Table of Contents

I. INTRODUCTION ................................................................................................................ 1
   A. Scope Of This Article ................................................................................................. 1
   B. Authors’ Perspective ................................................................................................. 1

II. TRADITIONAL VIEW OF THE PRIVITY DOCTRINE ............................................. 1
   A. Strict Privity .............................................................................................................. 1
      1. Application of the Privity Doctrine in Estate Planning and Will Drafting Context . 1
   B. Trend: Relaxing the Privity Barrier ......................................................................... 3
      1. Excess Insurance Carriers .................................................................................... 3
      2. Implied Contracts And Duty to Inform Non-Clients That The Attorney
         Does Not Represent Them, .................................................................................. 3
         a. Implied Contracts ............................................................................................... 3
         b. Duty to Inform Clients That The Attorney Does Not Represent Them .......... 4
      3. Fraud, Civil Conspiracy, And Intentional Torts .................................................. 4

III. NEGLIGENT MISREPRESENTATION ..................................................................... 5
   A. Legal Malpractice vs. Negligent Misrepresentation ............................................. 5
      1. Legal Malpractice ................................................................................................... 5
         a. Legal Malpractice Is Governed By Negligence Principles ......................... 5
         b. A Legal Malpractice Action Requires Privity of Contract ....................... 5
      2. Negligent Misrepresentation ............................................................................... 6
         a. Under RESTATEMENT (SECOND) OF TORTS § 552 ......................... 6
         b. Negligent Misrepresentation and Privity ................................................. 7
   B. Negligent Misrepresentation as a Viable Theory of Recovery ............................ 9
      1. Erosion of Privity in Other Professions ............................................................... 9
      2. Are Attorneys Any Different? ............................................................................ 9

IV. THE TEXAS DECEPTIVE TRADE PRACTICES ACT ........................................... 9
   A. Lawyers Can Be Liable For Deceptive Trade Practices .................................... 9
   B. Lawyers’ Clients Are Consumers; Or Are They? ............................................... 10
   C. The 1995 Amendment to the DTPA Creates Partial Exemption for
      Professional Services ............................................................................................. 11

V. CONCLUSION ............................................................................................................. 12
SIDESTEPPING PRIVITY: NEGLIGENT MISREPRESENTATION AND DTPA LIABILITY FOR LAWYERS

I. INTRODUCTION

A. Scope Of This Article

This article focuses on the questions of whether and when attorneys may be held liable to non-clients or third parties for acts or omissions which occur in the course of the attorneys’ rendering of professional legal services. To address this issue, we will start by briefly reviewing the privity doctrine and its limits. We will then examine two ways in which some Texas courts have held that the privity barrier may be ignored or overcome, and lawyers may be liable to non-clients.

First, the tort of negligent misrepresentation has developed and been applied as a theory of recovery by a person or entity not in privity of contract with a lawyer who seeks redress for the adverse results of reasonable reliance on representations by the lawyer.

Second, the Texas Deceptive Trade Practices Act (DTPA) provides a well-established basis for an attorney’s liability for deceptive acts or practices or unconscionable conduct in the course of providing legal services, although its scope of application to lawyers has been narrowed by recent amendments. There is substantial authority in Texas for upholding the liability of attorneys to non-client third parties under the DTPA, because privity of contract is not a required element of a DTPA claim.

B. Authors’ Perspective

The authors of this article practice almost exclusively on behalf of plaintiffs in litigation and frequently are involved in legal malpractice claims and other causes of action against attorneys and law firms. This may create a bias on our part in favor of a broader view of potential bases of liability for lawyers, but we will endeavor to describe the law as it is. However, to the extent that we are not able to resist editorializing in this article, we will generally follow our view that the grounds for recovery against any group of tortfeasors, including lawyers, should not be so categorically restrained as to bar wrongfully injured or rightfully aggrieved persons from a remedy for the harm done to them by such persons.

II. TRADITIONAL VIEW OF THE PRIVITY DOCTRINE

A. Strict Privity

Historically, attorneys in Texas have enjoyed the benefits of the doctrine of “privity of contract” to protect them from potential liability in professional negligence or legal malpractice claims brought by persons outside the attorney-client relationship. Although legal malpractice claims are most often based on professional negligence or breach of fiduciary duty and thus usually sound in tort, the general rule has been that attorneys have no legal duty, and therefore no possible tort liability, to persons with whom they have not had an attorney-client relationship -- a relationship which is contractual in nature. As Texas courts have stated, “privity,” as a legal basis for professional responsibility, “is the contractual connection or relationship existing between attorney and client.” Wright v. Gundersen, 956 S.W.2d 43, 48 (Tex.App.--Hous. [14 Dist.] 1996, no writ), citing Thompson v. Vinson & Elkins, 859 S.W.2d 581, 582 (Tex.App.--Houston 1st Dist.] 1987, writ ref’d n.r.e.).

Notwithstanding numerous inroads on the strict application of the privity doctrine in modern tort law, including relaxation of the privity requirement in certain legal malpractice contexts in other jurisdictions, the Texas Supreme Court has kept a tight hold on the privity doctrine in recent years with respect to claims against lawyers.

1. Application of the Privity Doctrine in Estate Planning and Will Drafting Context

Texas courts have long held, with few exceptions, that the duties that arise from the relationship of attorney and client are owed to the client only, and not to third parties. The corollary, of course, is that non-clients, or third parties to the attorney-client relationship, can not bring “legal malpractice” or breach-of-fiduciary-duty claims against lawyers, because there is no legal duty owed in such situations. This “no duty” aspect of the privity doctrine (i.e., lack of privity of contract means no legal duty) is often invoked as a defense to alleged attorney or law firm liability, and the doctrine has been applied to bar actions against lawyers in a number of situations.
Among the most notable of these “no duty” situations in Texas concerns estate beneficiaries who may suffer losses or damages as a result of a negligently drafted trust or will. In *Barcelo v. Elliott*, 923 S.W.2d 575, 578 (Tex. 1996), the Texas Supreme Court, taking the distinctly minority view among the highest state courts around the country, affirmed the strict application of the privity rule in the estate planning and will drafting context, thereby barring wronged beneficiaries from any remedy for the negligence of the decedent’s attorney.

In *Barcelo*, the decedent’s grandchildren were the remainder beneficiaries under an inter vivos trust which had been declared invalid and unenforceable by the probate court. They sued the lawyer who had drafted the trust for malpractice. The plaintiffs alleged that the lawyer acted negligently in (1) providing in the trust agreement that it would not be effective until signed by the trustee, and then failing to obtain the executed document, (2) drafting the will so as to provide that the residuary estate would pass into the trust, and then providing in the trust agreement that it would terminate upon Mrs. Barcelo’s death, leaving her residuary to pass by intestacy to her grandchildren, and (3) failing to fund the trust.


The *Barcelo* court then examined case law in other states, acknowledging that the majority of states addressing this issue have relaxed the privity barrier in the estate planning context. *Barcelo* at 577. Those courts have done so largely on the grounds that if the beneficiaries are not allowed to sue and recover for the damages caused by negligent legal work performed for the testator, then their interests can never be properly protected and the negligent lawyer can escape with no accountability. Some states that have adopted such a view have allowed a broad cause of action for legal malpractice by any persons claiming to be intended beneficiaries whose interests are impaired by the alleged negligence, while other states have limited the class of permissible plaintiffs to specifically identified beneficiaries. *Id.* at 577-78.

The *Barcelo* majority refused to adopt or allow any such cause of action in favor of beneficiaries, expressing concern that lawyers for testators would be unfairly subjected to lawsuits by heirs “who simply did not receive what they believed to be their due share under the will or trust.” *Id.* at 578. Even rejecting the more limited cause of action allowed by some states, the *Barcelo* majority feared that the policy rationales supporting the privity barrier would be thwarted by such claims, that an attorney’s ability to render independent advice to a testator could too easily be second-guessed after the testator’s death by the persons named as or claiming to be beneficiaries.

The *Barcelo* majority also theorized that allowing estate beneficiaries to sue for alleged malpractice committed by the attorney for a testator would create undue problems of proof. The existence of an unexecuted document, for example, may or may not reflect the testator’s intent; the testator may have postponed execution of a will because of second thoughts regarding the will’s distribution scheme, and allowing a claim by purported beneficiaries against the attorney who drafted the will could create unwarranted liability for the lawyer if the testator unexpectedly died. *Id.* at 578. Given such possible scenarios, the *Barcelo* majority decided 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." *Id.* at 578 (emphasis added).

In a strong dissenting opinion, Justice Cornyn, joined by Justice Abbott, asserted that "the Court unjustifiably insulates an entire class of negligent lawyers from the consequences of their wrongdoing." The dissent stated that "[b]y refusing to recognize a lawyer's duty to beneficiaries of a will, the Court embraces a rule recognized in only four states, while simultaneously rejecting the rule in an overwhelming majority of cases." *Id.* at 579.

The dissent in *Barcelo* pointed out that in a negligence action, including one for legal malpractice, the threshold question presented is whether the defendant owes the plaintiff a legal duty. Determining whether a duty exists depends on several factors, including risk, foreseeability, and likelihood of injury, weighed against other factors, such as the social utility of the actor's conduct.

In the estate planning situation, the dissent in *Barcelo* viewed the foreseeability of harm as weighing heavily in favor of recognizing an estate or trust lawyer’s duty to intended beneficiaries. *Id.* at 580. Justice Cornyn refuted, one by one, each of the majority’s hypothetical problems with allowing a cause of action to beneficiaries. *Id.* at 580-81.
Writing a separate dissenting opinion in *Barcelo*., Justice Spector would have recognized a limited cause of action for beneficiaries who are specifically identified on the face of an invalid will or trust to assert a claim for injury caused by the negligence of the attorney for the testator. Id. at 582.

2. Application of the Privity Doctrine in Other Contexts

Other cases illustrating situations in which the privity barrier has been applied to bar legal malpractice claims include Gamboa v. Shaw, 956 S.W.2d 662 (Tex. App. -- San Antonio 1997, no pet.) (corporate shareholder not in privity with corporation's lawyers); Draper v. Garcia, 793 S.W.2d 296 (Tex. App. -- Houston [14th Dist.] 1990, no writ) (insurer's recording agent lacked privity with insured's attorney); Bell v. Manning, 613 S.W.2d 335 (Tex. Civ. App. -- Tyler 1981, writ ref'd n.r.e.) (non-clients who relied on instruction relayed by lawyer's secretary lacked privity with lawyer); Martin v. Treviño, 578 S.W.2d 763 (Tex. Civ. App. -- Corpus Christi 1978, writ ref'd n.r.e.) (doctor who prevailed in medical malpractice suit lacked privity to sue plaintiff's attorney for negligence in filing alleged frivolous lawsuit).

B. Trend: Relaxing the Privity Barrier

Following the general trend in a majority of jurisdictions in the United States, some Texas courts have limited the strict privity doctrine in certain contexts or under certain circumstances. A brief summary of these exceptions follows:

1. Excess Insurance Carriers

The Texas Supreme Court in *American Centennial Ins. Co. v. Canal Ins.*, 843 S.W.2d 480 (Tex. 1992), effectively recognized an exception to the rule of strict privity of contract in upholding the duty of a primary insurance carrier's attorney to an excess liability carrier. Several Texas appellate courts apparently have read *American Centennial* to stand for such an exception. See, e.g., *Oliver v. West*, 908 S.W.2d 629, 631 (Tex.App. -- Eastland 1995, writ denied); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d. 313, 315 (Tex. App. -- San Antonio 1994, writ refused).

In *American Centennial* the excess insurer urged the Court to recognize a direct duty running from the primary to the excess insurer. The Court declined to permit a direct action by the excess carrier against the primary carrier. Instead, the Court held that the excess carrier could bring an equitable subrogation action against both the primary insurer and the defense counsel who represented the primary carrier.

In its discussion of the defense counsel's liability, the Court recognized the general privity rule. The Court reasoned, however, that permitting the excess insurer to bring an equitable subrogation action against the primary carriers and their attorneys would not interfere with the relationship between the attorney and the client nor result in additional conflicts of interest. *American Centennial* at 484. The Court stressed that in that case the excess insurers did not predicate liability on tactical decisions by trial counsel implicating conflicting interests between the insured and the insurer, and the Court noted these interests might diverge under circumstances not found in this case.

Therefore, the Court carved out a limited exception to the general rule of privity in the context of a primary carrier's attorney's liability to an excess insurer in an equitable subrogation action. See also *Stonewall Surplus Ins. Co. v. Drabek*, 835 S.W.2d 708 (Tex.App.--Corpus Christi 1992, writ denied) (en banc).

2. Implied Contracts And Duty to Inform Non-Clients That The Attorney Does Not Represent Them

There is a common, but mistaken, belief that absent a specific, express agreement to become a person's attorney, there can be no creation of an attorney-client relationship. Another often mistaken belief is that there must have been a payment of a fee, or at least an obligation to pay a fee for legal services, in order to hold an attorney liable for negligence. However, direct agreement and payment of fees are not the only indicia of an attorney-client relationship and concomitant responsibilities. The duties and liabilities of an attorney can arise not only by express agreement to represent someone, but also by implication of an attorney-client relationship from the parties' actions. See, *Banc One Capital Partners Corporation v. Kneipper*, 67 F.3d 1187, 1198 (5th Cir. 1995); *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App.--Texarkana 1989, writ denied).

a. Implied Contracts

Though not an exception to privity, but rather a method of demonstrating privity, the concept of an "implied" contractual attorney-client relationship may be viewed as a loosening of the formal and traditional view of how such a relationship may be proven.

In *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex.App.--Corpus Christi 1991, writ denied), a decision reversing a summary judgment for an attorney who contended that he had not entered into an attorney-client relationship with the plaintiff, the court stated the rule in Texas for formation of an attorney-client relationship by implication:
An agreement to form an attorney-client relationship may be implied from the conduct of the parties. Moreover, the relationship does not depend upon the payment of a fee, but may exist even as a result of rendering services gratuitously.


The plaintiff in Perez v. Kirk & Carrigan sued the defendant attorney for fraud, breach of fiduciary duties, negligence, and DTPA violations, arising out of the attorney’s disclosure of an alleged confidential communication to law enforcement authorities, resulting in the plaintiff’s indictment in connection with a fatal bus crash. The attorney claimed that the statement was not made in an attorney-client relationship, that no fiduciary duty to the plaintiff existed, that the plaintiff was not a DTPA consumer, and that the statement’s disclosure caused the plaintiff no harm. The court of appeals reversed the summary judgment on all those counts, holding that "as a matter of law, the attorney-client relationship existed, that plaintiff was a DTPA consumer, and that the statement’s disclosure caused the plaintiff reasonable reliance on the attorney’s advice or counsel. See, e.g., Parker v. Carnahan, 772 S.W.2d 151, 157 (Tex. App.--Texarkana 1989, writ denied). Wright v. Gundersen, 956 S.W.2d 43, 48 (Tex. App.--Hous. [14 Dist.] 1996, no writ); Querner v. Rindfuss, 966 S.W.2d 166 (Tex. App.--San Antonio 1998, pet. denied); Burnap v. Linnartz, 914 S.W.2d 142, 148 (Tex. App.--San Antonio 1995, writ denied); Kotzur v. Kelly, 791 S.W.2d 254, 257 (Tex. App.--Corpus Christi 1990, no writ).

This independent cause of action for negligent failure to warn is now sometimes referred to by legal malpractice practitioners as a “Carnahan claim” or as a claim under the “Carnahan doctrine.”

3. Fraud, Civil Conspiracy, And Intentional Torts

While the tort of negligent misrepresentation and the applicability of the DTPA are the primary focus of this paper, it is important to remember that fraud claims can also be brought against attorneys as separate causes of action distinguishable from “legal malpractice” or professional negligence claims. See Jampole v. Matthews, 857 S.W.2d 57 (Tex. App.--Houston [1st Dist.] 1993, writ denied); see also, e.g., Sullivan v. Bickel & Brewer, 943 S.W.2d 477 (Tex. App.--Dallas 1995, writ denied), and Estate of...
Sidestepping Privity

Degley v. Vega, 797 S.W.2d 299 (Tex. App. -- Corpus Christi 1990, no writ); Querner v. Rindfuss, 966 S.W.2d 661, 666, (Tex.App. -- San Antonio 1998, pet. denied). In all of these cases, the appellate courts held that the clients had stated a cause of action against their attorneys for fraud, a cause of action which is subject to the four-year statute of limitations. Sullivan, 943 S.W.2d at 483; Jampole, 857 S.W.2d at 62; Vega, 797 S.W.2d at 303. But cf. Sledge v. Alsup, 759 S.W.2d 1 (Tex. App. -- El Paso 1988).

Lack of privity will not be a defense in the case of a lawyer's independent, intentional tort such as fraud directed against a third party. See, e.g., Savings Bank v. Ward, 100 U.S. 195, 205-06 (1879) (attorney not liable to parties not in privity of contract unless fraud or collusion could be shown); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App. -- Houston [1st. Dist.] 1985, no writ) (attorney not liable for breach of any duty to third party, but can be liable for conspiracy to defraud), Hennigan v. Harris County, 593 S.W.2d 380 (Tex. Civ. App. -- Waco 1979, writ ref'd n.r.e.) (attorney who had settled underlying dispute with third party held to have committed actionable fraud against adversary); Bernstein v. Portland Savings and Loan Ass'n., 850 S.W.2d 694, 701 (Tex.App. -- Corpus Christi 1993, writ denied).

III. NEGLIGENT MISREPRESENTATION

A. Legal Malpractice vs. Negligent Misrepresentation

Texas law presently remains unsettled as to whether the tort of negligent misrepresentation is a viable theory of recovery against lawyers separate and apart from the cause of action for legal malpractice and its requirement of privity of contract. The distinctions between legal malpractice and negligent misrepresentation, and the current state of the law regarding both, are discussed below.

1. Legal Malpractice

   a. Legal Malpractice Is Governed By Negligence Principles

   Although some states allow a cause of action for legal malpractice to arise in contract, or both contract and tort, most courts, including those in Texas, have treated a “legal malpractice” claim as primarily, if not exclusively, a tort action founded in negligence. See Woodburn v. Turley, 625 F.2d 589 (5th Cir. 1980), Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989). In Patterson & Wallace v. Frazer, 79 S.W. 1077 (Tex. Civ. App. 1904, no writ), 93 S.W. 146 (Tex. Civ. App. 1906), rev'd on other grounds, 100 Tex. 103 (1906), the Texas Supreme Court long ago held that in legal malpractice actions (at least those founded on professional negligence), the ordinary care-negligence standard is applicable and determinative of liability. Recently, in Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996), the Supreme Court reiterated that a legal malpractice action usually "sounds in tort and is governed by negligence principles." Id. at 577.

   Under the traditional Texas negligence standard, the plaintiff who alleges having an attorney-client relationship (privity) with the defendant lawyer has the burden to prove that the attorney owed a duty to the plaintiff as a client; that this duty was breached; that the breach was the proximate cause of the injury to the client; and that there were damages as a result of the breach. See generally Mallen & Levit, Legal Malpractice 657, at 811-12 (2 ed. 1981); W. Prosser, Handbook of the Law of Torts § 30 (4th ed. 1971). See also Vol. 3, Texas Pattern Jury Charges, PJC 60.01, which provides that: "Negligence,' when used with respect to [Defendant Lawyer], means failure to use ordinary care, that is, failing to do that which an attorney of ordinary prudence would have done under the same or similar circumstances, or doing that which an attorney of ordinary prudence would not have done under the same or similar circumstances." This is essentially the same definition as is used in all Texas professional negligence cases.

   b. A Legal Malpractice Action Requires Privity of Contract

   Absent a showing of privity of contract, an attorney in Texas generally owes no professional duty to a third party or non-client. See Banc One Capital Partners Corporation v. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1995). The professional negligence or legal malpractice liability of attorneys is thus limited to claims by those with whom the attorney was in privity, i.e., clients. In upholding this strict privity requirement in Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996), the Texas Supreme Court cited Savings Bank v. Ward, 100 U.S. 195, 200, 25 L.Ed. 621 (1879), for the common law proposition that "an attorney owes a duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligent representation of the client." Barcelo, at 577.

   Recently, the Fifth Circuit Court of Appeals, in First National Bank of Durant v. Trans Terra Corp. Int'l. ___ F.3d ___ (5th Cir. 1998), considered whether a lender could pursue claims under a legal malpractice cause of action and/or a negligent misrepresentation theory against lawyers who, in the course of representing a borrower, submitted an inaccurate title opinion to the lender. The Fifth Circuit
agreed with the district court that the attorneys were entitled to judgment as a matter of law on the legal malpractice claim because of a lack of privity. The Court acknowledged that "Texas law is clear that a legal malpractice claim requires proof of an attorney-client relationship between the plaintiff and the defendant attorney." Id. at ____. The majority opinion by Judge Thomas Reavley concluded that "[t]he Texas Supreme Court's reasons for requiring attorney-client privity in legal malpractice cases do not compel a privity requirement in a negligent misrepresentation case such as this one." Id. at ____. In a dissenting opinion, Judge Edith Jones expressed "some sympathy" with the result reached by the majority, but she asserted her reservations and doubts that the Texas Supreme Court will extend to lawyers potential liability for negligent misrepresentation. Durant at ____. The district court granted a post-verdict motion for judgment in favor of defendants Lane and the law firm of Lane & Douglass. In First National Bank of Durant v. Trans Terra Corporation International, ___ F.3d ___ (5th Cir. 1998), the Fifth Circuit held that the plaintiff bank could not bring a legal malpractice cause of action because no attorney-client relationship existed between the bank and the defendant attorney. But, applying a common law negligent misrepresentation cause of action under § 552 of the RESTATEMENT (SECOND) OF TORTS (1977), the Fifth Circuit held that the facts supported a finding of liability even absent an attorney-client relationship. Durant involved a lender bank's lawsuit against an attorney who, in the course of representing the borrower, submitted an inaccurate title opinion to the bank. The borrower Epps was the owner of Trans Terra Corporation, which owned interests in six oil and gas wells in Roberts County, Texas. The borrower's attorney, Malcolm Douglass, had prepared numerous title opinions on the wells purporting to show the ownership interests of Trans Terra. In preparing the title opinions, the attorney did not properly examine the courthouse records for the documents affecting the title, but instead relied on information provided by the borrower and a landman. The First National Bank of Durant agreed to loan Trans Terra $1.5 million, contingent upon the bank's receiving a current title opinion on the property. The attorney's title opinion was addressed to and forwarded to the bank, and stated that the attorney rendered the title opinion "solely and exclusively for your benefit." It also stated that the attorney had examined the deed records of the courthouse to the date of the opinion, when in fact, the attorney had not examined the records nor received any new information from the landman. Trans Terra defaulted on the loan and the bank proceeded to foreclose. The bank learned that the title opinion prepared for the loan to Trans Terra and earlier title opinions were incorrect and that Trans Terra's, and consequently the bank's, interests in the oil wells were substantially smaller than those represented in the title opinion. The bank brought suit for recovery of damages against Trans Terra, Epps, Douglass, Douglass's law partner, Don Lane, and the law firm of Lane & Douglass. In holding that the facts supported a finding of liability against the defendant lawyer despite the absence of privity, the Durant majority analyzed the elements of a negligent misrepresentation claim recognized by the Texas Supreme Court in Federal Land Bank Association of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991). Under § 552: 

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of
others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3) [not pertinent here], the liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

The Fifth Circuit in Durant observed that the court in Sloane had expressly agreed with the Restatement definition of negligent misrepresentation, and that Sloane also reformulated the elements for this cause of action in Texas: (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies 'false information' for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. First National Bank of Durant, ___ F.3d at ___.

Regarding the case before it, the Durant court held that "[u]nder either formulation of the elements of a negligent misrepresentation claim, the evidence supports a finding of liability against [the defendant attorney]." Durant, at .

b. Negligent Misrepresentation and Privity

Apparently due in part to the Fifth Circuit’s decision in Durant, the Texas Supreme Court has indicated that it may soon decide the issue of whether lack of privity serves as a bar to a non-client’s negligent misrepresentation claims against an attorney.

The Fifth Circuit decided Durant on May 27, 1998. In reaching its conclusion that lack of privity between the plaintiff and the defendant attorney does not bar negligent misrepresentation claim under § 552 of the RESTATEMENT, the Durant majority relied upon the reasoning of the Texarkana Court of Appeals in F. E. Appling Interests vs. McCamish, Martin, Brown & Loeffler, 953 S.W.2d 405 (Tex. App. -- Texarkana 1997, petition granted).

On April 14, 1998, shortly before Durant was decided, the Texas Supreme Court had denied review in Appling, which the Durant majority specifically noted, stating that Appling “is the latest authority from the Texas courts.” Durant at ___. However, on August 25, 1998, after the Fifth Circuit decided Durant, the Texas Supreme Court withdrew its order denying review in Appling and granted the petition for review. The issues on which the Supreme Court granted review are stated as follows:

1. Does an attorney owe a duty to a non-client that will support claims of negligence or negligent misrepresentation against the attorney when those claims arise out of the attorney’s professional services to his own client?

2. Does the absence of an attorney-client relationship (privity) serve as an absolute bar to a non-client’s negligence and negligent misrepresentation claims against an attorney?

3. May an adverse party bring a negligence or negligent misrepresentation cause of action against its opponent’s counsel?"

Because of the obvious and immediate pertinence of these issues to the topic of this paper, some further discussion of Appling is necessary.

In Appling, the plaintiff sued a savings association, VSA, under a lender liability theory. The parties worked toward a settlement, but the plaintiff was concerned that the settlement agreement would not be enforceable if VSA became insolvent and was taken over by the FSLIC. To complete the settlement, an attorney for the defendant law firm signed a settlement agreement in which the VSA and its counsel represented that the agreement had been approved by the VSA board of directors and otherwise met the requirements of 12 U.S.C. § 1823(e). Later, VSA did become insolvent, the FSLIC became the receiver, and a federal court held that the settlement agreement was unenforceable because it did not comply with § 1823(e).

After reviewing Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996), and other authorities, the court of appeals in Appling held that contractual privity between the plaintiff and the defendant attorney is not required if the elements of a § 552 negligent misrepresentation claim are otherwise met. Appling at 407-410.

The court in Appling posited a clear distinction between a legal malpractice claim and a negligent misrepresentation claim. The court reasoned that a negligent misrepresentation claim is not premised on the breach of a duty that a professional person owes his client or others in privity, but on an independent duty based on the attorney’s manifest awareness of the plaintiff's reliance on the representation and the
intention that the plaintiff so rely. Id. at 408. The court stated that "[t]he basis for a negligent misrepresentation claim is the relationship of trust created when an attorney makes representations to a third party in order to induce the third party's reliance." Id. The court believed that its holding did not conflict with the Supreme Court's ruling in Barcelo v. Elliott, because the plaintiffs in Barcelo "would have no negligent misrepresentation cause of action because the defendant never made a representation to them." Appling at 409.

The Appling court also distinguished two prior Texas appellate cases implicating § 552: First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagin and Stewart, 648 S.W.2d 410, 412-413 (Tex. App.--Dallas 1983, writ ref'd n.r.e.) and Bell v. Manning, 613 S.W.2d 335, 335-38 (Tex. Civ. App.--Tyler 1981, writ ref'd n.r.e.). After examining the facts and holdings of those two earlier cases, the Appling court stated that First Municipal and Bell had "failed to recognize that strict privity may not be required in a negligent misrepresentation cause of action." Appling at 410. The opinions in those cases, however, suggest that they did view privity as essential, albeit their views on that issue might be considered dicta in light of the decisions as a whole.

In First Municipal, for instance, the court applied the strict privity rule in a negligent misrepresentation case, but it also held that even absent a privity requirement, the evidence showed that the non-client could not recover for the alleged negligence because it did not rely upon the opinion of the attorneys. First Municipal at 413.

Similarly, in Bell the court recognized that other professionals, such as accountants and doctors, have been held liable for negligent misrepresentations to third parties not in privity, but the court nevertheless held that strict privity was required in any such cases involving attorneys. Bell at 338. But even though the court held that the defendant attorney could not be held liable to the plaintiff in the absence of privity, the court also stated that "we fail to see how the remarks made by [the attorney's secretary] could be classified as a negligent misrepresentation . . . ." Bell at 339.

The Fifth Circuit's majority opinion in Durant agreed with Appling's distinguishing of First Municipal and Bell. The Durant court also distinguished the holding in Thompson v. Vinson & Elkins, 859 S.W.2d 617, 623 (Tex. App.--Houston [1st Dist.] 1993, writ denied), in which the court rejected the application of a § 552 claim to lawyers. Although the Durant majority recognized that Appling was in conflict with these earlier state appellate court decisions, it was persuaded that the Texas Supreme Court would agree with Appling because

"[i]t is the latest authority from the Texas courts, and in our view is directly on point. The Texas Supreme Court denied review in Appling. The Appling court had the benefit of the Texas Supreme Court's decisions in Sloane and Barcelo, the most recent Texas Supreme Court decisions relevant to the issue presented, and discussed both cases. We further note that writing contrary to Appling in earlier Texas cases was not essential to the holdings in those cases." Durant at ___.

The dissenting opinion in Durant, while noting that "Judge Reavley's opinion is certainly not wrong, as it reflects a rule many other states have adopted," questioned whether the Texas Supreme Court would cut back on its bright-line requirement of privity in Barcelo to adopt the negligent misrepresentation tort recognized in Appling. See Durant at ___.

Although Barcelo's privity ruling specifically addressed the estate planning context only, both its majority opinion and its dissent pointed out that the Supreme Court in that case was refusing to adopt the position of the majority of other states which have allowed beneficiaries a cause of action for negligent estate planning or will drafting notwithstanding a lack of privity. See Barcelo at 577 (noting that the majority of other states have relaxed the privity barrier in the estate planning context), and at 579 (dissent notes that the Court "embraces a rule recognized in only four states, while . . . rejecting the rule in an overwhelming majority of jurisdictions").

It therefore remains to be seen whether Durant turns out to be a correct statement of Texas law on negligent misrepresentation claims against attorneys. That seems quite doubtful now that the Supreme Court has withdrawn its previous order denying a petition for review and has granted review in Appling on the issues presented.

B. Negligent Misrepresentation as a Viable Theory of Recovery

1. Erosion of Privity in Other Professions

The elements of the negligent misrepresentation cause of action set forth in § 552 of the RESTATEMENT have been applied in cases against other professional persons in Texas besides lawyers despite the lack of privity between the parties. See, e.g., Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408 (Tex. App. -- Dallas 1986, writ ref'd...
n.r.e.) (accountant); Cook Consultants v. Larson, 700 S.W.2d 231 (Tex. App. -- Dallas 1985, writ ref’d n.r.e.) (surveyor); Rosenthal v. Blum, 529 S.W.2d 102 (Tex. Civ. App. -- Waco 1975, writ ref’d n.r.e.) (physician); Shatter-proof Glass Corp. v. James, 466 S.W.2d 873 (Tex. Civ. App. -- Fort Worth 1971, writ ref’d n.r.e.) (accountant).

2. Are Attorneys Any Different?

The Texas Supreme Court seems likely to be more reluctant to set aside the privity requirement in negligent misrepresentation claims against attorneys than in actions against other professionals, even where the attorneys’ conduct may literally satisfy the elements of a cause of action under § 552 of the RESTATEMENT. Because the Supreme Court has recently been conservative in recognizing what it views as “expansive” causes of action generally, and particularly strict in maintaining the privity requirement for attorneys’ liability (other than for fraud and perhaps for some DTPA violations), even where most other jurisdictions have allowed a cause of action, see Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996), it appears at best uncertain that the Court would affirm the existence of a non-privity cause of action in F. E. Appling Interests vs. McCamish, Martin, Brown & Loeffler, 953 S.W.2d 405 (Tex. App. -- Texarkana 1997, petition granted). It is not clear whether a genuine, meaningful difference can be drawn between lawyers and other professionals as a basis for imposing a privity relationship of attorney and client as a prerequisite for liability for negligent misrepresentation only as to lawyers. Perhaps one can argue that the attorney-client relationship is more sacred and deserving of exclusive recognition and protection than other professional relationships, or perhaps one might even posit that lawyers are more vulnerable to false claims of misrepresentation by third parties to whom they owed no loyalty and were perhaps even adverse, and therefore need greater protection themselves than do other professionals. But the whole purpose of recognizing negligent misrepresentation as a basis for liability is to protect the interests of those who have reasonably and justifiably relied on false information conveyed by the defendant in the course of a business or transaction in which the defendant has a pecuniary interest. While the adversary nature of the legal system should certainly prevent persons to whom the attorney owes no obligation from suing an attorney for acting properly on behalf of his or her clients to the detriment of such persons, and should thus preclude claims by persons unjustifiably claiming reliance on the attorney, it is by no means clear that lawyers are materially different from other professionals in their obligations to prevent the careless dissemination of information to those who may justifiably be relying on the (mis)information.

Perhaps in reviewing the decision in Appling the Supreme Court will venture so far into the past as to do away entirely with the tort of negligent misrepresentation in Texas. That certainly seems a bit extreme, though not impossible. But whatever the outcome, one would certainly hope that the decision is not in any way motivated, even subconsciously, by an inclination to protect attorneys from liability just because they are attorneys instead of physicians, accountants, engineers, or other professionals.

A reversal of Appling might inevitably be perceived as special lawyer protection, even if there are rational grounds for such a decision. It would at least be inconsistent with the growing trend in the rest of the country toward relaxing the privity rule in certain contexts, which some Texas courts have signaled their willingness to join in order to reach an equitable result: to-wit, the Fifth Circuit in First National Bank of Durant v. Trans Terra Corporation International, ___ F.3d ___ (5th Cir. 1998); the Texas appellate courts in, e.g., Parker v. Carnahan, 772 S.W.2d 151, 157 (Tex. App.--Texarkana 1989, writ denied), and F. E. Appling Interests vs. McCamish, Martin, Brown & Loeffler, 953 S.W.2d 405 (Tex. App.--Texarkana 1997, petition granted); and even, in some circumstances, the Texas Supreme Court, e.g., American Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480 (Tex 1992). See also the dissenting opinions in Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996).

IV. THE TEXAS DECEPTIVE TRADE PRACTICES ACT

A. Lawyers Can Be Liable For Deceptive Trade Practices

Before the 1995 amendments to the DTPA, it had long been established that lawyers could be held liable under the DTPA for false, misleading, or deceptive acts or practices, and/or for committing an unconscionable act or course of conduct as defined by the statute. Tex. Bus. & Com. CODE § 17.46 and § 17.50. See, among other cases, DeBakey v. Staggs, 612 S.W.2d 924 (Tex. 1981); Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex.App. -- Houston [1st Dist.] 1993, writ denied); Sample v. Freeman, 873 S.W.2d 470 (Tex.App. -- Beaumont 1994, writ denied); Barnard v. Mecom, 650 S.W.2d 123 (Tex.App. -- Corpus Christi 1983, writ ref’d n.r.e.); Lucas v. Nesbitt, 653 S.W.2d 883 (Tex.App. -- Corpus Christi 1983, writ ref’d n.r.e.).
The Texas Supreme Court has recently reaffirmed that a DTPA claim can be maintained against an attorney for unconscionable conduct based on the attorney’s affirmative misrepresentation to a client. In Latham v. Castillo, 41 Tex.S.Ct.J. 994 (Tex. 1998), the Supreme Court reviewed the reversal by the court of appeals of a directed verdict on a DTPA unconscionability cause of action (among others) arising out of a lawyer’s failure to timely file a medical malpractice suit, and the lawyer’s representation to the clients that he had filed and was actively pursuing the lawsuit. In a 5-4 decision, the Supreme Court majority held that, accepting as true the clients’ claims that the lawyer had misrepresented what he had done, there was some evidence to support the claim that the conduct was unconscionable as defined by the DTPA, i.e., that the lawyer took advantage of the clients’ trust and lack of knowledge to a grossly unfair degree. Id. at 995.

The lawyer in Latham argued that the alleged DTPA cause of action was nothing more than “a dressed up legal malpractice claim” and that the plaintiffs had to present evidence that they would have won the medical malpractice case in order to recover. Id. The Supreme Court majority, however, held that the DTPA was intended to provide a remedy in addition to any common-law remedies, that it should be liberally construed toward that end, and that “[r]ecasting the [plaintiffs’] DTPA claim as merely a legal malpractice claim would subvert the Legislature’s clear purpose in enacting the DTPA -- to deter deceptive business practices.” Id. at 995-6. Because the plaintiffs had presented evidence of a deceptive act, it was not just a negligence or “legal malpractice” claim. As the Court put it: “It is the difference between negligent conduct and deceptive conduct.” Id. at 996. As a result of this distinction, “the DTPA does not require and the [plaintiffs] need not prove the ‘suit within a suit’ element when suing an attorney under the DTPA.” Id. The Court recognized that the deceptive conduct must still be a producing cause of damages to be actionable, but that “actual damages” under the DTPA includes mental anguish, and that there was some evidence that the plaintiffs had suffered a “high degree of mental pain and distress” to submit the claim to a jury. Id. at 996-7. (The majority affirmed the directed verdict as to the plaintiffs’ fraud and breach-of-contract claims because the plaintiffs presented no evidence of the type of economic damages necessary to support either claim.)

The Supreme Court’s four dissenters in Latham contended that the lawyer’s misrepresentation, by itself, was insufficient to constitute an unconscionable action under the DTPA; that proof of the viability of the plaintiffs’ underlying medical malpractice claim was a prerequisite to liability which was absent; and that the evidence of the plaintiffs’ mental anguish that was attributable to the lawyer’s misconduct was legally insufficient. Id. at 997-1001.

B. Lawyers’ Clients Are Consumers; Or Are They?

Liability under the DTPA requires that the plaintiff be a "consumer." Under the DTPA definition, a "consumer" is "an individual ... who seeks or acquires by purchase or lease, any goods or services." Tex. Bus. & Com. CODE § 17.45(4). See Amstadt v. U.S. Brass Corp., 919 S.W.2d 644 (Tex. 1996). An attorney's client is ordinarily considered a consumer of the attorney's services. DeBakey v. Staggs, 612 S.W.2d 924 (Tex. 1981) (per curiam); Johnson v. Delay, 809 S.W.2d 552, 554 (Tex. App. -- Corpus Christi 1991, writ denied). However, a non-client who does not actually seek or acquire the legal services in question, even if arguably an incidental beneficiary of the legal services, is not a consumer. Wright v. Gundersen, 956 S.W.2d 43, 47-8 (Tex.App. -- Hous. [14 Dist.] 1996, no writ).

"Privity of contract with a defendant is not required for the plaintiff to be a consumer." Amstadt at 649. See also, Home Savings Ass'n v. Guerra, 733 S.W.2d 134, 136 (Tex. 1987); Kennedy v. Sale, 689 S.W.2d 890, 892-93 (Tex. 1985); Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983); Cameron v. Terrell & Garret, Inc., 618 S.W.2d 535, 540-41 (Tex. 1981).

Although privity is not required under the DTPA, the courts in DTPA actions against lawyers will scrutinize the nature of the relationship between any non-client plaintiff and the defendant attorney in determining whether the plaintiff is a "consumer" as to the lawyer. For example, in First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagen & Stewart, 648 S.W.2d 410, 417 (Tex. App.--Dallas 1983, writ ref'd n.r.e.), the court denied consumer status to a non-client plaintiff because the plaintiff did not purchase or lease legal services.

In Parker v. Carnahan, 772 S.W.2d. 151, 159, (Tex. App.--Texarkana 1989, writ denied), the court held that although no direct attorney-client relationship existed between the plaintiff wife (whose husband was a client) and the defendant attorney, the plaintiff nonetheless had DTPA consumer status because the attorney had rendered services for the benefit of the plaintiff.

In Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex. App.--Houston[1st Dist.] 1993, writ ref'd n.r.e.), the court explicitly questioned the application of the privity rule in DTPA cases against attorneys.
The court stated that “because attorneys may be subject to liability under the DTPA,” [citing DeBakey v. Staggs, supra] “and because privity between plaintiff and defendant is not required in a DTPA action” [citing Kennedy v. Sale, supra], “we believe that no privity is required in a DTPA case against an attorney, as well.” Id. at 625. The court in Thompson reasoned that, although the plaintiffs did not directly "seek or acquire any “goods or services” from the defendant law firm:

“Privity between the plaintiff and defendant is not a consideration in deciding the plaintiff's status as a consumer under the DTPA … A plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, not by a contractual relationship with the defendant.”

859 S.W.2d at 625. Cf. Wright v.Gundersen, 956 S.W.2d 43, 48 (Tex.App.--Hous. [14 Dist.] 1996, no writ) (beneficiary/executrix of will who did not seek or acquire lawyer’s services in preparing defective will for testator was not a consumer as to those services). (The court in Thompson did affirm that the attorneys were entitled to summary judgment on the DTPA claims in that case, but only because the evidence disproved one of the elements of the DTPA claim, i.e., that the alleged violations were a producing cause of damages.)

Despite Thompson, a very peculiar holding was reached on DTPA “consumer” status in Vinson & Elkins v. Moran, 946 S.W.2d 381 (Tex. App.--Houston [14th Dist.] 1997, writ dism’d by agr.). That was an appeal from a judgment against the law firm based on a jury verdict for negligence, gross negligence, breach of fiduciary duties, conspiracy, DTPA “laundry list” violations, and an unconscionable course of conduct by the V&E lawyers in disregarding numerous conflicts of interest in the course of the firm’s representation of a large estate during its administration. The Fourteenth Court of Appeals declared as a matter of law in Moran, that the plaintiffs, who were beneficiaries of the estate, were not DTPA consumers of the law firm’s services because the services were primarily intended to benefit the executors of the estate. What is strange about this holding is that the jury in Moran had found -- and the same court of appeals had just affirmed in a lengthy discussion in the very same opinion -- that the evidence supported the finding that an attorney-client relationship was established directly between the beneficiaries and the defendant law firm by their actions and course of dealing. Even though the court upheld the factual determination of the beneficiaries as clients, it rejected as a matter of law their status as consumers of the same legal services for which they were clients!

The apparent inconsistency of these holdings in Moran was not resolved by the Supreme Court because that case was settled while applications for writ of error were pending from both sides. It would nonetheless seem logical -- contrary to the conclusion of the court of appeals -- that a lawyer’s client would necessarily be a consumer of the lawyer’s legal services, even though not every consumer would necessarily have to be a client. Cf. Thompson (estate beneficiaries, who did not produce evidence to establish the existence of attorney-client relationship directly with estate’s lawyers, nonetheless could be DTPA consumers of legal services provided for their benefit).

The seemingly anomalous Moran “consumer” holding was, however, recently followed as to estate beneficiaries in Querner v. Rindfuss, 966 S.W.2d 166 (Tex.App. -- San Antonio 1998, pet. denied), in which the court discussed the Moran holding but did not engage in a close analysis or discussion of the inconsistency between a finding that a plaintiff is a lawyer’s client and a declaration that he or she is nonetheless not a consumer of the lawyer’s legal services on the very same matters.

C. The 1995 Amendment to the DTPA Creates Partial Exemption for Professional Services

The Legislature substantially amended the DTPA in 1995. As a result of these amendments, § 17.49 of the DTPA now expressly exempts from the statute’s coverage:

“the rendering of a professional service, the essence of which is the providing of advice, judgment, or similar professional skill.”

Tex. Bus. & Com. CODE § 17.49(c). This DTPA exemption, however, explicitly does not apply to four areas of professional services:

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

(2) a failure to disclose information in violation of Section 17.46(b)(23);

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

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

Tex. Bus. & Com. CODE § 17.49(c).

The 1995 amendments took effect on September 1, 1995. All causes of action that accrued on or after
that date are governed by the amended version of the DTPA. Regardless of when the cause of action accrued, the amendments will also apply to all DTPA cases filed after September 1, 1996. (Thus, if a cause of action accrued before September 1, 1995, and suit was filed before September 1, 1996, then the amendments do not apply, and the pre-amendment version of the DTPA will still control the case.)

This author has found no reported cases yet applying Tex. Bus. & Com. CODE § 17.49(c), although several cases have made reference to this new DTPA provision. See, e.g., Latham v. Castillo, 41 Tx.S.Ct.J. 994 (Tex. 1998); Murphy v. Campbell, 964 S.W.2d 265, 269 (Tex. 1997); Arthur Andersen & Co. v. Perry Equipment Corp., 945 S.W.2d 812, 815 (Tex. 1997); Wright v. Gundersen, 956 S.W.2d 43 (Tex. App. -- Hous. [14th Dist.] 1996, no writ). Therefore, it will still be necessary to look to pre-amendment cases for guidance on the issue of privity in suits brought against attorneys under the four enumerated exceptions to § 17.49(c).

V. CONCLUSION

The citadel of privity in legal malpractice cases stands firm in Texas today. However, a lawyer is not immune from suits for fraud by non-clients. The DTPA provides another avenue for relief in some circumstances in which a relationship of contractual privity between attorney and client does not exist, if the plaintiff is nonetheless a “consumer” who has sought or acquired the defendant attorney’s legal services. The tort of negligent misrepresentation may provide yet another source of liability by lawyers to non-clients, but whether that will be the case in Texas probably turns on the outcome of the Appling case.