AVOIDING AND DEFENDING A MALPRACTICE SUIT
“WELCOME TO THE REAL WORLD”

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CHAPTER 10
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ADMISSIONS

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Ms. Moore is a member of several professional associations, including the State Bar of Texas, the Texas Association of Defense Counsel, the Defense Research Institute, the Dallas Association of Defense Counsel, and the Dallas Bar Association.

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AVOIDING AND DEFENDING A MALPRACTICE SUIT

SECTION I - “WELCOME TO THE REAL WORLD”

Avoiding and defending legal malpractice litigation is all about managing risk. Of course, that is sometimes easier said than done, given the personal nature of a professional malpractice claim, and especially now when the number of claims against lawyers is increasing. While even the best lawyers cannot always avoid a legal malpractice claim, there are ways to minimize the risk of being sued, or, alternatively, maximize defenses if a malpractice suit is filed.

In addition to understanding the nature of legal malpractice claims and other causes of action a lawyer may face, it is also important that lawyers have a basic understanding of their malpractice insurance coverage, and how the definitions and common provisions contained in lawyer professional liability policies may impact how a legal malpractice claim is ultimately resolved.

Here are some practical ways to manage the risk of a legal malpractice suits, as well as a primer on common professional liability insurance provisions that a lawyer should understand once a suit is filed.

I. MANAGING RISK

1) Choose clients wisely.

   a) Be willing to turn potential clients away.
   b) Avoid clients:
      i) With unrealistic expectations
      ii) In financial distress
      iii) That have terminated numerous counsel
      iv) Who you or your staff do not like
      v) That do not accept advice
      vi) With improper motives or seeking advantages over their opponents

2) Be a good communicator.

   a) Return calls w/in 24 hours if possible, or have a staff member contact the client with a time frame when you will return the call.
   b) Be accessible
   c) Manage Expectations
      i) Manage exceptions
      ii) Do not over sell
   d) As litigation progresses, share the opponent’s work product with the client so the client can appreciate vulnerabilities in the case.

3) A complete, well-documented file is excellent evidence of care and attention by a lawyer.

   a) Document communication with the client, especially all settlement offers/counter-offers with opposing counsel and your client.
   b) Confirm legal advice and recommendations in writing, especially if the client is going against the advice.

4) Bill smart.

   a) Make sure fee agreements are clear, and that bills are accurate and fair. Understand that a suit to collect fees will always result in a legal malpractice counterclaim--don't let arrearages get to that point.
   b) Detailed bills can be helpful evidence of the facts and circumstances that existed at the time decisions were made. Compare the following entries:

      1/10/08 calls to client regarding litigation;

      1/10/08 telephone call with client to discuss which documents to produce in response to requests for production, client's desire that no documents be produced, unless opponent produces documents first, client's agreement to send additional files to our office immediately, and possible settlement options; call to opposing counsel to advise that no documents will be produced until his client produces documents; draft outline of settlement options and ramifications of each; fax outline of settlement options to client; telephone conference with client to review settlement options and ramifications;

5) Be honest about mistakes.

   a) Cover-ups always make matters worse.
   b) Having said this, admitting mistakes does not mean admitting negligence or liability.

6) Use engagement letters/fee agreements that identify:

   a) The scope of the work to be done, including a statement that the representation is limited to the particular matter identified and you will not be representing the client in any future matter unless it is covered by a separate agreement;

      i) Document if the scope of the representation changes
   b) The identify of the client;
c) Who is not the client and excluded from representation (i.e. family members, children, other third-parties, pets);

d) Fees, including hourly timekeeper rates and anticipated types of expenses and how they will be charged;

i) Obtain a retainer and put it in your trust account

(1) “Non-refundable” retainers create problems if the amount of the retainer exceeds the value of the services performed. Thus, most “non-refundable” retainers are, in fact, refundable.

(2) In Cluck v. Commission for Lawyer Discipline, 214 S.W.3d 736 (Tex.App--Austin 2007, no pet. h.), an attorney received a total of $20,000 as a "non-refundable" retainer, and was later fired by the client who requested an accounting and refund of the $20,000 less reasonable attorneys’ fees and expenses. The attorney refused, based on the "non-refundable" language in the contract. The Commission for Lawyer Discipline decided the attorney had acted unethically, and suspended him from the practice of law (fully probated) for 2 years. The lawyer appealed and the Austin Court of Appeals affirmed the suspension primarily based on the lawyer’s failure to hold the $20,000 in a trust account.

7) Be careful if you are considering including an arbitration clause in your fee agreements.

a) The law is not fully settled in Texas concerning the appropriateness of arbitrating legal malpractice claims, although the recent case law supports the arbitration of such claims.

b) Requiring clients to arbitrate legal malpractice claims may jeopardize a lawyer’s malpractice insurance coverage, as the insurer may contend it was deprived of the right to a jury trial. [Check your policy.]

If your fee agreement contains an arbitration clause, make sure your insurance agent and insurer are aware of the provision by including a disclosure in the insurance application.

8) Document when you decline a representation.

a) Advise of any upcoming deadlines, limitations, etc.;

b) Return all documents received.

9) Understand who owns the file—the client!

a) That includes all documents in the file, including handwritten attorney notes. (Ethics Opinion 570)

i) Lawyer liens?

b) The lawyer has the right to copy the file, but the copying expense must be paid for by the lawyer.

i) The lawyer is entitled to a reasonable time to copy and turn over the file.

d) But any delay in producing the file to the client must not prejudice the client.

10) Obtaining professional liability insurance versus going bare—does having insurance simply provide a target?

a) It has been estimated by legal malpractice insurers and the State Bar of Texas that at least half of the state's lawyers do not carry malpractice insurance.

b) In general, there is a perception that family law lawyers typically have more assets that other lawyers, and thus have more to lose from a malpractice suit.

i) Defense costs add up quickly.

ii) Approximately 33% of the payments made by legal malpractice carriers annually are for defense costs.

iii) You know what they say: "A lawyer who defends himself has a fool for a client."

c) But some believe that Plaintiff’s lawyers typically do not handle cases against lawyers without insurance: "If there is no insurance, there's no remedy."

d) We recommend obtaining malpractice insurance because:

i) Lawyers are personally liable for their errors. Professional corporations and
limited liability partnerships do not protect lawyers from individual liability for their own mistakes. Additionally, a minimum of $100,000 of insurance is required to be afforded the protections of limited liability partnerships against vicarious liability.

ii) Some clients and lawyer referral services in Texas require professional liability insurance.

iii) Malpractice insurance protects individual lawyers against financial disasters. Younger lawyers should obtain malpractice insurance early in their career so that they will be protected from early mistakes discovered later.

e) Hot Topic—mandatory disclosure of insurance.

i) In May 2008, a legal task force authorized by the Texas Supreme Court voted 6-5 to reject a proposal to require lawyers to disclose whether he/she has professional liability insurance to clients.

(1) Opponents say the proposal would stigmatize lawyers without insurance, forcing them to buy policies they might have trouble affording and could lead to mandatory insurance.

(2) The American Bar Association, which adopted a model rule for disclosure in 2004, reported that clients wrongly assume most lawyers have insurance for malpractice.

(3) A State Bar poll of the public found that 70 percent of respondents favored disclosure of insurance. In other words, clients favor disclosure.

(4) In two separate State Bar polls, one online and one a telephone survey, around 70 percent of lawyers opposed the idea.

(5) For now, the task force vote means Texas joins Arkansas and Kentucky as the only states to have rejected disclosure, and Kentucky is reconsidering the issue. By contrast, 23 states require some form of disclosure—five require a lawyer to directly tell clients—and California is poised to become the 24th. But the issue may not be dead, as supporters of the proposal may bring it before the State Bar Board of Directors or ask the Supreme Court to implement the requirement.

II. MALPRACTICE INSURANCE PRIMER

1) The Professional Liability Policy

a) The insuring agreement (the “Grant of Coverage”) establishes the coverage afforded by a professional liability policy. Typically a declaration page (the “dec” page) provides the basic information about the policy, including:

- the identity of the insurer and the policyholder(s)
- the effective dates of insurance coverage
- the amount of the coverage, including per occurrence and aggregate limits
- any deductible or self insured retention
- the amount of premium

b) The policy sets forth the insurance company’s obligations, broken down into two separate and independent duties that exist in professional liability policies: (1) the duty to defend; and (2) the duty to indemnify.

c) The duty to defend is often the most significant duty provided under a policy, in that legal defense costs are often the biggest expense an insured will encounter in a legal malpractice case. The duty to defend is determined based solely upon the factual allegations contained in the petition/complaint, which must be taken as true regardless of whether they are in fact true or merely frivolous, and the terms of the policy. This is referred to as the “Eight Corners” rule. *Am. Physicians Ins. Exh. v. Garcia*, 876 S.W.2d 842, 847-48 (Tex. 1994).

d) If an insurer has a duty to defend against part of a plaintiff’s claim, it must defend the entire claim. *Maryland Cas. Co. v. Moritz*, 138 S.W.2d 1095, 1097–98 (Tex. Civ. App.—Austin 1940, writ ref’d), with all doubts resolved in favor of the insured.

1 There is no standard Texas form for professional liability insurance. Thus, specific provisions clauses and terms vary from policy to policy. This paper discusses common provisions, clauses and language contained in policies offered to Texas lawyers. Check your policy for the provisions, clauses and terms, specific to your policy.
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**Nat’l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.,** 939 S.W.2d 139, 141 (Tex. 1997). Consequently, if the pleading on its face alleges a claim potentially covered by the policy, the carrier must defend the case even if it knows the alleged facts are wholly untrue.

e) The duty to indemnify, on the other hand, arises only after an insured has been adjudicated to be legally responsible for damages in a lawsuit involving covered claims. In other words, if it is determined that the facts in the case fall within the coverage provided by the policy, the carrier has a duty to pay the claim up to the policy limits. The duty to pay is determined from the actual facts of the underlying case. See **Farmers Texas County Mut. Ins. Co. v. Griffin,** 955 S.W.2d 81, 82 (Tex. 1997) (“For example, a plaintiff pleading both negligent and intentional conduct may trigger an insurer’s duty to defend, but a finding that the insured acted intentionally and not negligently may negate the insurer’s duty to indemnify.”) (emphasis added).

2) **Definitions**

a) Definitions often determine coverage under the policy. Because definitions vary by policy, the insured must understand how key terms are defined. Important definitions include:

i) The Insured, which often includes:

(1) The partnership, limited liability company, or individual named in the dec page as the Named Insured;
(2) Past or present partners, principals, shareholders, members, officers, directors, or employed attorneys of the Named Insured;
(3) Retired lawyers of the Named Insured;
(4) Non-attorneys who are or were employed by the Named Insured, but only to the extent they were acting within the scope of their duties as an employee;

ii) Professional Services, which may be defined to include:

(1) Services rendered as an attorney, mediator, arbitrator, title agent or notary public;
(2) Services in connection with any bar association and its governing body or committees;
(3) Services as an administrator, conservator, receiver, executor, guardian, trustee, when performed as an attorney.

iii) Damages are often defined to include a monetary judgment, award, or settlement, but often specifically exclude:

(1) Punitive or exemplary damages;
(2) Fines, penalties or court-imposed monetary sanctions against the lawyer or the lawyer’s client;
(3) Fee disputes, including an overcharge, refund, or offset of legal fees, costs and/or expenses charged by the lawyer to the client;

(a) In Texas, breach of fiduciary duty resulting in “clear and serious violation of a duty to a client” can result in a fee disgorgement. **Burrow v. Arce,** 997 S.W.2d 229, 237-38 (Tex. 1999). Unfortunately, a judgment requiring a fee disgorgement will typically not be covered under a professional liability policy.

(4) Treble damages or multiple damage awards under statutes like the DTPA;

(5) Money owed to another attorney for any portion of legal fees paid to or by the lawyer.

3) **Exclusions**

a) Exclusions are policy provisions that eliminate coverage under particular circumstances. Under Texas law, exclusions are interpreted narrowly in favor of the insured. **Pucket v. U.S. Fire Ins. Co.,** 678 S.W.2d 936, 938 (Tex. 1984). Professional liability policies typically exclude the following from coverage:
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i) Illegal, dishonest, fraudulent, criminal, deliberate or malicious acts or omissions committed by a lawyer/insured;

ii) Claims of which the lawyer knew or should have known at the time the insurance was obtained;

iii) Liability arising out of a lawyer’s services and/or capacity as an officer, director, trustee or employee of a business enterprise other than the law firm named in the Declarations;

iv) Liability for acts as a public official (and not in representing a public official);

v) Liability arising out of any indemnity or hold harmless agreement entered into by a lawyer;

vi) Liability arising out of the rendering or failure to render investment advice;

vii) Exclusions for particular types of practices, such as a transactional securities practice, are possible.

viii) Exclusions from coverage of counterclaims for malpractice when the insured files a fee claim against a current or former client.

(1) “Any Claim, claim Expense and/or Defense Costs or Loss for legal malpractice alleged by a current or former client of the Insured, as a counterclaim to a lawsuit filed by the Insured to recover unpaid legal fees owed or claimed to be owed to the Insured. This exclusion shall preclude coverage for the entirety of the claim even if other, covered allegations are simultaneously made, or added to the Claim at a later date.”

4) Legal Malpractice policies are “claims made and reported” policies.

a) Unlike “occurrence” based policies such as Commercial General Liability (CGL) or Homeowner’s policies, which provide coverage for claims based on events occurring during the policy period, regardless of whether the claim is made known to the carrier during the policy period, lawyer errors and omissions policies are typically “claims made and reported” policies.

b) “Claims made and reported” policies require that the claim be made and reported to the insurer during the policy period. If the policy expires before the claim is made and reported, no coverage will be afforded under the policy.

c) Because of the “claims made and reported” requirement, when changing insurers or “shopping” policies it is often advisable to obtain “tail” coverage from the prior carrier for a short period of time after the prior carrier’s policy expires to make sure there is no gap in coverage.

5) Legal Malpractice policies are typically “burning limits” or “wasting” policies.

a) Legal Malpractice policies typically include both a “per claim” and aggregate policy limit, which limits the amount that the insurer must pay for both indemnity (to pay damages or fund a settlement) and defend the claim (to pay legal fees, expert fees, and other defense costs) (“Claim Expenses”).

b) In other words, every dollar spent on defense reduces the policy limit and thus the amount available to settle or otherwise resolve a claim.

6) Deductibles

a) Many professional liability policies require a lawyer to pay a deductible, which represents the first dollars paid towards either Claims Expenses or settlement, depending on how the policy is written. For smaller firms, $5,000-$10,000 deductibles are typical. Of course, there is often a direct correlation between the deductible and the premium—the higher the deductible the lower the premium.

b) Deductibles may be stated to be either per claim or aggregate. With a per claim deductible, if there are two or more claims in a policy year a deductible is owed for each claim.

7) Reservation of Rights Letters and Ability to Hire and Select Personal Counsel

a) After a lawsuit has been reported to a carrier, the carrier will engage in a coverage analysis that often results in the carrier issuing a written reservation of rights letter.

b) The need for a reservation of rights arises because of the potential conflict between the separate duty to defend and the duty to indemnify. The conflict comes into existence where there is potentially no duty to indemnify because the actual facts of the case do not fall within coverage, but the carrier still has the duty, or even the right, to control the defense of the case. In other words, in
fulfilling its duty to defend, the carrier is in control of litigation which, if the claim turns out not to be covered by the policy, exposes the policyholder to financial risk. See {\textit{Katerndahl v. State Farm Fire and Cas. Co.,}} 961 S.W.2d 518, 521 (Tex. App.—San Antonio 1997, no writ) (citing {\textit{J.E.M. v. Fid. & Cas. Co. of New York,}} 928 S.W.2d 668, 673 (Tex. App.–Houston [1st Dist.] 1996, no writ)) (“The purpose of a reservation of rights letter is to permit the insurer to provide a defense for its insured while it investigates questionable coverage issues.”).

c) Therefore, the purpose of the reservation of rights letter is to notify the insured of this potential conflict between these contractual duties and to make the insured aware that, even though the carrier is defending the case, the insured may ultimately be responsible for paying any judgment that may be entered. The general principle behind such letters is that the insured must be given an opportunity to take action to protect itself.

d) A carrier, of course, can always decide against asserting any defenses to coverage and opt to provide the insured with what is referred to as an “unqualified defense”, which means nothing more than the carrier has agreed to not only defend the case, but to pay any judgment up to its limits of coverage.

e) If, on the other hand, the carrier seeks to reserve its right to deny its duty to pay, it runs a substantial risk if it fails to timely and properly send a reservation of rights letter—a risk of being estopped from asserting defenses of non-coverage. In other words, coverage that may not have existed under the policy in the first place may be created because of the carrier’s failure to properly raise the defenses of non-coverage. Texas courts of appeals have used the doctrine of estoppel to impose coverage where an insurer failed to timely send a reservation of rights letter. For example, in {\textit{Farmers Texas County Mutual Insurance Company v. Wilkinson}},\textsuperscript{2} a leading case on the issue, the Austin Court of Appeals wrote:

{\textit{[I]f an insurer assumes the insured’s defense without obtaining a reservation of rights or a non-waiver agreement, and with knowledge of the facts indicating

\textit{noncoverage, all policy defenses, including those of noncoverage, are waived, or the insurer may be estopped from raising them.}}

601 S.W.2d 520, 521-22 (Tex. App.—Austin 1980, writ ref’d n.r.e.).

f) Once a reservation of rights letter is issued, an insured has several options, including doing nothing, asking questions and obtaining clarification of the insurer’s position, or rejecting the reservation of rights and demanding that the carrier allow him to select his own counsel to be paid by the carrier (typically at the rate the carrier would have paid its selected counsel). In general, if an insured rejects the reservation of rights, the insurer is put to an election. The carrier may (1) defend unconditionally, (2) deny coverage completely, (3) ignore the insured’s reaction to the reservation of rights letter and keep on defending as though nothing has happened, or (4) acquiesce to the insured’s demand by permitting the insured to select independent counsel who will be the attorney for the insured only. This counsel would only report to the insured and would not take instructions from the carrier. The carrier’s only responsibility would be to pay reasonable attorney’s fees.

g) Some people believe that this last scenario is firmly established as the legal obligation of the liability carrier when faced with the reservation of rights. There is little Texas authority on this issue, but some Fifth Circuit authority that supports this view. See {\textit{Rhodes v. Chicago Ins. Co.,}} 719 F.2d 116, 119 (5th Cir. 1983) (applying Texas law), (”When a reservation of rights is made, however, the insured may properly refuse the tender of defense and pursue his own defense. The insurer remains liable for attorneys’ fees incurred by the insured and may not insist on conducting the defense.”). rev’d on other grounds, Motiva Enter., LLC v. St. Paul Fire & Marine Ins. Co., 445 F.3d 381, 385 (5th Cir. 2006). Others believe that an insured is only entitled to pursue its own defense on the carrier’s nickel only when an actual conflict of interest arises between the insured and the carrier with respect to the carrier’s control of the defense. This is a complex and somewhat undetermined area of Texas law.

h) In reality, insurers and insureds can negotiate all sorts of individualized arrangements about how to handle the

\textsuperscript{2} 601 S.W.2d 520 (Tex. App.—Austin 1980, writ ref’d n.r.e.)
defense in the face of a reservation of rights letter.

8) **Retroactive Date and Prior Acts Coverage**

a) Prior acts restrictions typically exclude coverage for acts that occurred before a certain date. A policy with a “retroactive date” does not cover acts occurring before the retroactive date.

b) Depending on a lawyer’s claims history or the history of a former firm, an insurer may not cover prior acts.

c) Most policies cover former lawyers of a firm for their acts on behalf of the firm. If the prior firm has dissolved, however, prior acts coverage is highly desirable.

9) **Consent Clauses—the “Hammer” clause and its implications.**

a) Many policies contain a “consent to settle” clause that states that the carrier will not settle any claim without the prior consent of the lawyer. But those policies often contain a second provision—commonly known as the “Hammer clause”—that puts significant limiting conditions on the ability of a lawyer to refuse to consent to settle a claim.

b) A Hammer clause provides that if the carrier wishes to settle a claim but the lawyer withholds consent, the lawyer will only receive benefits under the policy equal to the amount for which the carrier could have settled the claim. A Hammer clause may read something like this:

The insurer shall not settle any claim without the consent of the insured. If, however, the insured shall refuse to consent to any settlement recommended by the insurer and shall elect to contest the claim or continue any legal proceedings in connection with such claim, then the insurer's liability for the claim shall not exceed the amount for which the claim could have been settled plus claims expenses incurred up to the date of such refusal.

c) The Hammer clause is designed to allow a carrier to make an economic decision to settle a case, and place the risk of an emotional decision not to settle on the insured. In essence, when the insured refuses to settle he risks personal liability for amounts over the settlement amount recommended by the insurer and possible liability for the defense costs incurred between the proposed settlement and trial.

d) For the lawyer/insured, the existence of a Hammer clause often nullifies any real ability to challenge an insurer’s desire to settle a case when the lawyer believes a settlement is unwarranted.

e) Some carriers offer to arbitrate disputes regarding the reasonableness of a proposed settlement, while other have a peer review process that provides an avenue for determining if a proposed settlement is appropriate.

10) **Choice of Counsel Provisions**

a) Many policies contain language giving the insurance carriers the right to select counsel without input from the insured. Defense counsel is typically selected from a panel of several local law firms specializing in legal malpractice defense. Often the insured is allowed to select specific lawyers from the panel counsel list.

11) **Grievance Protection**

a) Many malpractice carriers offer coverage for legal fees and expenses in defending grievance proceedings up to a stated sum (often $25,000) contained in a separate Limit of Liability.

b) Many insurers offer grievance protection without requiring the lawyer to pay any deductible.

**SECTION II - AVOIDING AND DEFENDING A LEGAL MALPRACTICE SUIT**

The dissolution of a marriage typically involves clients lacking sophistication in legal matters, and is fraught with emotional and financial stress. And from the parties' standpoint, the resolution of a divorce case is almost never satisfactory. Even so, the vast majority of cases are settled by agreement of the parties, and mediators often repeat the adage that a good settlement is one in which both parties are unhappy. Whether this is true or not, a client's dissatisfaction with a settlement can become dissatisfaction with the lawyer, and can give rise to a legal malpractice claim.

This article discusses the causes of action that are typically asserted in professional negligence cases, as well as issues that can be problematic in defending those cases. It later addresses issues in negotiations
and settlements that can give rise to legal malpractice claims against family law practitioners.

I. THE RULES THAT APPLY

A. The Disciplinary Rules. In addition to each lawyer’s personal resolve to act in accordance with good conscience and high morals, there are several sources of guidance for a lawyer’s professional conduct.


2. Texas Disciplinary Rules of Conduct. Each state has adopted its own standards for professional conduct, many of which closely follow the ABA’s Model Code and Model Rules. In Texas, attorneys’ conduct is governed by Texas Disciplinary Rules of Professional Conduct (“TDRPC”).

Both the TDRPC and the Model Rules explicitly disclaim an intention to create a cause of action for clients against attorneys who fail to meet their obligations under the rules. “These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violations of a rule do 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.” TDRPC, Preamble: Scope ¶ 15; see also, Model Rules, Preamble and Scope ¶ 20.

Texas courts have consistently agreed with these disclaimers. “While private persons can file complaints based on violations of the rules, the only party who has standing to enforce these rules is the State Bar. Accordingly, we overrule Advantage’s second point of error to the extent that it asserts the existence of a private right of action for a violation of State Bar Rules.” Home Advantage, Inc. v. Shaw, Bailey & Shaw, P.C., No. 07-97-0309-CV, 1998 WL 487042, at *3 (Tex. App.—Amarillo Aug. 19, 1998, no writ) (not designated for publication); see also, Martin v. Trevino, 578 S.W.2d 763, 770 (Civ. App.—Corpus Christi 1978, writ ref’d n.r.e.)(violations of the Code of Professional Responsibility do not give rise to a private cause of action; only the State Bar can enforce rules). Moreover, Texas trial courts are “without legal authority” to disqualify an elected district attorney on the basis of a violation of the disciplinary rules alone. State ex. rel. Young v. Sixth Judicial Dist. Court of Appeals at Texarkana, 236 S.W.3d 207, 213 (Tex. 2007); but see NCNB Tex. Nat. Bank v. Coker, 756 S.W.2d 398, 400 (Tex. 1989)(TDRPC are mere “guidelines,” but they can be used by the Texas Supreme Court to determine whether or not the trial court abused its discretion in disqualifying counsel.).

But even though ethics rules do not per se establish a cause of action, Texas Courts do look to the disciplinary rules as standards of conduct for attorneys in legal malpractice cases. See Vail v. Havana Painting Co., Inc., 761 S.W.2d 398, 400 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (failure to promptly deliver funds to client violated disciplinary rules, and gave rise to legal malpractice claim). Expert witnesses in legal malpractice cases regularly testify that an ethics rule represents the applicable standard of care for an attorney practicing in Texas. And although it has not ruled directly on the applicability of the TDRPC in legal malpractice cases, the Texas Supreme Court has, in a procedural disqualification case, approved the practice of referring to the rules for guidance, even after noting that the rules were not intended to set a standard for procedural decisions. In re Meador, 968 S.W.2d 346, 350 (Tex. 1998); see also, Anderson Producing Inc., v. Koch Oil Co., 929 S.W.2d 416, 421 (Tex. 1996)(TDRPC establishes standard of attorney conduct and can be used for guidance in procedural disqualification determinations).

B. National Standards. The 5th Circuit has held that, at least in disqualification proceedings, “national standards,” including the Model Rules, not the TDRPC, should be applied in a conflicts analysis. In re Dresser Indus., Inc., 972 F.2d 540, 543 (5th Cir. 1992); accord, In re American Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992); see also, FDIC v. United States Fire Ins. Co., 50 F.3d 1304, 1312 (5th Cir. 1995)(holding that numerous ethical rules are relevant to a federal inquiry regarding the disqualification of counsel).

C. Texas Ethics Opinions and Case Law While alleged violations of the TDRPC are addressed in grievance proceedings, most liability arises from Texas common law.

II. THE ATTORNEY-CLIENT RELATIONSHIP: ARE YOU MY CLIENT

A. The General Rule. A client is someone who can sue for legal malpractice. Under Texas law, only those who are in privity with an attorney (i.e., in an attorney-client relationship) may bring a claim for malpractice. Persons outside the attorney-client relationship have no cause of action for legal malpractice. Barcelo v. Elliot, 923 S.W.2d 575 (Tex. 1996). “Privity” means the contractual connection or relationship that exists between the attorney and the client. Id., at 578-79. In so holding, however, the Texas Supreme Court recognized the relaxing privity requirement in other jurisdictions. Recognizing the “sanctity” of an attorney-client relationship, Texas courts have held that a client who has privity and standing to sue their attorney may not be able to assign their legal

B. Implied Attorney-Client Relationship. Despite the privity requirement, Texas courts have held, as have courts in virtually every state, that attorney-client relationships can be inferred based upon the conduct of the parties. Cantu v. Butron, 921 S.W.2d 344, 351 (Tex. App.—Corpus Christi 1996, writ denied); Byrne v. Woodruff, 891 S.W.2d 689, 700 (Tex. App.—Dallas 1994, writ denied); Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied); Banc One Capital Partners Corp. v. Kneieipper, 67 F.3d 1187, 1198 (5th Cir. 1995). No formal contract is required; in fact, the putative client can even be represented by other counsel. Examples of factual scenarios giving rise to a finding of an implied attorney-client relationships include:

1. Vinson v. Elkins v. Moran, 946 S.W.2d 381, 404-06 (Tex. App.—Houston [14th Dist.] 1997, writ dism’d by agr.)(holding that an attorney-client relationship existed between attorneys for estate’s executors and beneficiaries of the estate based upon extensive communication and interaction with beneficiaries);
2. Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265-66 (Tex. App.—Corpus Christi 1991, writ denied)(legal services rendered gratuitously can give rise to attorney-client relationship);
3. Kotzur v. Kelly, 791 S.W.2d 254, 257-58 (Tex. App.—Corpus Christi 1990, no writ)(facts and circumstances gave rise to duty on the part of attorney to advise party that he was not representing them in litigation);
4. Arlitt v. Patterson, 995 S.W.2d 713, 718 (Tex. App.—San Antonio 1999, pet. denied)(implied attorney-client relationship when client retained counsel to prepare a joint estate plan); and

C. Entities as Clients. In representing corporate entities or partnerships, a lawyer’s client is the entity itself, not individual officers, directors, partners, shareholders or other interested entities. Gamboa v. Shaw, 956 S.W.2d 622 (Tex. App.—San Antonio 1997, no writ); TDRPC 1.12(a); Marshall v. Quinn-L Equities, Inc., 704 F. Supp. 1384 (N.D. Tex. 1988)(attorney representing limited partnership did not represent individual investors); FDIC v. Howse, 802 F. Supp. 1554 (S.D. Tex. 1992)(attorney representing corporation owed no duty to corporate director); Fortson v. Winstead, McGuire, Sechrest & Minnich, 961 F.2d 469 (4th Cir. 1992)(no attorney-client relationship between employees and officers of corporation and corporation’s attorneys). Keep in mind, however, the implied attorney-client relationship. It is not uncommon, especially in commercial litigation and bankruptcy representations, for decision-makers, officers and directors to and rely on an attorney for the corporation in making personal decisions, which may be held to give rise to an implied attorney-client relationship. See, e.g., Wiebold Stores, Inc. v. Schottenstein, 131 B.R. 655, 661 (N.D. Ill. 1991)(attorneys were assisting directors in connection with representation of corporation).

D. Joint Clients. For obvious reasons, joint representations commonly give rise to potential conflicts of interest. The representation of multiple parties such as husband and wife, insured and insurer, or several parties whose interests appear to be aligned, requires close scrutiny of the client relationship, the interests that will be affected and the duties owed. See e.g., Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, writ denied)(express attorney-client relationship with employer, implied attorney-client relationship with employee); Vickery v. Vickery, 999 S.W.2d 342 (Tex. 1999)(finding attorney-client relationship with husband and wife); Castillo v. First City Bancorporation of Texas, 43 F.3d 953 (5th Cir. 1994)(lender and borrower); Goeth v. Craig, Terrill & Hale, L.L.P., No. 03-03-00125-CV, 2005 Tex. App. LEXIS 2815 (Tex. App.—Austin 2005, no pet.) (attorneys representing individual shareholders, officers and directors, as well as the corporation faced conflict of interests with respect to derivative claims).

E. The Relaxing Privity Requirement
1. The General Rule. To assert a cause of action for professional negligence, all jurisdictions require privity between the plaintiff and the defendant-attorney. Texas has strictly interpreted this requirement, however courts in other jurisdictions have relaxed the necessary privity showing, and Texas courts have flirted on the outskirts. McCamish, Martin, etc. v. F. & E. Appling, 991 S.W.2d 787, 792 (Tex. 1999); Barcelo v. Elliott, 923 S.W.2d 575, 578-79 (Tex. 1996);
In 2006, Texas joined the majority of States by recognizing a cause of action for legal malpractice for a decedent’s estate against its real estate planner. Belt v. Oppenheimer, Blend, Harrison & Tate, 192 S.W.3d 780 (Tex. 2006). The Belt court held that there is no legal bar preventing an estate’s personal representative from maintaining a legal malpractice claim, on behalf of the estate, against the decedent’s estate planners. Id. at 785. In Belt, the decedent’s attorney’s alleged negligence in drafting a will resulted in a $1.5 million dollar tax liability to the estate. The supreme court, in distinguishing Belt from Barcelo v. Elliot, 923 S.W.2d 575 (Tex. 1996), noted that an estate may bring a survival suit on behalf of a decedent’s estate, and that common law causes of action for harm to property rights survive a party’s death. Id. at 784. Because the decedent’s claim affected the property rights of the estate, the Belt court held that the legal malpractice claim survived the client’s death. Id. The court noted, however, that an estate could only recover economic damages for damage to the property rights. Id. at 785. Finally, the court held that because the decedent’s estate is “not a legal entity and may not properly sue as such; only a personal representative may assert a legal malpractice claim on behalf of the estate.” Id. at 786. Personal representative is defined as an executor, independent executor, administrator, independent administrator, [or] temporary administrator. Id. at 784; see also, TEX. PROB. CODE § 3(aa).

b. Foreseeable Reliance by, or Intended Benefit to, Third Parties Courts in some jurisdictions have relaxed the privity requirement in cases in which it was foreseeable that the information supplied by the attorney was intended for the benefit of third parties, such as opinion letters written as part of a business transaction. See Atlantic Paradise Assocs., Inc. v. Perskie, Nehman, & Zeltner, 666 A2d 211, 214 (N.J. Super. Ct. App. Div. 1995); Molecular Technology Corp. v. Valentine, 925 F.2d 910 (6th Cir. 1991)(attorney owed a duty of care to potential investors whom the attorney knew or should have known would rely on the statements made in a private offering); One National Bank v. Antonellis, 80 F.3d 606 (1st Cir. 1996); McCarthy v. Landra, 678 N.E.2d 172 (Mass. App. 1997)(where real property passed directly to plaintiffs as beneficiaries, attorney’s preparation of the real estate documents was done on their behalf, not on behalf of administratrix).

c. Fiduciary Relationships Non-client beneficiaries have sought to hold an attorney liable for conduct undertaken in the representation of a fiduciary. See Johnson v. Superior Court, 45 Cal. Rptr. 2d 312, 316 (Cal. Ct. App. 1995); see also, General Resources Org. Inc. v. Deadman, 907 S.W.2d 22, 31 (Tex. App.—San Antonio 1995, writ denied, 932 S.W.2d 485)(finding informal relations may give rise to a fiduciary duty if the court finds the existence of a confidential relationship); Melvin v. Home Fed. Sav. & Loan, 482 S.E.2d 6 (N.C. App. 1997) (where attorney deposited trust funds into estate account and paid himself attorneys fees from the trust funds, fiduciary relationship arose from attorney’s role as trustee). In community property states such as Texas, an attorney who represents one spouse may owe obligations to the other spouse. See, e.g., Yaklin v. Glusing, Sharpe & Krueger, 875 S.W.2d 380, 383 (Tex. App.— Corpus Christi 1994, no writ)(attorney’s negligence caused separate property to become community property). And in the bankruptcy context, for example, a debtor’s attorney may owe a fiduciary duty directly to the bankruptcy estate or the creditors. See In re Delta Petroleum (P.R.), Ltd., 193 B.R. 99, 111 (D.P.R. 1996).

With the noted exception of bankruptcy representations, however, an attorney representing a fiduciary generally owes no duty to the beneficiary. Even so, when an attorney makes contact with and representations to intended beneficiaries or third parties, potential liability arises, not from a direct fiduciary relationship, but from foreseeable reliance that may exist. This is discussed in more detail later in this paper.

4. General and Limited Partners, Officers, Directors. In certain cases, courts have imposed a duty to limited partners on attorneys for a general partner or a partnership itself in favor of limited partners. In representing corporate entities or partnerships, the potential for conflicts arises from the fact that a lawyer’s client is the entity itself, not individual officers, directors or partners. Marshall v. Quinn-L Equities, Inc., 704 F. Supp. 1384 (N.D. Tex. 1988)(attorney representing limited partnership did not represent individual investors); FDIC v. Howse, 802 F. Supp. 1554 (S.D. Tex. 1992)(attorney representing corporation owed no duty to corporate director); Fortson v. Winstead, McGuire, Sechrest & Minnick, 961 F.2d 469 (4th Cir. 1992)(no attorney-client relationship between employees and officers of corporation and corporation’s attorneys). See TDRPC 1.12(a). Keep in mind, however, the implied attorney-client relationship. Officers and directors may look to and rely on an attorney for the corporation in making...
personal decisions, which may be held to give rise to an implied attorney-client relationship. See, e.g., Wiebold Stores, Inc. v. Schottenstein, 131 B.R. 655, 661 (N.D. Ill. 1991)(attorneys were assisting directors in connection with representation of corporation). At least five factors are relevant in establishing an attorney-client relationship with individuals who are principles of the entity client:

1. The size of the partnership or corporation. The argument is that representation of a small partnership with a few members, or a closely held corporation, may suggest an individual representation, while representation of a entity with more principals would not.
2. The nature and scope of the attorney’s engagement.
3. The kind and extent of contacts between the attorneys and the individuals.
4. The attorney’s access to financial, personal and confidential information relating to the individual partner’s interests.
5. The totality of the circumstances, including the parties’ conduct.

III. CAUSES OF ACTION REQUIRING PRIVITY

A. Legal Malpractice. Cosgrove v. Grimes sets forth the legal malpractice standard in Texas, requiring proof of an attorney-client relationship; a breach of the standard of care; injury that would not have occurred, but for that breach; and damages. Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1988). Under this standard, “attorneys are not strictly liable for all of their client’s unfulfilled expectations.” Id. But liability can result when an attorney’s conduct is such that no reasonably prudent attorney would have acted in that manner. See Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988). When attorneys hold themselves out to be specialists in a field, their conduct will be measured by a reasonably prudent specialist standard. Rhodes v. Batilla, 848 S.W.2d 833, 843 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

1. Proximate Cause While breaching a duty to a client will always reflect on an attorney’s professionalism and competency and can lead to professional sanctions, it will not always lead to malpractice liability. Again, Texas malpractice follows the well-known tort mantra of duty-breach-causation-damages. An essential part of that analysis is proximate cause. Texas courts have determined that for attorneys to be liable on malpractice claims their breach of duty must have proximately caused the damage that the client suffered. Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989). Proximate cause has been defined as including “foreseeability and cause in fact.” FDIC v. Shrader & York, 991 F.2d 216, 221 (5th Cir. 1993). Essentially, a legal malpractice plaintiff must prove that, but for the lawyer’s conduct, the result would have been different.

a. Foreseeability. The first element of proximate cause, foreseeability, is not as limiting as it might seem. Foreseeability is not confined to the particular damages that resulted from the breach, but rather includes all damages the general type of which should have been anticipated: “Foreseeability does not require that the actor anticipate the precise consequences of his actions.” Hall v. Stephenson, 919 S.W.2d 454, 466 (Tex. App.—Fort Worth 1996, writ denied); see also, Dyer v. Schafer, Gilliland, Davis, McCollum & Ashley, Inc., 779 S.W.2d 474, 478 (Tex.App.—El Paso 1989, writ denied)(emphasizing that foreseeability means that one should know of a danger posed to others by negligent acts).

b. Cause In Fact: Suit Within a Suit. Cause in fact, the second element that must be proven to establish proximate cause, tends to be the more burdensome requirement from a plaintiff’s perspective. To establish proximate cause in legal malpractice cases arising from underlying litigation for example, the plaintiff essentially has to prove a “suit within a suit.” Jennings v. Zimmerman, Axelrad, Meyer, Stern & Wise, P.C.; No. 04-04-00544-CV; 2005 Tex. App. LEXIS 6518, *6 (Tex. App.—San Antonio Aug. 17, 2005, no pet.)(a ‘suit within a suit’ is required to prove that the client would have prevailed in the underlying action). See also, Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied)(a “suit within a suit’ required). In cases in which the plaintiff sought to recover in the underlying action, the plaintiff must prove the amount that would have been collected in order to recover in the legal malpractice action. Cosgrove v. Grimes, 774 S.W.2d at 665 (plaintiff must show what “would have been recovered and collected ... if the suit had been properly prosecuted”); Ballesteros v. Jones, 985 S.W.2d 485, 489 (Tex. App.—San Antonio 1998, writ denied). Lastly, a judgment not withstanding the verdict was affirmed when there was no proof that the plaintiff would have recovered and collected in the underlying case. Williams v. Briscoe, 137 S.W.3d 120 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

c. There is No Action for a Lost Chance to Prevail. The Texas Supreme Court has specifically held that no “lost chance of survival” exists in medical malpractice cases, and specifically noted the inapplicability of such a claim in legal malpractice cases. Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 511 (Tex. 1995); Kramer v. Lewisville Memorial Hosp., 858 S.W.2d 397, 406 (Tex. 1993). In Kramer, the alleged medical malpractice arose from the defendants’ alleged failure to diagnose plaintiff’s breast cancer. The Texas
Supreme Court held that Texas does not recognize a cause of action for lost chance of survival or cure in cases where the adverse result probably would have occurred anyway. In refusing to adopt the loss of chance doctrine in medical malpractice actions, the *Kramer* court noted the incongruity in applying such a claim to legal malpractice actions:

Furthermore, assuming we adopt the loss of chance doctrine in the context of this medical malpractice action, it is doubtful that there is any principled way we could prevent its application to similar actions involving other professions. [Footnote omitted.] If, for example, a disgruntled or unsuccessful litigant loses a case that he or she had a less than 50 percent chance of winning, but is able to adduce expert testimony that his or her lawyer negligently reduced this chance by some degree, the litigant would be able to pursue a cause of action for malpractice under the loss of chance doctrine. [Citations omitted.]

*Kramer*, 858 S.W.2d at 406.

In the *Park Place* case, defendants moved for summary judgment on plaintiffs’ medical malpractice claims, alleging that defendants were negligent in weaning their premature infant daughter from a respirator too early, and that defendants’ substandard care resulted in their daughter’s death. It was uncontested that plaintiffs’ daughter had only a forty percent chance of survival even before the attempt to wean her from the respirator. The court held that the dispositive proximate cause issue was not whether the infant’s death resulted from defendants’ allegedly negligent care, but rather, whether the infant “could have survived if no effort had been made to remove her from the respirator.” The court held that, at best, the evidence indicated that the attempt to wean the infant from the respirator “reduced her already less-than-even chance of survival,” reversing summary judgment against the defendants. *Park Place*, 909 S.W.2d at 511. Applying this principal in the legal malpractice context, there is no cause of action for the loss of a chance “to hit the big one.” A legal malpractice plaintiff must prove that he would have prevailed in underlying litigation by a preponderance of the evidence.

2. Damages. In Texas, economic and punitive damages are available to a successful legal malpractice plaintiff; the jury decides the amount of damages as a question of fact. *Millhouse v. Wisenthal*, 775 S.W.2d 626, 627n.2 (Tex. 1989).

a. Mental Anguish. Emotional distress damages may also be awarded in legal malpractice cases, albeit on a limited basis. Several years ago the Texas Supreme Court first upheld, without discussing, an emotional distress award in a legal malpractice suit. *Cosgrove v. Grimes*, 774 S.W.2d 662, 666 (Tex. 1989) ($500 award for mental anguish). However, the court subsequently addressed the issue directly, and clarified that mental anguish or emotional distress damages cannot be awarded when the underlying injury is purely economic. *Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999). The court refused to express an opinion on the appropriate standard when the underlying injury is not purely economic. *Id.* Just two months after *Delp*, the court refused, over the strenuous objection of Justice Hecht, to hear a case in which a court of appeals upheld a $350,000 award for emotional distress where the lawyer/defendant was found to have breached a fiduciary duty to her client in a divorce representation where the lawyer colluded with the other spouse, a friend from law school. See *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999).

b. Punitive Damages. Texas Civil Practice and Remedies Code §41.003 authorizes exemplary damages where a plaintiff can prove fraud or malice by clear and convincing evidence. In judging whether and to what degree exemplary, or punitive, damages are warranted, a court must look to “the nature of the wrong, the character of the conduct involved, the degree of the culpability of the wrongdoer, the situation and sensibilities of the parties concerned, and the extent to which such conduct offends a public sense of justice and propriety.” *Alamo Nat’l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981). Further, a court may take into account what amount may be necessary to serve as a deterrent to others. *Transportation Ins. Co. v. Morigel*, 879 S.W.2d 10, 27 n.22 (Tex. 1994). Judge Buchmeyer of the Northern District of Texas affirmed a bankruptcy court’s order of $3,504,000 in exemplary damages against a firm and its lawyers individually based on impermissible conflicts of interest and breach of fiduciary duty. *In re Legal Econometrics*, No. CA 3:98-CV-2297-R, 1999 WL 304564 (N.D. Tex. May 11, 1999).

c. Legal Malpractice Claims Cannot be Fractured Into Other Causes of Action. In legal malpractice cases, plaintiffs often include several causes of action, such as breach of contract and DTPA allegations. Texas courts uniformly hold that legal malpractice actions are tort claims. See *Cosgrove v. Grimes*, 774 S.W.2d at 664; see also, *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988)(holding that malpractice claims against professionals are tort claims). Texas courts have disallowed such efforts to recast legal malpractice claims, noting that nothing is to be gained
by “fracturing” a cause of action into numerous claims. See Sledge v. Alsup, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ); see also, Klein v. Reynolds, Cunningham, Peterson & Cordell, 923 S.W.2d 45, 49 (Tex. App.— Houston [1st Dist.] 1995, writ denied)(noting that plaintiff’s alternative causes of action were merely different “means to an end” in asserting a legal malpractice claim). This rule has been applied to eliminate breach of contract, DTPA violations, breach of fiduciary duty, and fraud claims. See Judwin Properties, Inc. v. Griggs & Harrison, P.C., 911 S.W.2d 498, 506, 507 (Tex. App.— Houston [1st Dist.] 1995)(a breach of contract claim that is in the nature of a tort, such as legal malpractice, as opposed to a contract (i.e. excessive legal fees), is a tort claim; breach of fiduciary claim couched entirely from facts that are essentially legal malpractice); see also, Jampole v. Matthews, 857 S.W.2d 57, 62 (Tex. App.— Houston [1st Dist.] 1993, writ denied)(distinguishing an action for negligent legal practice and one for breach of contract only where there is a claim of excessive fees)

B. Breach of Fiduciary Duty. An attorney-client relationship is a fiduciary relationship. In addition to competent, therefore, an attorney must also be loyal to a client’s interests and always act with “utmost good faith.” Judwin Properties, Inc. v. Griggs & Harrison, 911 S.W.2d 498, 506 (Tex. App.— Houston [1st Dist.] 1995, no writ). In the words of one court, “the relationship between attorney and client 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). Upon proof of an attorney-client relationship, which creates a fiduciary duty as a matter of law, the burden of proof shifts to the fiduciary to prove the absence of a breach of fiduciary duty that is, “absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.” Vickery v. Vickery, 999 S.W.2d 342, 376 (Tex. 1999).

C. Continuing Obligations. Obligations to be competent and serve the interests of the client continue, of course, until the representation has ended. Even then, certain obligations survive termination of the attorney-client relationship, though. Pursuant to TDRPC 1.05 and 1.09, an attorney must keep client confidences in perpetuity. Further, an attorney is prohibited from representing anyone adverse to a former client on the same or a substantially related matter. TDRPC 1.09. Though waiver of a conflict arising from such continuing duties is allowed in either case, the obligations to the first client control until a fully informed consent can be obtained.

IV. CAUSES OF ACTION THAT DO NOT REQUIRE PRIVITY

A. The Texas Deceptive Trade Practices Act. The DTPA includes a professional services exclusion, which provides that lawyers may not be sued under the DTPA in the absence of (1) an express misrepresentation of a material fact that is not advice, judgment, or opinion; (2) a failure to disclose; (3) an unconscionable action or course of action that is not advice, judgment or opinion; or (4) breach of an express warranty that is not advice, judgment or opinion. Tex. Bus. & Com. Code §17.29(c).
Nonetheless, there are courts have allowed legal malpractice plaintiffs to circumvent this provision. For example, in *Latham v. Castillo*, 972 S.W.2d 66, 67-8 (Tex. 1998), the defendant attorney told his clients that he had filed a medical malpractice claim when he had not. The Texas Supreme held that this affirmative misrepresentation was not "advice, judgment or opinion" under DTPA §17.29(c), noting that, while a claim for negligent failure to timely file a claim would be a claim for legal malpractice, evidence of affirmative misrepresentations constitutes deceptive conduct that is actionable under the DTPA.

A DTPA allegation increases the exposure to defendants in legal malpractice cases. In contrast to a legal malpractice claim, which requires a plaintiff to prove a "case within a case," a plaintiff need not prove that he or she would have recovered in the underlying case to establish a claim under the DTPA. *Latham v. Castillo*, 972 S.W.2d at 69. Moreover, a plaintiff may recover mental anguish damages under the DTPA, despite the fact that such damages are typically not recoverable in legal malpractice actions. Finally, the DTPA allows the recovery of attorneys' fees, which are not recoverable in legal malpractice and professional negligence matters.


C. Negligent Misrepresentation. In 1999, the Texas Supreme Court joined other jurisdictions in recognizing negligent misrepresentation, as defined in the Restatement (Second) of Torts § 552 (1997), as a cause of action that can be raised against an attorney by a third party. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999) (noting that negligent misrepresentation is distinct from legal malpractice.). A negligent misrepresentation cause of action requires proof that: (1) the defendant in the course of his business or a transaction in which he had an interest (2) supplied false information for the guidance of others (3) without exercising reasonable care or competence in communicating the information (4) the plaintiff justifiably relied on the information that (5) proximately caused the plaintiff's injury. *Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 577 (Tex. App.—Dallas 2007, no pet. h.). "Under the tort of negligent misrepresentation, liability is not based on a breach of the duty a professional owes his or her clients or others in privity, but on an independent duty to the non-client based on the professional's manifest awareness of the non-client's reliance on the misrepresentation and the professional's intention that the non-client so rely." *McCamish, 991 S.W.2d* at 792. This duty that an attorney owes to a nonclient, however, only arises when (1) the attorney is aware of the non-client and intends that the non-client rely on the representation; and (2) the non-client justifiably relies on the attorney’s representation of material fact. *Kastner, 231 S.W.3d* at 577. Although the third party's reliance must be justified, most courts agree that reliance is never justified in an adversarial situation. *Id.* at 794.

D. Fraud. A lawyer can also be liable for intentionally tortious conduct, such as fraud. *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468 (Tex. App.—Houston [1st Dist.] 1985, no writ). The lack of privity is not a defense to a third party's fraud claims. "An attorney has no general duty to the opposing party, but he is liable to third parties when his conduct is fraudulent or malicious." *Id.* at 472. A fraud claim requires proof of an actual misrepresentation, made with the intent that the person to whom the misrepresentation was made will rely upon it.

E. *Trenholm v. Ratliff*, 646 S.W.2d 927, 930 (Tex. 1983)

F. Conspiracy. Texas courts have seen increased litigation in recent years regarding a non-client suing a lawyer or a lawyer’s law firm for conspiracy to breach a fiduciary duty. It was recently held that a lawyer's former client could not bring a cause of action for conspiracy to breach a fiduciary duty against the law firm that represented his former lawyer when the client did not allege that the firm committed any acts or misrepresentations, independent of its representation of lawyer, upon which former client justifiably relied. *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); see also, *Alpert v. Riley*, No. H-04-CV-3774, 2008 WL 304742, *15-16 (S.D. Tex.)(original federal court filing by Alpert attacking the merits of the state court opinion; federal court held in support of the aforementioned state holding). The Texas Supreme Court has recognized a cause of action by a non-client against an attorney for conspiracy. *See generally Chu v. Hong*, 249 S.W.3d 441 (Tex. 2008). In *Chu*, the attorney's client, the buyers, purchased community property from a husband approaching an imminent divorce. *Id.* at 443. After the sale was made, the wife filed suit and alleged that the attorney was involved in
a conspiracy to defraud her and her portion of the community property. *Id.* The Court said that “as an attorney, Chu had a fiduciary duty to further the best interests of his clients, the buyers; imposing a second duty to the sellers would inevitably conflict with the first. An attorney who personally steals good or tells lies on a client’s behalf may be liable for conversion or fraud in some cases.” *Id.* at 446. The Court further said that the attorney can only be held liable for a conspiracy claim if he “agreed to the injury to be accomplished” because agreeing to the conduct ultimately resulting in an injury is not enough to rise to the level of conspiracy by an attorney against a non-client. *Id.* at 446-47.

V. CAUSES OF ACTION THAT ARE NOT RECOGNIZED UNDER TEXAS LAW

A. Liability Arising from Conduct Undertaken on Behalf of a Client in Litigation.

In order to promote zealous representation, Texas courts have held that an attorney has “qualified immunity” from civil liability, with respect to nonclients, for actions taken in connection with representing a client in litigation or in an adversarial context. *Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Oshman*, No. 01-06-00696-CV, 2008 WL 746548, *7 (Tex. App.—Houston [1st Dist.] March 20, 2008, pet. filed); see also, *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). “This qualified immunity generally applies even if conduct is wrongful in the context of the underlying lawsuit. For example, a third party has no independent right of recovery against an attorney for filing motions in a lawsuit, even if frivolous or without merit, although such conduct is sanctionable or contemptible as enforced by the court.” *Id.*

The newly termed “immunity” applies even if the alleged conduct is fraudulent or intentionally tortious. *Taco Bell Corp. v. Cracken*, 939 F. Supp. 528 (N.D. Tex. 1996); see also, *Lewis v. Am. Exploration Co.*, 4 F. Supp. 2d 673 (S.D. Tex. 1998). The *Taco Bell* case arose from a prior underlying personal injury action in which Taco Bell was named as a defendant. After the underlying case was settled, although Taco Bell filed suit after the litigation giving rise to this claims had concluded, the crux of the complaint related to alleged wrongful conduct by an adversary's lawyers in the litigation itself, rather than in initiating the litigation. *Id.* at 532. Taco Bell sued the attorneys for the plaintiffs, among others, alleging that the plaintiffs’ attorneys engaged in fraud, abuse of process, conspiracy and negligent misrepresentation by “manipulat[ing] the judicial system, and engag[ing] in tortious conduct, for the purpose of obtaining venue in a particular forum.” *Id.* at 532.

The *Taco Bell* court held that, because Taco Bell’s allegations sought “to hold defendants liable for acts or omissions undertaken as part of the discharge of their duties as attorneys to opposing parties in the same lawsuit,” the claims against the opposing attorney failed. *Id.* at 532. The court relied on *Bradt v. West*, 892 S.W.2d 56, 71-72 (Tex. App.—Houston [1st Dist.] 1994, writ denied), a Houston court of appeals case holding that an attorney does not have a cause of action against opposing counsel for conduct in representing his or her clients. The *Taco Bell* court noted that the reasoning in *Bradt* relied heavily on public policy in holding that an attorney has the right to raise defenses or assert rights on behalf of a client, without subjecting himself to liability and damages. *Taco Bell Corp. v. Cracken*, 939 F. Supp. at 532, citing *Morris v. Bailey*, 398 S.W.2d 946, 947 (Tex. Civ. App.—Austin 1966, writ ref’d n.r.e.). In the words of the *Bradt* court:

[any other rule would act as a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied a full development of his case if his attorney was subject to this threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled. *Bradt v. West*, 892 S.W.2d at 71, citing *Morris v. Bailey*, 398 S.W.2d at 947-48.

Relying on *Bradt*, the *Taco Bell* court specifically addressed the fraud and conspiracy allegations:

Nor would it avail *Taco Bell* to assert that because defendants engaged in fraud and civil conspiracy, such acts cannot be classified as proper conduct for a lawyer representing a client. In *Bradt*, the court affirmed a summary judgment that dismissed claims of a similar nature, rejecting the proposition that they did not address protected conduct. See *Bradt*, 892 S.W.2d at 65, 76 (holding claims for conspiracy to maliciously prosecute, malicious prosecution, intentional infliction of emotion distress, tortious interference with contractual relations, liability under the Texas Tort Claims Act, and abuse of process were barred as a matter of law.)

In holding that a party has no right of recovery under any cause of action against an adversary's lawyer for conduct by the lawyer in representing a client in a lawsuit, the *Taco Bell* court emphasized that it is the type of conduct in which the defendant attorney engaged, rather than the merit of the alleged wrongful conduct itself that is determinative. *Id.* at 532. This
analysis is consistent with those cases that have held lawyers liable for fraud or intentionally tortious conduct when the lawyer acts outside the scope of an attorney-client relationship, such as where a lawyer acts for personal benefit rather than on the client behalf. See n.15, supra. In Chapman Children’s Trust v. Porter & Hedges, 32 S.W.3d 429, 440-41 (Tex. App.—Houston [14th Dist.] 2000, pet. denied), the court relied on the Bradt and Taco Bell decisions to hold that parties to a settlement agreement had no cause of action against attorneys for the opposing party for alleged wrongful distribution of settlement proceeds. The Chapman court emphasized the necessity of focusing on the type of conduct in which the attorney engages rather than on whether the conduct was meritorious in the context of the underlying lawsuit. Id. The court concluded that evidence that the attorneys attempted to negotiate a smaller settlement on behalf of their client, in light of their client’s precarious financial situation, involved conduct undertaken as part of the attorneys’ duties to their client. Id.

Following the Taco Bell reasoning, the court in McCampbell v. KPMG Peat Marwick, L.L.P., 1997 U.S. Dist. LEXIS 19891 (N.D. Tex. 1997), held that allegations of false statements in an affidavit and a motion for new trial by an adversary’s attorney alleged “precisely the kind of fraud insufficient to support a cause of action under the Taco Bell decision.” Similarly, in Renfroe v. Jones & Associates, 947 S.W.2d 285 (Tex. App.—Fort Worth 1997, writ den), the court held that a garnishee had no wrongful garnishment of action against the garnisor’s attorneys. The Renfroe court relied on both the lack of privity between the attorney defendants and the public policy rationale set forth in the Bradt and Taco Bell cases. Id. at 287-88, but see Querner v. Rindfuss, 966 S.W.2d 661 (Tex. App.—San Antonio 1998, pet. denied).

Although an apparent departure from the often repeated rule that an attorney can be liable, even to a client’s adversary, for fraudulent or intentionally tortious conduct, the Taco Bell analysis eliminates only causes of action arising from an attorney’s litigation conduct undertaken on behalf of a client. As the Taco Bell court noted, procedural and statutory remedies exist for the punishment of such wrongful conduct. Id. at 532.; see, e.g., FED. R. CIV. P. 11 (power to punish attorney for filing improper pleadings, motions and other papers); TEX. R. CIV. P. 215 (power to punish attorney for abusing discovery); and TEX. GOV’T CODE ANN. § 21.002 (Vernon 1988) (power to punish attorney for contempt of court). At least in the recent eyes of Texas courts, these “rules of the game” provide a sufficient measure of governance and accountability to both litigating lawyers and litigants themselves.

B. Aiding and Abetting the Breach of Fiduciary Duty

Under Texas law, a third party who knowingly participates in a fiduciary’s breach of duty can be liable as a joint tortfeasor. See Kastner v. Jenkens & Gilchrist, P.C., 231 S.W.3d 571, 577 (Tex. App.—Dallas 2007, no pet. h.); see also, Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 574, 160 S.W.2d 509, 514 (Tex. 1942). A cause of action premised on aiding and abetting the breach of a fiduciary duty during litigation must involve the litigator’s knowing participation in the breach. Kastner, 231 S.W.3d at 580; see also, Cox Texas Newspapers, L.P. v. Wootten, 59 S.W.3d 717, 722 (Tex. App.—Austin 2001, pet. denied). Moreover, as recently as March 2008 the Texas Supreme Court reversed judgment that was entered against an attorney for aiding and abetting a fiduciary breach. Chu v. Hong, 249 S.W.3d 441, 447 (Tex. 2008). In Chu, the jury found that the attorney helped a non-client defraud his wife of community property. The Texas Supreme Court reversed all claims against the attorney based upon a marital property concepts, but in dicta indicated skepticism for an aiding and abetting claim against an attorney. Id.

In Thompson, two trust beneficiaries sued a law firm hired by the trustee to assist in distributing the trust’s assets. Thompson, 859 S.W.2d at 618-19. The plaintiffs accused Vinson & Elkins of a conflict of interest and interfering with their inheritance rights. Id. at 619-21. However, the trial court granted summary judgment for Vinson & Elkins. Id. at 618. Based on the absence of privity, the court of appeals affirmed the summary judgment on the malpractice claim. Id. at 621-22. Although the plaintiffs also asserted that Vinson & Elkins could be liable for its knowing participating in the trustee’s breach of his fiduciary duty, the court of appeals disagreed. Id. at 624 n.5. The court reasoned that the cases the plaintiffs relied upon, including Kinzbach Tool, did not involve a claim against the fiduciary’s attorney. Id. To extend liability to the fiduciary’s attorney, the court concluded, would conflict with the privity rule. Id.

In Lesikar, one of two co-executrices, Jenny Rappaport, sued the other executrix’s attorney for allegedly conspiring with his client to breach her fiduciary duty to the estate. Lesikar, 33 S.W.2d at 318. Relying on Thompson, the Texarkana Court of Appeals affirmed the trial court’s summary judgment for the attorney. Id. at 320. In so ruling, the court observed that each co-executrix was entitled to retain and receive candid advice from an attorney concerning her duties. Id. The court declined to require an attorney hired by one co-executrix to effectively represent the other by making the attorney liable to the nonclient. Id.
VI. VICARIOUS LIABILITY: AM I MY BROTHER'S KEEPER

Vicarious liability is a question that often arises in legal malpractice cases. Setting aside the tactical issues that arise from lawyers blaming one another, lawyers may be held liable for negligent acts or omissions by employees or staff under respondent superior. *Mosaga, S.A. v. Baker & Botts*, 780 S.W.2d 3 (Tex. App.—Eastland 1989, no writ). In addition, vicarious liability issues can depend on a firm's business structure. Generally, Texas lawyers practice together in one of four types of business entities, with different vicarious liability issues.

**IMPORTANT NOTE**: As of January 1, 2006, Texas codified the laws of entities into the Business Organizations Code (BOC). It is possible that an entity (general partnership, limited partnership, limited liability partnership, professional corporation, or limited liability company) that was formed prior to the enactment of the BOC is still governed by different statutes unless the requisite paperwork is filed opting into the BOC. Entities formed after January 1, 2006 are necessarily governed by the BOC.

A. *General Partnerships*. A partnership is liable for loss or injury to a person, including a partner, or for a penalty caused by or incurred as a result of a wrongful act or omission or other actionable conduct of a partner acting in the ordinary course of business of the partnership or with the authority of the partnership. A partnership is liable for the loss of money or property of a person who is not a partner that is received in the course of the partnership's business and misapplied by a partner while in the custody of the partnership. *Tex. Bus. Orgs. Code Ann.* § 152.303 (Vernon 2006). Furthermore, all partners are jointly and severally liable for a debt or obligation of the partnership unless otherwise agreed by the claimant, prescribed by law, or the act or omission occurs before admittance of the partner into the partnership. *Id.* § 152.304. If the partnership is governed by the Texas Revised Partnership Act, then lawyers who practice together as a general partnership are jointly and severally liable for partnership obligations, including liability for wrongful acts or omissions of a partner acting in the ordinary course of business or with authority of the other partners. *Medical Designs, Inc. v. Shannon, Gracey, Ratliff & Miller, L.L.P.*, 992 S.W.2d 626 (Tex. App.—Fort Worth 1996, writ denied).

B. *Registered Limited Liability Partnerships*. L.L.P.s limit partners' liability to some extent. A partner in a L.L.P. is not personally liable, directly or indirectly, for a debt or obligation of the L.L.P. *Tex. Bus. Orgs Code Ann.* § 152.801(a) (Vernon 2006). A partner in a L.L.P. is not personally liable for the negligence of another partner unless the first partner was supervising or directing the other partner, directly involved in the negligent activity, or had notice or knowledge of the activity and failed to take reasonable measures to prevent or cure the negligence. *Id.* § 152.801(b).

C. *Professional Corporations*. A shareholder in a professional corporation is subject to no greater liability than a shareholder in a for profit corporation, which means that a shareholder is not personally liable for an act or obligation that is authorized or on behalf of the corporation. *Tex. Bus. Orgs Code Ann.* § 303.002(b) (Vernon 2006); *see also*, *Id.* § 21.107. If the corporation has been incorporated under the Professional Corporation Act, *Tex. Rev. Civ. Stat. art.* 1528e, attorneys are individually liable for negligence or wrongful conduct as is the corporation. Shareholders, officers and directors, however, are not vicariously liable for the conduct of others in the firm.

D. *Professional Limited Liability Companies*. Except as and to the extent the company agreement specifically provides otherwise, a member or manager is not liable for a debt, obligation, or liability of a limited liability company, including a debt, obligation, or liability under a judgment, decree, or order of a court. *Tex. Bus. Orgs. Code Ann.* § 101.114 (Vernon 2006). Attorneys practicing in a P.L.L.C. remain liable for their own negligence or misconduct; in addition, the P.L.L.C. is jointly and severally liable. Under the statutory provisions, *Tex. Rev. Civ. Stat. art.* 1528n, members, managers, and officers are not vicariously liable.

VII. PROBLEM AREAS: SLEEPING DOGS VS. BARKING DOGS

Lawyers are not judged by their results, at least, not when it comes to a legal malpractice claim. Whether a lawyer met the standard of care requires an analysis of the facts and circumstances existing at the time, not hindsight. *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1988). The same is true under the TDRPC—the disciplinary rules recognize that attorneys are not guarantors of a client’s case. There are, however, a myriad of circumstances that can give rise to complaints against attorneys as a result of litigation representations. The following are issues that arise most frequently—in other words, the red flags we should be looking out for.

A. *Legal Malpractice*. In litigation matters, there are any number of issues that can give rise to the majority of malpractice allegations, the most common of which are listed below.
1. Failure to file claims within the time allowed by the applicable statute of limitation or regulatory provision.
2. Failure to prosecute claims, or delay in prosecuting claims.
3. Failure to raise applicable defenses or to join the correct parties.
4. Failure to retain and designate appropriate expert witnesses.
5. Failure to fully investigate a claim or defense.
6. Errors in complying with discovery requirements.
7. Withdraw from, or termination of, an attorney's representation.
8. Errors in drafting or reviewing court orders.
9. Errors in recommending or documenting settlements.
10. Failure to preserve error for appeal.

B. Conflicts of Interests and Breach of Fiduciary Duty. In defending grievance and legal malpractice proceedings, alleged conflicts of interest are among the most common, and often the most troublesome claims. Not all conflicts are avoidable, nor are all conflicts actionable. But legal malpractice claims and grievance complaints arising from conflicts of interest can be avoided by understanding the identity of the client, the duties owed to the client and to third parties, the issues that give rise to potential conflicts in the liability context, and the required disclosures and waivers.

VIII. CONFLICTS OF INTEREST

Conflicts of interest are the most problematic claims against attorneys, because it can be difficult to prevail on summary judgment. For this reason, this article discusses the Texas Rules of Disciplinary Procedure which are most frequently raised in professional liability cases.

A. Rule 1.06 of the Texas Disciplinary Rule of Professional Conduct.

1. A lawyer shall not represent opposing parties to the same litigation.
2. In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

   a. Involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
   b. Reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

3. A lawyer may represent a client in the circumstances described in (b) if:
   a. The lawyer reasonably believes the representation of each client will not be materially affected; and
   b. Each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

4. A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

5. If a lawyer has accepted representation in violation of this rule, or if multiple representation properly accepted becomes improper under this rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these rules.

6. If a lawyer would be prohibited by this rule from engaging in a particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

1. Representation of Opposing Parties. Parties are opposing if a judgment favorable to one of the parties will directly impact unfavorably on the other party. Although this issue is often addressed in cases dealing with disqualification of an attorney in litigation matters, the conflict of interest analysis is the same.

a. In re Posadas USA, Inc., 100 S.W.3d 254, 258 (Tex. App.–San Antonio 2001, no pet.). Good cause for withdrawal existed when an attorney represented multiple clients in the same action, one client disclosed information showing conflict of interest with other clients, and clients did not consent to continuation of dual representation.

b. J.W. Hill & Sons, Inc. v. Wilson, 399 S.W.2d 152, 154 (Tex. App.—San Antonio 1966, writ ref'd n.r.e.). A direct conflict of interest existed when the company and the company’s driver disputed whether the driver was in the course of his employment when the accident occurred. The court held that, “to require or even permit an attorney or firm of attorneys in open
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c. Richards v. Commission for Lawyer Discipline, 35 S.W.3d 243 (Tex. App.—Houston [14th Dist.] 2000, no pet.). A conflict of interest existed when the lawyer represented both the husband and wife in divorce proceedings.

d. Daves v. Commission for Lawyer Discipline, 952 S.W.2d 573 (Tex. App.—Amarillo 1997, no writ). Court held that the lawyer improperly represented both the parents and the child in a personal injury suit when both parents and child had an interest in the potential recovery.

e. Copeland v. Carpenters Dist. Council of Houston and Vicinity Pension Fund, 771 F.Supp. 807 (E.D. Tex. 1991). By filing a motion requesting that one of the two competing pension fund claimants be allowed to join the pension fund’s motion for summary judgment, the counsel for the pension fund was also representing the adverse claimant. This placed the attorney’s in a precarious position with regard to their professional obligation to avoid conflicts because the lawyers had already entered into an attorney-client relationship with the other client.


g. State Bar Opinions.

(1) Tex. Comm. on Legal Ethics, Op. 500, 58 Tex. B.J. 380 (1995) (representation of both passenger and driver in personal injury case creates a potential conflict which may rise to the level of a non-waivable conflict if the driver of the other vehicle alleges negligence by client driver).

(2) Tex. Comm. on Legal Ethics, Op. 525, 61 Tex. B.J. 460 (1998) (with full disclosure, lender’s attorney may prepare loan documents at the request of lender and to be paid by the borrower).

2. Representation of Co-Plaintiffs or Co-Defendants.

a. In re K.M.H., 181 S.W.3d 1, 11 (Tex. App.—Houston [14th Dist.] 2005, no pet.). In evaluating whether there is a substantial risk of a conflict of interest before trial, the trial court should consider the available record to determine the likelihood that the clients’ positions will be adverse to each other.

b. In re B.L.D., 113 S.W.3d 340, 347 (Tex. 2003). In deciding whether there is a conflict of interest between parents opposing termination in a single lawsuit, a conflict exists if there is a substantial risk that the appointed counsel’s obligations to one parent would materially and adversely affect his or her obligations to the other parent.

c. American Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480, 484 (Tex. 1992). The relationship and interests between the insured and the insurer produce complex and often conflicting situations. As a result, defense counsel must be very sensitive towards the conflicts and potential conflicts that exist.

d. Sanchez v. Hastings, 898 S.W.2d 287 (Tex. 1995). A lawyer representing both a decedent’s family in pursuing wrongful death and survivor claims, and the decedent’s employer’s workers’ compensation carrier in a subrogation claim, raises at least the potential of a conflict of interest when representing the
family on a gross negligence claim against the employer.

e.  *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998). The lawyer owes an unqualified loyalty to the insured and must at all times protect the interests of the insured, and may not let those interests be compromised by the insurer’s instructions.

f.  *Stonewall Surplus Lines Ins. Co. v. Drabek*, 835 S.W.2d 708, 710 (Tex. App.—Corpus Christi 1992, writ denied). “The primary carrier, pursuant to its contract, hired [the defendant’s lawyers] to defend the case on behalf of the insureds. In doing so, [the lawyers] owed the defendants in the underlying suit the unqualified duty to conscientiously and adequately represent them.”

4. **Substantially Related Matters.** If it is determined that an attorney’s representation is substantially related to another matter the attorney is handling, there is a conclusive presumption that confidences and secrets were imparted to the attorney. The client is not required to reveal the secrets he or she is seeking to protect in order to establish a conflict of interest.

a.  *Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex. 1995). To require the movant to show that the tainted attorney revealed confidences to his or her harm would be virtually impossible.

b.  *Hoggard v. Snodgrass*, 770 S.W.2d 577, 583 (Tex. App.—Dallas 1989). The court found a violation of the Texas Code of Professional Responsibility, even though there was no apparent conflict of interest. The court held that the appearance of impropriety was enough, and the risk of public suspicion of the legal profession outweighed the social interest of attorney's continued representation of the child.

c.  *Howard v. Texas Dept. of Human Services*, 791 S.W.2d 313, 315 (Tex. App.—Corpus Christi 1990, no writ). Presumption that matters are substantially related is applied even though attorney had not met client in course of previous representation, but had been hired to act for her by her father.

5. **Substantial Relationship Test.** Texas courts use the “substantial relationship” test to determine whether matters involved in two representations were such that there was a genuine threat that secrets of one client would be revealed during the representation of another client.

a.  Tex. Disciplinary R. Prof’l Conduct 1.09(a)(3). A party seeking disqualification is required to show (1) the existence of a prior attorney-client relationship (2) in which the factual matters involved were so related to the facts in the pending litigation that it creates a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary.

b.  *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 51 (Tex. 1998). Actual disclosures of confidences need not be proven; the issue is the existence of a genuine threat of disclosure because of the similarity of the matters.

c.  *NCNB Texas National Bank v. Coker*, 765 S.W.2d 398, 399-400 (Tex. 1989). An action is “substantially related” to former litigation when both involve similar liability issues, similar scientific issues, and similar defenses and strategies.

d.  *Metropolitan Life Ins. Co. v. Syntek Fin. Corp.*, 881 S.W.2d 319 (Tex. 1994). The court found that there was no substantial relationship between the law firm’s prior representation of an individual who held a controlling interest in finance corporation and noted that to satisfy the substantial relationship test as a basis for disqualification, respondent was required to prove that the facts of the prior representation were so related to the pending litigation that a genuine threat existed the confidences revealed to former counsel would be divulged to a present foe.

e.  *Henderson v. Floyd*, 891 S.W.2d 252 (Tex. 1995). The supreme court held that where co-counsel had personally represented a client, even though he had never met the client and never served as attorney of record, he did see the client’s files and settlement video, and was therefore precluded from representing another client in a substantially related matter.

f.  *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996). In cases in which an attorney with a law firm possesses a client’s confidential information, all attorneys in the firm are presumed to have access to the information. The court held that an attorney’s knowledge of a non-client’s confidential information is imputed to the other attorneys in the firm.

g.  *Arkla Energy Resources v. Jones*, 762 S.W.2d 694, 695 (Tex. App.—Texarkana 1988, orig. proceeding). “A superficial resemblance between issues is not enough to constitute a substantial relationship, and facts which are community knowledge or which are not material to a determination of the issues litigated do not constitute ‘matters involved’ within the meaning of the rule.”
h. Centerline Industries v. Knize, 894 S.W.2d 874, 876 (Tex. App.—Waco 1995, orig. proceeding). “Without a former client’s consent, a lawyer should not represent another person in a matter adverse to the former client when the lawyer represented the former client in the same matter or substantially related matter.”

6. Directly Adverse. The representation of one client is directly adverse to the representation of another client if the lawyer’s independent judgment on behalf of a client, or the lawyer’s ability or willingness to consider, recommend, or carry out a course of action, will be or is reasonably likely to be adversely affected by the lawyer’s representation of, or responsibilities to, the other client.

7. Dual Representation in the Same or Related Matters. A dual representation can be directly adverse if there is a reasonable likelihood that the lawyer will be called upon to espouse adverse positions in the same or related matter.

8. Simultaneous Representation. Simultaneous representation of clients whose interests are only generally adverse, such as competing economic interests, does not constitute the representation of directly adverse interest when the representations are in unrelated matters. In re Posadas USA, Inc., 100 S.W.3d 254 (Tex.App.—San Antonio 2001, no pet.); In King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 752-53 (Tex. 2003), the court held that “[s]imultaneous representation in unrelated matters is not evidence of a fraudulent conspiracy between an attorney and client. Such dual representation is permissible under Texas's ethical rules and was not prohibited in the 1980s. The rule prohibiting an attorney once retained by a client from acting for the opposing party applies only in the case of conflicting interest.”

9. Conflicts that Develop During Representation.
   a. Scrivner v. Hobson, 854 S.W. 2d 148, 152 (Tex. App.—Houston [1st Dist.] 1993 orig. proceeding). The court permitted discovery of the lawyer’s documents to deduce the basis of settlement for 100 families’ agreement that was obtained allegedly through improper calculations of settlement amounts and unauthorized by the families. “Where the attorney represents clients in obtaining an aggregate settlement for which no individual negotiations on behalf of any one client were undertaken by the attorney, the client’s ‘file’ becomes any and all documents pertaining to the case.”

   b. TDRPC 1.06(c) – Full Disclosure and Informed Consent. Pursuant to TDRPC 1.06(c), clients may waive most conflicts of interest after “full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.”

10. Reasonable Belief. TDRPC 106(c) allows most conflicts to be raised if a lawyer “reasonably believes” the representation of each client will not be “materially affected” by simultaneous representation. If the lawyer concludes that either client should not agree to representation under the circumstances, the lawyer should not seek consent to proceed, or should end one or both representations. TDRPC 1.06 cmt. 7.

11. Requesting Consent. Disclosure and consent are not mere formalities. The nature and specificity of the disclosure may vary, depending on the facts and the sophistication of the clients. Moreover, while there is no requirement that disclosure and consent be in writing, comment 8 to TDRPC 1.06 suggests that it would be “prudent” to provide all affected clients with “at least a written summary of the considerations disclosed.”

12. Full Disclosure. Each client (affected or potentially affected) must consent after full disclosure. TDRPC 1.06(c). Full disclosure means just that—full disclosure of the pros and cons of a joint representation.

   a. Conoco Inc. v. Baskin, 803 S.W.2d 416 (Tex. App.—El Paso 1991, orig. proceeding). The court held that the client’s consent was invalid because the attorney’s disclosure did not comply with the TDRPC 1.06(c) standard. The client and the client’s other attorney were unaware of the details of the other involved lawsuits, nor was the client’s other attorney included in the disclosure and consent conversation.

   b. Haase v. Herberger, 44 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2001, no pet.). A lawyer represented both husband and wife in a lawsuit relating to construction defects on their home. During the course of the litigation, the couple filed for divorce. The defendants in the construction case subsequently made a settlement offer, which the wife wanted to accept but the husband did not. The wife, on her own, sought an order from the family law court granting her the sole authority to accept the settlement offer, which the family court ordered. After the settlement was concluded, the husband filed suit against the attorney, alleging a conflict of interest and seeking forfeiture of the contingency fee. The court held that “as a result of this potential conflict that arose when [husband and wife] had differing interests in the settlement of the construction litigation, the lawyers should have followed the direction found in 1.06(c)...they should have both consented after full disclosure.”
13. **Practical Considerations.** As a practical matter, it is usually inadvisable to represent one client against another client, even if the two matters are wholly unrelated and even if paragraphs (a), (b) and (d) are not applicable. However, there are circumstances in which a lawyer may act as advocate against a client, and a lawyer is certainly free to do so unless the representations would violate the Texas Disciplinary Rules of Professional Conduct. The propriety of concurrent representations will often depend on the specific facts. For example, it could be permissible to represent one client against another corporate client with diverse operations in an unrelated matter. Or a lawsuit alleging fraud and conspiracy could raise a conflict to a degree that would preclude representation, where a suit for declaratory judgment concerning contract interpretation would not.

14. **Withdrawal.** If a conflict of interest develops, the lawyer must promptly withdraw from “one or more representations to the extent necessary” so as to avoid the conflict. *Davis v. Stansbury*, 824 S.W.2d 278, 282-83 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding); *Conoco v. Baskin*, 803 S.W.2d 416, 421 (Tex. App.—El Paso 1991, orig. proceeding) (conflict may be resolved by withdrawal from one or more of the representations); *Davis v. Stansbury*, 824 S.W.2d 278 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding) (law firm resolved conflict by withdrawing from the representation of a client after discovering that the firm had previously represented a conflicting client).

**B. Rule 1.07--Intermediaries.** TDRPC 1.07 reads as follows:

1. *A lawyer shall not act as intermediary between clients unless:*

   \(a.\) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client’s written consent to the common representation

   \(b.\) The lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients’ best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

   \(c.\) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

   \(d.\) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

   \(e.\) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

   \(f.\) Within the meaning of this rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

   \(g.\) If a lawyer would be prohibited by this rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer’s firm may engage in that conduct.

1. **Acting as Intermediary.** A lawyer acts as an intermediary when he acts on behalf of each of two or more parties with potentially conflicting interests. For example, an attorney could act as an intermediary in settlement negotiations between two parties. represent two parties in settlement negotiations.

2. **Informed consent.** All parties must be informed that by entering into a intermediary relationship, the lawyer will act on behalf of all of the parties and cannot surrender or elevate the interests of one single party above those of another. A written summary of the considerations disclosed to the client is desirable, including admonition to all parties that all communications are not protected by an attorney-client privilege. TDRPC 1.07, cmt. 6.

3. **Reasonable belief.** The lawyer must reasonably believe that the matter can be resolved without litigation, that the intermediation can resolve the matter in a manner “compatible with the clients’ best interests,” each client will be able to make an “adequately informed decision in the matter” as a result of the intermediation, and there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful. The reasonableness of an attorney’s belief will be judged in light of the parties’ level of knowledge, sophistication,
emotional involvement, bargaining power and experience.

4. Consultation. When acting as an intermediary, the lawyer must consult with each party regarding decisions to be made and considerations relevant in making them, so that each client can make adequately informed decisions. Having said this, however, consultation does not mean that the lawyer must tell each client the exact same thing in the same words. See Tex. Comm. on Professional Ethics, Op. 512, V. 58 Tex. B.J. 1147 (1995).

5. Withdraw as Intermediary. An attorney must withdraw as an intermediary if any of the clients request, any of the prerequisites permitting an attorney to act as intermediary are no longer met, intermediation is no longer in the best interests of one of the clients, or one of the clients is no longer able to make an adequately informed decision. However, an intermediary may continue to act on behalf of other parties, even if one party withdraws--the only requirement is that none of the clients object to the continued intermediation.

C. Prohibited Transactions TDRPC 1.08 reads as follows:

1. A lawyer shall not enter into a business transaction with a client unless:
   a. The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
   b. The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
   c. The client consents in writing thereto.

2. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

3. Prior to the conclusion of all aspects of the matter giving rise to the lawyers employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

4. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:
   a. A lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
   b. A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

5. A lawyer shall not accept compensation for representing a client from one other than the client unless:
   a. The client consents;
   b. There is no interference with the lawyers independence of professional judgment or with the client-lawyer relationship; and
   c. Information relating to representation of a client is protected as required by rule 1.05.

6. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

7. A lawyer shall not make an agreement prospectively limiting the lawyers liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

8. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
   A. Acquire a lien granted by law to secure the lawyers fee or expenses; and
   B. Contract in a civil case with a client for a contingent fee that is permissible under rule 1.04.

9. If a lawyer would be prohibited by this rule from engaging in particular conduct, no other lawyer
TDRPC 1.08 does not preclude standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

1. Business Transactions. TDRPC 1.08 does not preclude standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, such as banking or brokerage services, products manufactured or distributed by the client, or utilities services.

   a. State Bar of Texas v. Dolenz, 3 S.W.3d 260 (Tex. App.—Dallas 1999, no pet.). The Court of Appeals found a violation of the disciplinary rules when evidence confirmed that the lawyer had set up a trust for the client and was sole beneficiary of that trust, that the lawyer had the client execute several promissory notes secured by the client/artist’s paintings, artwork, and copyrights, and that the lawyer became actively involved in marketing the client’s artwork. The court noted that business relationships between lawyers and clients are beset with conflicts of interest and will often involve situations in which the lawyer occupies a dangerously superior bargaining position.

   b. Akridge v. State, 13 S.W.3d 808 (Tex. App.—Beaumont 2000, no pet.). The defendant failed to establish the existence of a conflict of interest with respect to a criminal defense lawyer who also acted as a surety on the defendant’s bond and who continued to represent the defendant even though the defendant had not paid the lawyer’s entire fee. The conclusion was based on the defendant being unable to demonstrate (1) that defense counsel was actively representing conflicting interests, and (2) that the conflict had an adverse effect on specific instances of counsel’s performance.

2. Gifts. A lawyer may not prepare an instrument that gives a “substantial” gift, including a testamentary gift, to the lawyer or a person related to the lawyer. If a client’s desire to make such a gift would require the lawyer to prepare a legal instrument, the lawyer should advise the client to seek the advice of another lawyer. TDRPC 1.08 cmt. 3. Moreover, a substantial gift that does not require documentation still must meet the basic fairness standard. A lawyer is not, however, prohibited from receiving reasonable gifts from a client, such as a simple gift to commemorate a holiday or to express appreciation.

   a. Shields v. Texas Scottish Rite Hospital for Crippled Children, 11 S.W.3d 457 (Tex. App.—Eastland 2000, pet. denied). In a will construction case, a $2 million testamentary gift to the lawyer was held invalid because the lawyer had drafted the decedent’s will in violation of Rule 1.08(b).

   b. Olson v. Watson, 52 S.W.3d 865 (Tex. App.—El Paso 2001, no pet.). The Court of Appeals invalidated a testamentary gift of an entire estate to a lawyer and lawyer’s family, based in part on Rule 1.08(b), because an attorney-client relationship existed between the lawyer and the deceased.


3. Literary or Media Rights. A lawyer may not make or negotiate an agreement whereby the lawyer would acquire the literary or media rights concerning the conduct of representation because it creates a conflict of interest between the interests of the client and the lawyer. This limitation applies to both prospective and former clients and continues to apply throughout the duration of “all aspects of the matter” and may continue beyond the term of the representation of the client. Note that this limitation is not subject to client waiver.

4. TDRPC 1.08(a) & cmt. 4. A lawyer may agree that the fee for representing a client in a literary transaction shall consist of a share of the property, but the agreement must conform to the other rules regarding fee agreements and acquisition of proprietary interest.

   a. Beets v. Collins, 65 F.3d 1258, 1265 (5th Cir. 1995). The plaintiff claimed that she was deprived of constitutionally effective counsel in a criminal matter partially because her attorney accepted a media rights contract for his fee. The Fifth Circuit held that the record did not demonstrate the contract ever induced the lawyer to compromise his zealous representation of the plaintiff in favor of his own pecuniary interest and
the attorney’s actions did not prejudice plaintiff in any manner.

5. Financial Assistance to a Client Generally, an attorney may not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings because it may affect the attorney’s judgment by acquiring a personal stake in the outcome. There are, however, two exceptions:

   (a) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, even when the repayment may be contingent on the outcome of the matter [1.08(d)(1)]; and

   (b) a lawyer may pay court costs and expenses of litigation on behalf of indigent clients [1.08(d)(2)].

If a lawyer incurs expenses on behalf of an entity in which the lawyer has a pecuniary interest, a lawyer should not incur such expenses unless the client has entered into a written agreement disclosing the nature and amount of the possible expenses and the relationship between the lawyer and the other entity involved.

   a. **Odak v. Arlington Mem. Hosp. Found**, 934 S.W.2d 868 (Tex. App.—Fort Worth 1996, writ denied). The statute requiring a plaintiff’s lawyer in a health care liability claim to obtain a written report from an expert and to file an affidavit or post a cost bond did not violate the open courts provision of the Texas Constitution by imposing a duty that the lawyer could not comply with without breaching the disciplinary rules because Rule 1.08(h) “expressly permit[s] an attorney to provide a client with assistance such as posting a cost bond or obtaining an expert opinion on a claim’s validity and preparing and filing an affidavit.”

**PRACTICE NOTE:** An agreement made by the lawyer to advance or pay costs may make the client ineligible for a “free appeal” as authorized by TEX. R. APP. P. 40(a)(3). See Griffin Indus. Inc. v. Honorable Thirteenth Court of Appeals, 934 S.W.2d 349, 354 (Tex. 1996).

6. Payment by a Third Party. A lawyer may not accept compensation from a third party unless the client consents, the arrangement does not interfere with the lawyer’s independent professional judgment or with the attorney-client relationship, and the confidentiality of attorney-client communications is protected. The genesis of this rule arises from the U.S. Supreme Court’s decision in **Woods v. City Nat’l Bank & Trust Co.**, 312 U.S. 262, 268 (1941), in which the Supreme Court held that an attorney should not allow another to pay a client’s fees because the practice unfairly forces the attorney to choose between conflicting duties.

7. Insurance Defense. A conflict arises between an attorney’s representation of an insured at the behest and expense of the insurer. This is an area that is fraught with dispute and potential missteps, as illustrated by the case law.

   a. **State Farm Mut. Auto. Ins. Co. v. Traver**, 980 S.W.2d 625, 628 (Tex. 1998). An attorney owes an unqualified loyalty to the insured and must at all times protect the interests of the insured, even the representation could conflict with the insurer’s instructions.

   b. **Employers Casualty Co. v. Tilley**, 496 S.W.2d 552 (Tex. 1973). Recognizing the conflict created when an insurance company pays an insured’s legal fees, the attorney’s loyalty to the insured should be an “unqualified loyalty” where the attorney “owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured.” Before undertaking such a representation, representing multiple clients, the attorney should explain the complications that may arise with common representation and accept employment only upon the client’s consent. In instances where a lawyer is justified in representing two or more clients having differing interest, “it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires.” If a situation arises where the interest of the insured and those of the insurer are conflicted, the insured should be informed and given the opportunity to protect himself.

   c. **Stonestall Surplus Lines Ins. Co. v. Drabek**, 835 S.W.2d 708, 710 (Tex. App.—Corpus Christi 1992, writ denied). “The primary carrier, pursuant to its contract, hired [the defendant’s lawyers] to defend the case on behalf of the insureds. In doing so, [the lawyers] owed the defendants in the underlying suit the unqualified duty to conscientiously and adequately represent them.”

8. Aggregate Settlement. A lawyer representing multiple clients may not participate in the aggregate settlement of the unless each client has consented after full disclosure.

   a. **Burrow v. Arce**, 997 S.W.2d 229 (Tex. 1999). “Settling a case en mass without consent of the clients is unfair to the clients and may result in a benefit to the attorney (speedy resolution and payment of fees) to the detriment of the clients (decreased
Lawyers are. Generally, arbitration is appropriate in connection with the advising that person in writing that independent representation is appropriate in connection with the unrepresented client or former client without first represented in making the agreement. Moreover, an agreement is permitted by law and the client is independently limiting their malpractice liability unless the agreement not permitted to make agreements prospectively must exist on a very high plane. Communications between attorneys and their clients are informed and consent to an aggregate settlement.

b. Judwin Properties v. Griggs & Harrison, 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, no writ.). The attorney owes a duty of loyalty and good faith to each client and it is the ethical responsibility of an attorney representing multiple clients to obtain individual settlements, unless those clients are informed and consent to an aggregate settlement.

c. Scrivner v. Hobson, 854 S.W.2d 148 (Tex. App.—Houston [1st Dist.] 1993, no pet.). The court granted mandamus relief permitting discovery of the lawyers’ files regarding the settlement agreement in a case concerning approximately 100 families. “Where the attorney represents clients in obtaining an aggregate settlement for which no individual negotiations behalf of any one client were undertaken by the attorney, the client’s ‘file’ becomes any and all documents pertaining to the case.”

d. Quintero v. Jim Walter Homes, Inc., 709 S.W.2d 225, 230 (Tex. App.—Corpus Christi 1985, writ ref’d). The appellate court held that the settlement reached was void because the lawyer failed to obtain informed consent from all of the clients, noting that communications between attorneys and their clients must exist on a very high plane.

e. Beets v. Collins, 65 F.3d 1258, 1270 (5th Cir. 1995). “The reason for distinguishing multiple representation conflicts from those involving self-interest is clear. When multiple representation exists, the source and consequences of the ethical problems are straightforward: ‘counsel represents two clients with competing interests and is torn between two duties. Counsel can properly turn in no direction. He must fail one or do nothing and fail both.’”

9. **Limitation of Malpractice Liability.** Lawyers are not permitted to make agreements prospectively limiting their malpractice liability unless the agreement is permitted by law and the client is independently represented in making the agreement. Moreover, an attorney may not settle a legal malpractice claim with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection with the settlement.

a. Keck v. National Union Fire Ins. Co., 20 S.W.3d 692, 699 (Tex. 2000). The Texas Supreme Court addressed the validity of a release entered into between an attorney retained by an insurance carrier and the insured client. The insurer alleged that the attorneys mishandled the case, and that as a result, the settlement was substantially higher than it should have been. The defendant attorney claimed that the release from the insured client precluded liability to the insurer. The court held that the Texas Disciplinary Rules forbid an attorney from “making an agreement that prospectively limits the attorney’s malpractice liability to the client unless (1) the agreement is permitted by law, and (2) the client is independently represented in making the agreement.” The court went on to note that the fiduciary duty that existed required full disclosure of all important information, and that the “recitation in the release that the attorneys advised the client in writing that independent representation [would be] appropriate in connection with the execution of this agreement,” was insufficient to rebut the “presumption of unfairness or invalidity attaching to the contract.”

10. **Arbitration Agreements.** Generally, arbitration agreements between an attorney and client are enforceable, assuming that the agreements otherwise comply with Texas law.

a. **But see In re Godt,** 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.). In that case, the client retained a lawyer, and signed a contingent fee contract relating to a medical malpractice case without discussing its provisions. A few months prior to the expiration of the statute of limitations, the attorney withdrew from the representation. The client sued the attorney for malpractice, and the attorney moved to compel arbitration based on a mandatory arbitration provision in the contingent fee contract. The Court of Appeals held that the arbitration provision was unenforceable because the contingent fee contracts were not signed by the attorney and client as required by Texas Government Code §82.065(a). The **Godt** Court distinguished two other Texas courts that had enforced arbitration:

b. Porter & Clements v. Stone, 935 S.W.2d 217 (Tex. App.—Houston [1st Dist.] 1996, no writ). The court found that the arbitration agreement in a fee agreement was binding and applied to legal malpractice and misrepresentation claims.

c. **Henry v. Gonzalez,** 18 S.W.3d 684 (Tex. App.—San Antonio 2000, pet. dism’d by agr.). This case had a similar fact pattern and complaint as laid out in **Godt;** however, the appellate court in **Gonzalez** ultimately they compelled arbitration because (1) the arbitration clause contained in the fee agreement survived the termination of the contract as a whole and was enforceable and binding on the parties; and (2) the
matters in controversy fell within the scope of the arbitration agreement, as the actual allegations forming the basis of the malpractice claim arose from the attorney’s representation of the client under the attorney-client contract. A dissenting opinion questioned whether an attorney should be permitted to take away a client’s right to jury should legal malpractice occur, and concluded that it should be against public policy in the absence of some additional protections for the client.

11. Interest in a Cause of Action or Litigation. A lawyer may not acquire a proprietary interest in a cause of action or subject matter of litigation, except that a lawyer may acquire a lien granted by law to secure the lawyer’s fee or expenses and may contract for a contingency fee.

12. Prohibitions Apply Across a Firm. TDRPC 1.09 applies to an entire firm; thus, if one lawyer would be prohibited from engaging in particular conduct, the entire firm would be prohibited.

D. Former Clients TDRPC 1.09 reads as follows:

1. Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

   a. In which such other person questions the validity of the lawyer’s services or work product for the former client;
   b. If the representation in reasonable probability will involve a violation of rule 1.05; or
   c. If it is the same or a substantially related matter.

2. Except to the extent authorized by rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

3. When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a) or if the representation in reasonable probability will involve a violation of rule 1.05.

1. Relationship with Former Client. Rule 1.09(a) controls whether an attorney may undertake representation adverse to a former client after the termination of the attorney-client relationship. A lawyer’s duty to a client to avoid conflicts of interest does not cease to exist when a particular matter is resolved or a representation ends. Conflicts of interest may arise whenever a lawyer contemplates representing another client in related matters or when the representation may jeopardize confidential information of a former client. The rule relies on the strict confidentiality of the client’s information and focuses upon the prohibition against the use of confidential information to the client’s disadvantage. Generally, the rule prohibits an attorney from undertaking new representation that is adverse to a former client in a matter that is the same or substantially related to the former representation. The determination of whether a prior representation would preclude an attorney from representing a new client involves a two pronged approach: first, is there a prior attorney-client relationship, whether express or implied? Second, is there a “substantial relationship” between the prior and current representation?


   b. In re American Airlines, Inc., 972 F.2d 605, 616 (5th Cir. 1992), cert. denied, 113 S.Ct. 1262 (1993). “A party seeking to disqualify counsel under the substantial relationship test need not prove that the past and present matters are so similar that a lawyer's continued involvement threatens to taint the trial. Rather, the former client must demonstrate that the two matters are substantially related...The second fundamental concern protected by the test is not the public interest in lawyers avoiding "even the appearance of impropriety," but the client's interest in the loyalty of his attorney.”

2. Representation Never Allowed. Rule 1.09 prohibits representation, absent disclosure and consent, in three circumstances.

3. Validity of Attorney’s Work. Representation would be improper where a subsequent client seeks to question the validity of the lawyer’s work or services on behalf of a former client.

   a. In re Epic Holdings, Inc., 985 S.W.2d 41 (Tex. 1998). The Texas Supreme Court held that plaintiff's counsel was disqualified under Rule 1.09(a)(1) because plaintiff's claims were adverse to defendants, were substantially related to matters on which plaintiff's counsel and defendants had previously
worked, and questioned the validity of plaintiff’s counsel prior law firm's services and work product.

b. Nat’l Medical Enters., Inc. v. Godbey, 924 S.W.2d 123, 131-32 (Tex. 1996). If an attorney is disqualified, any firm with which the attorney is associated is likewise disqualified.

c. Henderson v. Floyd, 891 S.W.2d 252 (Tex. 1995). The supreme court granted writ of mandamus, holding that co-counsel had personally represented relator despite never meeting relator and never serving as his attorney of record; however, he saw the files, he may have seen plaintiff’s settlement video, and he may have proofread briefs.

4. Confidential Information. A subsequent representation would be prohibited if there is a reasonable probability that it will result in the disclosure of a former client’s confidential information, in violation of TDRPC 1.05. This is often a question of fact, dependent on the specific circumstances presented.

a. Centerline Indus. v. Knize, 894 S.W.2d 874 (Tex. App.—Waco 1995, no writ). An attorney argued that, despite the fact that he had represented his former client in a substantially related proceeding, he should not be subject to Rule 1.09 unless there was an actual threat of disclosure of confidential communication and that disqualification would be improper because the confidences had been publicly disclosed in another proceeding. The court of appeals rejected the lawyer’s argument stating that Rule 1.09(a)(3) does not require an actual disclosure and once the substantial relationship exists, “the conclusive presumption that confidences and secrets were imparted to the former attorney” applies.

b. In re American Airlines, Inc., 972 F.2d 605, 615 (5th Cir. 1992). “Rule 1.09(a)(2) incorporates Rule 1.05, which prohibits a lawyer’s use of confidential information obtained from a former client to that former client’s disadvantage. Rule 1.09 thus on its face forbids a lawyer to appear against a former client if the current representation in reasonable probability will involve the use of confidential information or if the current matter is substantially related to the matters in which the lawyer has represented the former client.”

c. Henderson v. Floyd, 891 S.W.2d 252, 254 (Tex. 1995). The Texas Supreme Court held that the “same” matter is intended to prevent a lawyer from switching sides and representing a party whose interests are adverse to a person who sought in good faith to retain the lawyer in the first place. This prohibition can apply even if the lawyer declined the representation before the client had disclosed any confidential information.


e. Clarke v. Ruffino, 819 S.W.2d 947, 950 (Tex. App.—Houston [14th Dist.] 1991, no writ). Confidential information includes not only privileged information but “all information relating to a client or furnished by the client…acquired by the lawyer during the course of or by reason of the representation.”

5. Substantially Related Matter. A subsequent representation is prohibited in the same or a substantially related matter. A determination of “substantially related” requires an analysis of whether the lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client’s disadvantage or for the advantage of the lawyer’s current client or some other person. Again, the question of whether information was actually received from a former client is immaterial to the existence of a substantially related relationship.

a. Texaco v. Garcia, 891 S.W.2d 255, 256-57 (Tex. 1995). On a motion to disqualify counsel based on an alleged conflict of interest, the movant is required to prove the existence of a prior attorney-client relationship in which the factual matters involved were so related to the facts in the pending litigation that it creates a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary.

b. In re Epic Holdings, Inc., 985 S.W.2d 41 (Tex. 1998). The Texas Supreme Court held that the plaintiff’s lawyers should be disqualified for violating Rule 1.09(a)(3) because there was a genuine threat that confidential information obtained during the earlier representation at their prior firm would be disclosed.

c. Arkla Energy Res. v. Jones, 695 (Tex. App.—Waco 1995, no writ). The supreme court granted writ of mandamus, holding that co-counsel had personally represented relator despite never meeting relator and never serving as his attorney of record; however, he saw the files, he may have seen plaintiff’s settlement video, and he may have proofread briefs.

6. The Same Matter. Precluding representation in the “same” matter is intended to prevent a lawyer from switching sides and representing a party whose interests are adverse to a person who sought in good faith to retain the lawyer in the first place. This prohibition can apply even if the lawyer declined the representation before the client had disclosed any confidential information.

a. Henderson v. Floyd, 891 S.W.2d 252, 254 (Tex. 1995). The Texas Supreme Court held that because the attorney should be disqualified because he “may have done some actual work on the case, albeit minor, and was at least exposed to confidential information. It is not necessary to show that the personally and substantially participated in the matter. …The simple fact is that relator’s former lawyer is now associated with his opponent’s lawyer. Rule 1.09 does not permit such representation.”

7. Members of the Firm. TDRPC 1.09’s prohibitions apply to all attorneys in a firm, and
members of a firm may not represent a client if any of the members practicing alone would be prohibited from doing so. See Texaco v. Garcia, 891 S.W.2d 255 (Tex. 1995); NCB Tex. Nat’l Bank v. Coker, 765 S.W.2d 398 (Tex. 1989); Henderson v. Floyd, 891 S.W.2d 252, 254 (Tex. 1995).

a. In re Mitcham, 133 S.W.3d 274 (Tex. 2004). An employee who as a legal assistant on asbestos cases for a defense firm on behalf of a specific corporate defendant. After obtaining her law license, she was hired as an attorney for a plaintiff’s firm handling asbestos cases. To avoid any conflicts, her supervisor contacted her first supervisor and negotiated a settlement and agreement agreeing that neither they nor any attorneys at the second firm would participate in asbestos suits against the company or share information about them. Four years later the employee left the plaintiff’s firm, which subsequently filed suit an asbestos suit against the same corporate defendant. The court held that the presumption of confidential information precluded the plaintiff’s firm’s representation, even after the attorney in question left the firm.

b. Nat’l Med. Enters. v. Godbey, 924 S.W.2d 123 (Tex. 1996); holds that there is an irrebuttable presumption that attorneys gain confidential information on every case at the firm where they work (whether they work on a particular matter or not) and an irrebuttable presumption they share that information with the members of a new firm.

c. Phoenix Founders v. Marshall, 887 S.W.2d 123 (Tex. 1996). The rules are not as strict with respect to legal assistants, where there is an irrebuttable presumption that a legal assistant gains confidential information on cases on which they work, and a rebuttable presumption they share that information with a new employer.

IX. NEGOTIATIONS AND SETTLEMENT IN FAMLY LAW CASES

Texas public policy encourages the early settlement of pending litigation through various alternative dispute resolution (“ADR”) procedures. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002. The Texas Family Code also encourages the use of settlement agreements to promote amicable settlement of disputes in suits for divorce and allows for the use of ADR procedures as to enforcement and modification of agreements for joint managing conservatorship. See TEX. FAM. CODE ANN. §§ 7.006, 153.133 (O’Connor 2003-2004).

The trend towards settlement is mostly positive. From the standpoint of both attorneys and clients, a reasonable settlement, a decision which is entirely within a client's control, is usually preferable to the uncertainty of trial. And therein lies the key to avoiding potential legal malpractice claims that can arise from settlements and settlement negotiations: it is the lawyer's duty to make sure the client has the information needed to make settlement decisions and to provide advice and counsel, but it is the client's duty to ultimately make that decision. Unfortunately, the statutory and judicial emphasis on early resolution of litigation sometimes lends to an atmosphere in which the settlement goal becomes all consuming. A client's control and decision-making power in reaching a settlement, the one outcome in litigation that a client can control, may be diluted by a "settle at any cost" mentality. In a subsequent legal malpractice case, the unhappy client shines the spotlight, not on the attorney's conduct impacted that decision-making process.

A. ADR Procedures. A brief analysis of the various dispute resolution procedures is helpful in considering potential legal malpractice claims that can arise from settlements and settlement negotiations. In the family law context, mediation and the relatively new collaborative law process are by far the most prevalent.

1. Mediation. The court may refer parties in a divorce proceeding to mediation on written agreement of the parties or on its own motion. TEX. FAM. CODE ANN. § 6.602(a). In suits affecting the parent-child relationship, the Family Code sanctions arbitration or mediation. TEX. FAM. CODE ANN. §§ 153.0071 - 0072. Under the Family Code provisions, mediated settlement agreement (“MSA”) is binding in a divorce suit if it:

(1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party’s attorney, if any, who is present at the time the agreement is signed. TEX. FAM. CODE ANN. § 6.602(b).

If valid and binding, the parties are entitled to judgment on the MSA notwithstanding the requirements of TRCP Rule 11 (“no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record”) or any other rule. Id. § 6.602(c). In order to facilitate open and honest communication during ADR, oral and written material communicated during the process is generally confidential and not subject to disclosure,
and may not be used as evidence against a participant unless it is admissible or discoverable independent of the procedure. See TEX. CIV. PRAC. & REM. CODE ANN. § 154.073.

2. Collaborative Law. Collaborative law is a fairly new process developed to address the perceived shortcomings of mediation (e.g., lack of legal advice and advocacy during mediation, tension between mediator’s focus on compromise and attorney’s emphasis on informed consent, the emotions involved and other financial imbalances between the spouses). Pauline H. Tesler, Collaborative Law a New Paradigm for Divorce Lawyers, 5 PSYCHOL. PUB. POL’Y & L. 967, 967, 973-74 (1999). The decision to opt for collaborative law depends on the written agreement of the parties and their attorneys, but does not require a referral by the court; the process takes place entirely outside of the courtroom. The parties and their counsel sign a written “four-way” agreement. Generally speaking, parties to the collaborative law process will sign three contracts: (1) each spouse will sign a retention agreement with their own attorneys; (2) both attorneys and both spouses will sign a collaborative law participation agreement which outlines the process’s ground rules; and (3) both attorneys and spouses sign a formal collaborative law stipulation that reiterates the ground rules. Typically, the parties agree that, on the request of either party, the contractual “injunctions” can become court orders. TEX. FAM. CODE ANN. § 6.603(b).

The Texas Family Code requires collaborative law agreements to be written and to include provisions for:

1. Enforceability. The enforceability of settlement agreements is dependent, at least in part, on compliance with statutory procedural requirements. Therefore, the agreement of the parties must meet the technical requirements – in short, the issue is generally one of form over substance. Having said this, however, the Family Code does contain mandatory substantive provisions about which the parties must agree. For example, § 153.133 lists requires that an agreement for the appointment of Joint Managing Conservatorship must "designate the conservator who has the exclusive right to designate the primary residence of the child."

If a mediated settlement agreement MSA meets the requirements of § 6.602, a party is entitled to judgment on the MSA, and need not sue to enforce the settlement contract. Boyd v. Boyd, 67 S.W.3d 398 (Tex. App.—Fort Worth 2002, no pet.); Cayan v. Cayan, 38 S.W.3d 161 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). "Mediated settlement agreements are binding in suits affecting the parent-
child relationship, as well as suits involving only marital property." Boyd, 67 S.W.3d at 402 (noting that the language in section 6.602 and section 153.0071 is identical); see also, Alvarez v. Reiser, 958 S.W.2d 232, 234 (Tex. App.—Eastland 1997, pet. denied) (an agreement that meets the requirements of section 153.0071 is binding, unilateral withdrawal of consent does not negate the enforceability of the agreement, and a separate suit for enforcement is not necessary). Thus, once the requirements of sections 6.602(b)(1)-(3) or 153.0071(d)-(e) are met, the agreement is irrevocable as of the time of its execution, and any attempt to withdraw consent is ineffective. Section 6.602 has also been interpreted as an exception to Texas Family Code section 7.006(a), which states that a property division agreement may be revised or repudiated before rendition of divorce, and Texas Family Code section 7.001, which requires a trial court to order division of property as the court deems “just and right” in a final decree for divorce. Cayan, 38 S.W.3d at 166. In its holding, the Cayan court acknowledged that section 6.602 eliminates certain safeguards in the settlement process, such as a determination by the trial court that the terms of an agreement are "just and right" under section 7.006. The court noted, however, that "section 6.602 cannot be imposed on parties against their wishes." Id. at 166.

**Practice Note:** Despite the mandatory enforcement language in section 6.602, a court may have discretion to review the terms of a mediated settlement agreement if the terms of the agreement contemplate additional involvement by the court. In re Kasschau, 11 S.W.3d 305, 312 (Tex. App. -- Houston [14th Dist.] 1999, no pet.). In Kasschau, the settlement agreement acknowledged that the entry of a decree would be delayed and that agreed temporary orders would be entered while certain issues were resolved. The appellate court held that these facts established "the trial court's discretion to review the agreement before entering judgment...[and] that the trial court did not violate a ministerial duty by refusing to enter judgment on the mediated settlement agreement." Id.

2. **Compliance with § 6.602.** Enforceability under § 6.602 means strict compliance with the statutory requirements. A Houston appellate court found that an agreement should not have been entered once consent was revoked because the paragraph stating that the agreement was not subject to revocation was capitalized, but not underlined as required by the statute at that time. Spinks v. Spinks, 939 S.W.2d 229 (Tex. App.—Houston [1st Dist.] 1997, no writ) (agreement was entitled “Rule 11 Agreement” but contained the irrevocability language of Texas Family Code section 153.0071(d)). An agreement that does not meet the explicit terms of § 6.602, may nevertheless be enforceable under other applicable law, such as under Rule 11, or the enforcement procedures outlined in Family Code section 7.006.

3. **Rule 11.** Rule 11 agreements will not be enforced unless the agreement is in writing, signed, and filed with the papers of the court as a part of the record, or unless it is made in open court and entered of record. Padilla v. La France, 907 S.W.2d 454 (Tex. 1995) (series of settlement demand and response letters filed with court collectively qualified as a Rule 11 agreement). If a party to the agreement withdraws consent, the terms are not binding unless the other party successfully sues to enforce the settlement agreement as a contract. Padilla, 907 S.W.2d at 461-62. The agreement itself does not have to be filed with the court prior to repudiation; it simply must be filed before it is sought to be enforced. Id. at 461 (settlement letters filed with motion for summary judgment met Rule 11 filing requirement).

4. **The Texas ADR Act.** Mediated settlement agreements arising under the Texas ADR Act are, like Rule 11 agreements, to be enforced as any other contract. A party who agrees to a settlement may not unilaterally repudiate that agreement. Cary v. Cary, 894 S.W.2d 111 (Tex. App.—Houston [1st Dist.] 1995, no writ); In re Marriage of Ames, 860 S.W.2d 590 (Tex. App.—Amarillo 1993, no pet.). Enforcing an MSA entered into pursuant to the Texas ADR Act requires a summary judgment proceeding if no fact issue exists, or a trial (jury or bench) if there is a fact issue. Davis v. Wickham, 917 S.W.2d 414, 416-17 (Tex. App.—Houston [14th Dist] 1996, no writ).

**Practice Note:** While strict compliance with statutory provisions will generally assure enforceable settlement agreements, there are circumstances in which parties simply cannot or will not agree to a mandatory provision. This does not mean that the case cannot be settled, in fact, this kind of case, more than most, is one that probably should be settled – by whatever terms the parties agree. In such cases, a client may be advised about potential risks of going forward with a settlement, recognizing, again, that the decision to enter into a settlement agreement is ultimately the client’s decision.

B. **Fraud, Failure to Disclose.** "If a party fails to exercise diligence in investigating facts or law or otherwise enters into a section 6.602 agreement unadvisedly, he will not be rewarded for doing so with a reprieve from the agreement." Cayan v. Cayan, 38 S.W.3d 161, 167 (Tex. App. – Houston [14th Dist.] 2000, pet. den’d). On the other hand, a material misrepresentation by one party to an agreement can
support rescission or repudiation by the other party. Likewise, a failure to disclose material information by one contracting party can lead to the rescission of an otherwise enforceable settlement agreement under what is essentially a fraudulent inducement analysis. “Where a person is under a duty to disclose material information, refrains from doing so, and thereby leads another to contract in reliance on a mistaken understanding of the facts, the resulting contract is subject to rescission due to the intentional nondisclosure. Boyd v. Boyd, 67 S.W.3d 398 (Tex. App. – Fort Worth 2002, no pet.). For example, courts will invalidate section 6.602 agreements where an MSA contains a full disclosure provision and one party intentionally fails to disclose all assets, leading the other party to contract in reliance on a mistaken understanding of the facts. Even the inclusion of a catchall phrase dividing property not expressly disposed of by the MSA will not ameliorate the effect of the intentional nondisclosure. Id. at 404-05. An undisclosed asset may be awarded in a post-divorce enforcement action on the basis of fraud or failure to disclose. See, e.g., Hinson v. Hinson, 1998 Tex. App. LEXIS 4622 (Tex. App. -- Austin July 30, 1998).

Absent an affirmative misrepresentation, a failure to disclose will support rescission only if a duty to disclose exists.

1. Fiduciary Relationship. A duty to disclose can arise from a fiduciary relationship, recognizing, however, that the fiduciary duty arising from a marital relationship ends when the parties hire separate counsel to represent them in a contested divorce. Parker v. Parker, 897 S.W.2d 918, 924 (Tex. App. – Fort Worth 1995, writ den’d), overruled on other grounds by Formosa Plastics Corp. USA v. Presidio Engr’s & Contractors, Inc., 960 S.W.2d 41 (Tex. 1998).

2. Formal Discovery. The discovery provisions in the Texas Rules of Civil Procedure require complete and accurate disclosure, as well as an ongoing duty to supplement.

**Practice Note:** Remember that parties are charged with information that is available to them or their attorneys. McMahan v. Greenwood, 108 S.W.3d 467 (Tex. App. -- Houston [14th Dist.] 2003, pet. den’d); Sutton v. Grogan Supply Co., 477 S.W.2d 930, 935 (Tex. Civ. App. -- Texarkana 1972, no writ). A decision to conduct formal discovery entails more than sending requests and receiving responses--it means actually reviewing the documents and information that is provided.

3. Informal Discovery. The parties and their attorneys may agree to engage in informal discovery to avoid additional expense or emotional turmoil.

4. Collaborative Agreements. Most Collaborative Divorce Agreements provide for full disclosure prior to or as part of the mediation process.

**Practice Note:** Keeping in mind the confidentiality provisions applicable to mediation and settlement negotiations, Tex. Civ. Prac. & Rem. Code Ann. §§ 154.053, 14.073, it may be advisable to incorporate disclosures and representations on which parties rely into the settlement agreement itself.

**Practice Note:** The decision to rely on informal discovery or an opposing party's voluntary disclosures has obvious benefits, but significant drawbacks as well. Relying on informal discovery requires trust on the part of the parties and their attorneys. Ultimately, this is a decision that a client should make, with advice and input from the attorney.


**Practice Note:** A client who is representing the completeness and accuracy of disclosures must understand that “everything” means “everything,” as well as the ramifications of misrepresentation or failure to disclose. This does not mean that an attorney may not rely on a client’s representations, or that an attorney has a duty to supervise or verify a client’s disclosures. Having said this, however, an attorney who has knowledge of a client’s concealment must act in accordance with the Texas Disciplinary Rules of Professional Conduct, specifically §§ 1.02; 1.05(e); 1.5(b)(2)-(3); and 3.03.

C. Illegality. A contract that cannot be performed without violation of the law is void and not enforceable, notwithstanding the mandatory provisions of 6.602. Kasschau, 11 S.W.3d at 312. In the Kasschau case, the husband had secretly tape-recorded his wife’s conversations with third parties, a violation of the Texas Penal Code. A provision in the mediated settlement agreement required that the husband deliver the tape recordings to his attorney, and that both attorneys would then destroy the tapes. The trial court concluded that this provision required the destruction of evidence in a potential criminal proceeding, also a violation of the Penal Code. The court refused to sever the illegal provision, and held that the entire
agreement was void and unenforceable because the provision in question was part of the consideration for the settlement agreement as a whole. Id.

In the case of In re Calderon, 96 S.W.3d 711, 718 (Tex. App -- Tyler 2003, no pet.), the court considered a mediated settlement agreement which provided that venue and jurisdiction would continue in Smith County for three years. After the children had resided in Bexar County for more than six months, the mother filed a motion to transfer venue from Smith County to Bexar County pursuant to the mandatory venue provisions set forth in Texas Family Code Section 155.201(b)(requiring transfer of venue to a county where the child has resided for six months).

The husband opposed the transfer of venue, arguing that the mediated settlement agreement was enforceable under section 153.0071. On mandamus, the court held that the fixing of venue by contract is "invalid and cannot be the subject of private contract." Id., citing Leonard v. Paxson, 654 S.W.2d 440 (Tex. 1983). The court held that the mandatory venue provision was therefore void and not enforceable.

D. Duress and Coercion. Section 6.602 settlement agreements are still subject to review for duress, coercion or other dishonest means. Boyd, 67 S.W.3d at 403. As a practical matter, it is difficult to prove duress or coercion. Economic duress or coercion requires: (1.) a threat to do something which a party threatening has no legal right to do; (2.) some illegal exaction or some fraud or deception; and (3.) imminent restraint such as to destroy free agency without present means of protection. Simpson v. MBank Dallas, N.A., 724 S.W.2d 102, 109 (Tex. App. -- Dallas 1987, writ ref'd n.r.e.). Moreover, a contract will not be invalidated when the duress or coercion emanates from a third person who has no involvement with the opposite party to the contract. In King v. Bishop, 879 S.W.2d 222 (Tex. App. -- Houston [14th Dist.] 1994, no writ), the plaintiffs alleged that they were coerced into a settlement of underlying litigation by their attorney, and sought to rescind the settlement agreement. The appellate court upheld the enforceability of the settlement agreement, noting that the opposing party in the underlying litigation had no role in the alleged coercion, but noted that plaintiffs could pursue a damages claim against their attorney. See also, Hollaway v. Hollaway, 792 S.W.2d 168, 171 (Tex. App. -- Houston [1st Dist.] 1990, writ den'd).

E. The Involvement of Children. The strong public policy in favor of settlement applies in parent-child disputes. Having said this, however, there are additional factors that can impact a lawyer's representation in such cases.

1. Lawyer for Parent Does Not Represent Child. An attorney who represents a parent in a divorce proceeding does not represent the child. The question of who an attorney represents can be blurred, particularly when a child has significant interaction and involvement with a parent’s attorney.

Practice Note: Attorneys should clearly communicate, preferably in writing, that he is not representing the child, remembering that an attorney-client relationship may be implied by conduct of the parties. See, e.g., Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265-66 (Tex. App.—Corpus Christi 1991, writ denied) (stating that attorney-client relationship does not depend on the payment of a fee, but may exist as a result of rendering gratuitous services); Kotzur v. Kelly, 791 S.W.2d 254, 257-58 (Tex. App.—Corpus Christi 1990, no writ) (attorney may be held negligent when he fails to advise a party that he is not representing them when the circumstances lead the party to believe that he is).

2. Best Interest of the Child. A child’s best interest must be addressed in devising a custody settlement. A court’s parens patriae function includes protecting the interests of a child in a custody settlement, and generally may only enter an order that the court finds is in the child’s best interest. TEX. FAM. CODE ANN. § 153.002 (best interest of the child is the primary consideration of court in determining issues of conservatorship and possession and access to child); § 153.007 (if court finds agreement is in the child’s best interest, it will render an order in accordance with a written conservatorship the agreement).

3. The Exception to Best Interest Determination. At least one court has held that the mandatory provisions of §§ 6.602 and 153.0071 preclude any best interest determination, or any modification or revision to a custody agreement reached in mediation. In re Circone, 122 S.W.3d 403, 406 - 07 (Tex. App. -- Texarkana 2003, no pet.). In the Circone case, the child was represented by attorney ad litem. Even so, it is difficult to reconcile the holding with § 153.002, which states that "the best interest of the child shall always be the primary consideration of the court...." Note that § 153.0071(b), which addresses arbitration procedures as opposed to mediations, specifically provides for a best interest determination by the court.

4. Conflicting Views of Best Interest. Differing views of the best interest of a child may conflict with an attorney’s duty to zealously represent a client/parent. James D. Stewart & Carrie Sisak, Don’t Forget the Child, Advanced Family Law Course
In certain cases, the potential for conflict can justify additional steps to protect a child’s best interest.

a. **Attorney for the Child.**

   Securing independent counsel to advocate for a child can avoid potential conflicts of interest on the part of an attorney representing a parent. See *Samara v. Samara*, 52 S.W.3d 455 (Tex. App. -- Houston [1st Dist.] 2001, pet. den’d). Independent counsel can speak for the child, although the question of purporting to represent a child raises questions about the ability of a child to form an attorney-client relationship at all, and creates the potential for conflicts between the child’s wishes versus the best interests.

b. **Guardian Ad Litem/Attorney Ad Litem.** The Family Code specifically provides for the discretionary appointment of a guardian ad litem, an attorney ad litem or an "amicus attorney." Family Code § 107.021. The court may make such an appointment "only if the court finds that the appointment is necessary to ensure the determination of the best interests of the child." *Id.*

c. **Duty of Confidentiality.** The involvement of a child does raise an exception to an attorney’s duty of confidentiality to his client. Section 261.101 of the Texas Family Code requires persons who reasonably believe that a child’s physical and/or mental health has been adversely affected by abuse or neglect to report their suspicions to the authorities. The statute specifically states that the duty applies without exception to persons whose personal communications may otherwise be privileged, including attorneys.

F. **The Collaborative Law Contract.** Questions have been raised about an attorney's ability to zealously represent a client within the collaborative process. Proponents of the process feel that these issues are addressed by statutory provisions which allow for the termination of the process and a judicial determination, as well as the fact that the parties and lawyers sign contractual agreements explicitly setting forth the purposes for which each lawyer is retained. However, at least one malpractice attorney has analyzed the collaborative law process and the model collaborative law provisions and determined that it may be risky business for the attorneys involved. See Gary M. Young, Malpractice Risks of Collaborative Divorce, 75 WIS. LAW 14, *14 (2002).

1. **Duties Arising Under Collaborative Law Agreements.** Beyond the statutory scheme set forth in the Family Code, the language of a Collaborative Agreement determines the scope of the agreement and the duties owed. Some collaborative divorce agreements require the parties, and their attorneys, to correct miscalculations or inadvertent mistakes of others involved in the process; the disclosure of all information, whether requested or not; or even an attorney's withdraw there is mistrust of their own client's good faith. These provisions arguably create duties on the part of an attorney that do not otherwise exist under Texas law, including duties to a client's opposing party. The issue here is not one of a dual representation or conflict of interest, because the parties' acknowledgement in the agreement that each attorney represents the interests of his or her client constitutes consent and waiver under the disciplinary rules. The issue is, however, the contractual obligations that a lawyer may undertake as part of a collaborative representation.

2. **Ethical Issues.** Potential ethical concerns arise because the scope of a collaborative representation is limited by agreement. This limited representation can arguably affect an attorney's zealous representation and confidentiality obligations, not to mention conflicts of interest that may arise. Addressing these issues requires frank and detailed communications between attorney and client, acknowledgement of the issues, and client consent to the collaborative representation. Ethical concerns such as these are discussed in far more detail in an excellent article by Larry Spain, which was published in the Baylor Law Review. Spain, Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can be Ethically Incorporated into the Practice of Law, 56 Baylor L. Rev. 141 (2004).

**Practice Note:** Informed consent requires disclosure of specific risks or ramifications that may arise as a result of a limited representation or potential conflict of interest. The disclosure, as well as the client's consent, should be documented.