El Paso 1989, writ denied).

4. DTPA Causation
   Latham v. Castillo, 972 S.W.2d 66 (Tex. 1998), is the Texas Supreme Court’s latest application of the DTPA to attorney misconduct. In the case, there was evidence that attorney Latham affirmatively misrepresented to his clients, the Castillos, that he had filed a medical malpractice claim when in fact he had not. The Castillos offered no evidence that they would have prevailed in their medical malpractice suit against the hospital had it been brought properly by Latham. Id. at 67.

   The Court held that Latham’s affirmative misrepresentations caused the Castillos to lose the opportunity to prosecute their claim against the hospital. Because this was “unconscionable conduct” that resulted in unfairness to the consumer, the Castillos were able to bring their suit under the DTPA. Id. at 67-69 (noting that the resulting unfairness must be “glaringly noticeable, flagrant, complete, and unmitigated”). Under the statute, the Castillos were not required to prove that they would have won the underlying medical malpractice action to prevail in their DTPA cause of action against Latham. Id. at 69. This is in contrast to a legal malpractice claim, in which the client would have to prove the “case within a case”, i.e., that the client would have won the underlying suit but for attorney malpractice. Finally, the Court held that the Castillos did not have to first prove that they have suffered economic damages to recover mental anguish damages. Justice Owen, joined by Justices Gonzalez, Hecht, and Enoch, concurred and dissented, concluding that because the Castillos did not prove that they had a meritorious claim against the hospital, the Castillos presented no evidence of unconscionable action by Latham, and no evidence of actual damages. Id. at 72 (Owen, J., concurring in part, dissenting in part).

E. Breach Of Contract
   In the past, Plaintiffs have attempted to take advantage of the four-year period of limitations applicable to breach of contract actions by framing their legal malpractice claim as a breach of contract. The Texas courts, however, have treated such breach of contract claims as tort claims. See Willis v. Maverick, 760 S.W.2d 642, 647 (Tex. 1988); American Medical Electronics v. Korn, 819 S.W.2d 573, 576 (Tex. App.—Dallas 1991, writ denied); Sledge v. Allsup, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ); Woodburn v. Turley, 625 F.2d at 589 (5th Cir. 1980). Now that it is clear that breach of fiduciary duty is a four year statute of limitations, there is less need for plaintiffs to plead a contract cause of action. TEX. CIV. PRAC. & REM. CODE § 16.004(a)(5).

F. Conspiracy
   An attorney may be liable for conspiracy. Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ); Bourland v. State, 528 S.W.2d 350, 353-57 (Tex. Civ. App.—Austin 1975, writ ref’d n.r.e.). To recover against an attorney for conspiracy, the plaintiff must show that: (1) the attorney knew the object and purpose of the conspiracy; (2) there was an understanding or agreement to inflict a wrong or injury; (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. Likover, 696 S.W.2d at 472. Nonetheless, privity is not required to bring a conspiracy cause of action. Id.
G. Professional Misconduct

Paragraph 15 of the Preamble to the Texas Disciplinary Rules Of Professional Conduct provides: “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 . . . . [N]othing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.” Texas Disciplinary Rules Of Professional Conduct, preamble, ¶15 (1989).

Professional misconduct does not give rise to a private cause of action. Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc., 779 S.W.2d 474, 479 (Tex. App.—El Paso 1989, writ denied); Blanton v. Morgan, 681 S.W.2d 876, 879 (Tex. App.—El Paso 1984, writ ref’d n.r.e.).

Texas courts do, however, use the disciplinary rules as standards of conduct for attorneys in legal malpractice actions. See e.g., Avila v. Havana Painting Co., Inc., 761 S.W.2d 398, 400 (Tex. App.—Houston [14th Dist.] 1988, writ denied); Blanton v. Morgan, 681 S.W.2d 876, 879 (Tex. App.—El Paso 1984, writ ref’d n.r.e.).

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H. Frivolous Lawsuits And Pleadings

A party or his attorney may be liable for attorneys’ fees incurred by an adversary in defending against certain frivolous pleadings and lawsuits: (1) under the DTPA, Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 637 (Tex. 1989); (2) under Texas Rules of Civil Procedure 13; (3) under Texas Civil Practice & Remedies Code §9.011 (Vernon 1987); and (4) under Federal Rules of Civil Procedure 11, Thomas v. Capitol Security Services, Inc., 836 F.2d 866, 876 (5th Cir. 1988).

I. Collection

1. Debt Collection

An attorney may be liable for violating the Federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692a-1692o (1982), and/or the Texas Debt Collection Act. TEX. REV. CIV. STAT. ANN. arts. 5069-11.01 – 5069-11.11 (Vernon 1987). To prevail on an unfair debt collection action under the federal or Texas statutes, however, plaintiff must prove the attorney is a “debt collector,” as defined in the applicable statute. Cathermen v. First State Bank of Smithville, 796 S.W.2d 299, 302 (Tex. App.—Austin 1990, no writ).

2. Retention of Client’s Money

Texas Government Code §82.063 provides a statutory right for a client to recover on demand money an attorney receives or collects on the client’s behalf. Tex. Gov’t Code Ann. §82.063 (Vernon 1988); see also Avila v. Havana Painting Co., 761 S.W.2d 398, 400-01 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

J. Federal And State Securities Law


K. The Attorney-Client Privilege When Suing A Client for Unpaid Fees

In a recent short opinion, the Texas Supreme Court indicated that the attorney-client privilege applicable to attorney fee statements remains even after the attorney sues the client for nonpayment of legal fees. Judwin Properties, Inc. v. Griggs & Harrison, 43 Tex. Sup. Ct. J. 289, 290 (Jan. 6, 2000). In Judwin, a law firm sued its client for unpaid attorneys’
fees. The law firm attached the firm’s unpaid fee statement to the firm’s petition. The client then counterclaimed for negligent disclosure of the information in the fee bills. The client claimed the fee bills were protected under the attorney-client privilege.

The trial court granted the lawyers summary judgment. The Court of Appeals affirmed the lawyers’ summary judgment stating:

[The client] did not dispute that the fee statements were related to the issue of nonpayment. Rule 503(d)(3) [the attorney-client privilege evidence rule] says that the attorney-client privilege does not apply to evidence related to a breach issue between the lawyer and client. The lack of privilege favors the finding that [the attorney] had no duty to withhold the information. Tx. R. Ev. 503(d)(3). Accordingly, by citing rule 503(d)(3), [the lawyer] conclusively disproved the duty element of [the client’s] claim and was entitled to summary judgment.


The client then appealed to the Texas Supreme Court. The Texas Supreme Court denied the client’s petition for review. In denying the client’s petition for review, the court stated:

In denying this petition for review, the court disproves of this language. The petition for review is denied.

Judwin Properties, Inc. v. Griggs & Harrison, 43 Tex. Sup. Ct. J. 289, 290 (Jan. 6, 2000)(emphasis added). Thus it appears that the Supreme Court believes that, even after an attorney sues a client for unpaid fees, the attorney must be sensitive to preserve the attorney-client privilege.

V. HOW TO AVOID BEING SUED
There is no one way to avoid being sued. Below are simple suggestions that may help.

A. Be careful who you represent.
Do not take a client if:
• the monetary payoff is minimal compared to the effort; these are matters you will tend to neglect.
• the representation is in a complex area where you do not have expertise, and it will be difficult to gain the expertise.
• the new client has already gone through many attorneys before finding you. Generally, your brothers and sisters in the bar are not as bad as your new client wants you to believe. Chances are if your client is unhappy with them, he or she will be unhappy with you.

B. Know who your client is.
You can become someone’s attorney based upon a person’s expectation in light of all the surrounding circumstances. If you have any reason to believe a non-client might claim you are their lawyer, write and tell them you are not. This comes up frequently when an attorney is representing a closely-held corporation or a partnership. The officers and partners may assume the lawyer is representing them as well as the entity. The lawyer is not. The lawyer’s primary allegiance is to the entity, not to its...
partners, directors, officers, or employees. Rule of Conduct 1.12(a).

C. Conflicts are bad news.

The State Bar has identified the ten conflicts listed below as the most common sources of disciplinary complaints. All can lead to malpractice suits.

- Representing both sides in a supposedly uncontested divorce.
- Representing co-defendants in a criminal case.
- Representing multiple heirs to an estate.
- Not having a clear idea of who your client is (for example, the corporation that retained you, or its officers)
- Representing both an organization and its principles.
- Providing free legal service to charitable boards or organizations where your own interests are involved.
- Entering into business relationships with your clients. This can be where: you serve on the client’s board of directors, you receive loans from the client, you go into business with the client, or you take an interest in a business as a legal fee. These activities are not absolutely prohibited, but they may be claimed to be as presumptive fraud. None of these business arrangements should ever be entered into without urging your client in writing to obtain independent legal advice.
- Having a sexual relationship with a client.
- Committing malpractice and not telling the client.
- Not terminating an attorney-client relationship once a conflict develops.
D. Fees.

1. Don’ts:
   - lowball your fees;
   - put disclaimers of liability in your fee contract;
   - insist on a nonrefundable retainer. These are not absolutely prohibited. They can be interpreted as being paid for work you may not do. This is prohibited.

2. Do’s:
   - get paid up front for some of your work;
   - clearly state how fees and expenses will be computed;
   - clearly spell out the scope of representation.

E. Return calls and report activities.

F. Calendar/Calendar/Calendar.

G. What to do if you are fired or withdraw.
   - your file is the client’s; not yours. When the client asks for the file, copy what you need and give the file to the client. Do not bill the client for the copying.
   - make sure your former client is protected.
   - don’t sue on unpaid fees. The exception is if you are owed a lot of money, and you do not mind being sued by your former client, because you will be.

H. Be aware of your partners’ problems.
  Lawyers do not like to evaluate and do peer review of their fellow partners. It is uncomfortable. See, Are Law Firm Partners Islands Unto Themselves?, 10 GEO. J. LEGAL ETHICS 271 (1996). Unfortunately, the majority of claims against firms relate to the conduct of their principals. According to American Bar Association statistics, attorneys with ten or more years of legal experience generate 66% of all malpractice claims, ABA Standing Committee on Lawyer’s Professional Liability, The Lawyers Desk Guide to Legal Malpractice R 31 (1992). Also, unfortunately, being a limited liability partnership does not always guarantee that a partner has no personal liability for the acts of another partner. Seeking Shelter in the Minefield of Unintended Consequences – The Traps of Limited Liability Law Firms, 54 WASH. & LEE L. REV. 717, (1997) and Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships, 39 S. TEX. L. REV. 399 (1998). Realizing the above, a firm needs to encourage partners to share problems. This is easier said than done.