We wish to thank Randy Johnston of Johnston Tobey, P.C. for his valuable comments and assistance in the preparation of this paper.

MALPRACTICE FOR LITIGATORS: An Update on Recent Developments in Texas Legal Malpractice and Ethics Law

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CHAPTER 6

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LEGAL MALPRACTICE FOR LITIGATORS: An Update on Recent Developments in Texas Legal Malpractice and Ethics Law

I. INTRODUCTION

This article provides an update on recent developments in Texas legal malpractice and ethics law. Of particular note are several recent Texas Supreme Court opinions on attorney liability and ethics issues. Belt v. Oppenheimer, Blend, Harrison & Tate further defines the applicability of the privity doctrine by allowing the personal representative of an estate to sue the testator’s attorney for malpractice. Alexander v. Turtur & Associates, Inc. requires that expert testimony be used to prove causation in certain circumstances. And Hoover Slovecyk LLP v. Walton provides new guidance on what constitutes an unconscionable contingency fee. In addition to these opinions, this article discusses the claims typically brought against attorneys, developments in what is required to establish professional negligence liability, and recent opinions on attorneys’ ethical obligations that might affect litigators.

II. THE ATTORNEY-CLIENT RELATIONSHIP

A. General Background on the Privity Rule

Texas law generally prohibits non-clients from suing lawyers. Under the privity rule, persons outside the attorney-client relationship have no cause of action for injuries sustained due to an attorney’s malpractice or breach of fiduciary duty. See, e.g., Gillespie v. Scherr, 987 S.W.2d 129, 132 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (holding the privity rule prevents claims against attorney for a class by non-client potential class action members); Gamboa v. Shaw, 956 S.W.2d 662, 665 (Tex. App.—San Antonio 1997, no pet.) (shareholders of a corporation may not sue the corporate attorney because “[s]uch a deviation [from the privity rule] would result in attorneys owing a duty to each shareholder of any corporation they represent,” and “would owe a duty to both sides of the litigation in any type of derivative suit brought against the corporation by a shareholder.”) Cf. Kastner v. Jenkins & Gilchrist, P.C., 231 S.W.3d 571, 578 (Tex. App.—Dallas 2007, n.p.h.) (“It is well-established that an attorney’s representation of a partnership does not constitute representation of each of the individual partners.”).

Texas courts have advanced several policy concerns in favor of the privity rule. First, liability to non-clients can hamper an attorney’s vigorous representation of his own client. As one court stated: “The attorney’s preoccupation or concern with the possibility of claims based on mere negligence (as distinguished from fraud) by any with whom his client might deal would prevent him from devoting his entire energies to his client’s interest.” Bell v. Manning, 613 S.W.2d 335, 339 (Tex. Civ. App.—Tyler 1981, writ ref’d n.r.e.); see also Am. Centennial Ins. v. Canal Ins., 843 S.W.2d 480, 484 (Tex. 1992) (“Texas courts have been understandably reluctant to permit a malpractice action by a non-client because of the potential interference with the duties an attorney owes to the client”). Thus, “[w]ithout the privity barrier, fear of liability would inject undesirable self-protective reservations into the attorney’s counseling role.” Vinson & Elkins v. Moran, 946 S.W.2d 381, 401 (Tex. App.—Houston [14th Dist.] 1997, pet. dism’d by agr.).

A second concern is that liability to non-clients may “tend to encourage a party to contractual negotiations to forego personal legal representation and then sue counsel representing the other contracting party for negligent misrepresentation if the resulting contract later proves disfavored in some respect.” Bell, 613 S.W.2d at 339. Furthermore, “[i]t is obvious that opening attorney-client contracts to third party scrutiny would entail a vast range of potential liability.” Dickey v. Jansen, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.).

The most common application of the privity rule in recent years has been in the context of wills and trusts, where beneficiaries have tried to sue the testator’s attorney. Texas courts have applied the privity rule in this context to prevent such claims by beneficiaries. In Dickey v. Jansen, for example, the First Court of Appeals upheld the application of privity in the context of a trust. Dickey v. Jansen, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.). In Dickey, the intended beneficiaries under a testamentary trust brought suit against the testator’s attorney for negligent preparation of the trust. The court of appeals held that the intended beneficiaries were not in privity with the testator’s attorney, and lack of privity precluded the action. Id. at 582. Similarly, in Huie v. DeShazo, the Texas Supreme Court held that only the trustee, not the trust beneficiary, is a client of the trustee’s attorney. Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996). While the trustee still has a fiduciary duty to the beneficiary, any communication between the trustee and his attorney is protected from the beneficiary because of the attorney-client privilege. Id.; see also Parish v. Wilhelm, No. 10-08-00037, 2008 WL 5246685, at *2 (Tex. App.—Waco Dec. 17, 2008, no pet.) (holding that a deceased client’s attorney who was retained to change her life insurance beneficiary designation did not owe a duty to the prospective beneficiaries).

In Barcelo v. Elliot, the seminal Texas privity case, the Texas Supreme Court refused to recognize an
exception to the privity rule in the estate planning and trust context, concluding that an attorney who drafts a will or trust does not owe a duty of care to named beneficiaries under the will or trust. Barcelo v. Elliot, 923 S.W.2d 575, 578-79 (Tex. 1996). In so holding, the Barcelo court reasoned that “the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent.” Id. at 578. The supreme court has recently held that the Barcelo rule does not preclude a legal malpractice claim brought by a representative of the estate, as opposed to the estate’s beneficiaries. Belt v. Oppenheimer, Blend, Harrison & Tate, 192 S.W.3d 780, 784 (Tex. 2006). The opinion, which is discussed in more detail below, makes clear that Barcelo’s bright line rule is still good law.

B. When is Privity Established Under Texas Law?

1. Nature of the Attorney-Client Relationship

For there to be privity, there must be an attorney-client relationship. The attorney-client relationship is a contractual relationship in which an attorney agrees to render professional services on behalf of the client. See Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1995); Sutton v. McCormick, 47 S.W.3d 179, 182 (Tex. App.—Corpus Christi 2001, no pet.). The attorney-client relationship can also extend to “preliminary consultations between the client and the attorney regarding the attorney’s possible retention.” Nolan v. Forman, 665 F.2d 738, 739 n.3 (5th Cir. 1982).

An attorney-client relationship is ordinarily created by an express agreement between the parties. See, e.g., Sutton, 47 S.W.3d at 182. However, the attorney-client relationship can also be implied based on the parties’ conduct. See Kneipper, 67 F.3d at 1198; Parker v. Carnahan, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied). In Parker, the Texarkana Court of Appeals described the standard as follows:

The legal relationship of attorney and client is purely contractual and results from the mutual agreement and understanding of the parties concerned, based upon the clear and express agreement of the parties as to the nature of the work to be undertaken and the compensation agreed to be paid therefor. The contract of employment may be implied by the conduct of the two parties. All that is required is that the parties explicitly or by their conduct manifest an intention to create the attorney-client relationship.

Courts apply an objective standard, examining what the parties said and did, in order to determine if there was a meeting of the minds with respect to the creation of an attorney-client relationship. Sutton, 47 S.W.3d at 182. The client’s subjective belief that an attorney-client relationship existed is not, in and of itself, sufficient to establish an attorney-client relationship. See Vinson & Elkins v. Moran, 946 S.W.2d 381, (Tex. App.—Houston [14th Dist.] 1997, writ dism’d by agrt.) (“To determine if there was an agreement or meeting of the minds, one must use objective standards of what the parties said and did and not look to their subjective states of mind.”). In Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., the plaintiffs argued that testimony from the client’s CEO that she thought an attorney-client relationship had been formed at a particular time demonstrated the existence of an attorney-client relationship. Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 254-55 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). The court noted that the CEO’s “subjective belief that Birnberg was her attorney is not relevant to this inquiry. The determination of whether there is a meeting of the minds is based solely on objective standards of what parties did and said, not their alleged subjective states of mind.” Id. Rather, the court evaluated the question based on objective evidence, such as correspondence regarding the representation, the language of the fee agreement, and when the attorneys were provided with confidential client information. Id. at 255-56.

Further, a contractual relationship will generally only be implied upon a showing of sufficient intent. In Banc One Capital Partners Corp. v. Kneipper, for example, some investors argued that the defendant law firm manifested an intent to create a limited attorney-client relationship upon issuing an opinion letter in connection with a securities offering. Kneipper, 67 F.3d at 1198. The court affirmed a summary judgment for the attorneys because the opinion letter did not evidence an intent to form an attorney-client relationship.

The attorney-client relationship does not depend upon the payment of a fee, but may exist as a result of rendering services gratuitously. Parker, 772 S.W.2d at 157. However, the mere fact that services are rendered does not mean that an attorney-client relationship existed. For example, it is possible that an attorney may act as a mere scrivener between two parties in drafting documents for a transaction. Sutton, 47 S.W.3d at 184; In re Bivins, 162 S.W.3d 415, 420 (Tex. App.—Waco 2005, no pet.).
2. Failure to Advise That No Attorney-Client Relationship Exists

In the absence of evidence that the attorney knew that the parties assumed he or she was representing them in a matter, the attorney has no affirmative duty to inform the parties otherwise. But an attorney can be liable when the circumstances would lead the non-client to believe the attorney has undertaken the representation and the attorney fails to warn the non-client that this is not the case. See Cantu v. Butron, 921 S.W.2d 344, 351 (Tex. App.—Corpus Christi 1996, writ denied) (recognizing that gaining trust and confidence can establish a relationship); Byrd v. Woodruff, 891 S.W.2d 689, 700 (Tex. App.—Dallas 1994, writ denied); Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265-66 (Tex. App.—Corpus Christi 1991, writ denied). Such liability would be imposed if “the attorney was aware or should have been aware that his conduct would have led a reasonable person to believe that the attorney was representing that person.” Burnap v. Linnartz, 914 S.W.2d 142, 148-49 (Tex. App.—San Antonio 1995, no writ).

In a litigation context, an attorney declining representation can avoid this problem by: (1) stating in writing to a person whom the attorney has declined to represent that the attorney is not taking the person’s case; and (2) urging that person in writing to obtain other counsel immediately because of the possibility of problems with the statute of limitations.

C. Recent Texas Supreme Court Case on Privity: Belt v. Oppenheimer, Blend, Harrison & Tate

In March 2006, the Texas Supreme Court issued an opinion that clarifies the application of the privity doctrine in the context of wills and estates. The court held in Belt v. Oppenheimer, Blend, Harrison & Tate that the personal representative of an estate may bring a legal malpractice claim against the attorney who represented the decedent in planning the estate. 192 S.W.3d 780 (Tex. 2006).

In Belt, several attorneys represented David Terk in preparing his will and advising him on planning his estate. After Terk passed away, his children became the joint independent executors of the estate and, in that capacity, sued the attorneys alleging that the attorneys’ estate planning advice caused the estate to incur $1.5 million in excess tax liability. The attorneys argued that the privity rule established in Barcelo v. Elliott prevented such a claim. The children responded that they were not suing as beneficiaries of the estate, but rather directly on behalf of the estate, and thus were not barred under Barcelo.

The supreme court agreed with the children, and concluded that the Barcelo rule, while still in effect to prevent claims by estate beneficiaries, did not bar claims brought by the personal representatives of an estate. Id. at 784. The court acknowledged that Texas is in the minority in requiring strict privity in estate-planning malpractice suits. Id. It also reasoned that the policy concerns articulated by Barcelo—possible conflicts between testator and beneficiaries during the estate planning process, the need for extrinsic evidence to prove the decedent’s intent, and the importance of allowing estate planners to zealously represent their clients—are not implicated when the legal malpractice claim is brought on behalf of the estate rather than the beneficiaries. Id. at 783-84.

The court concluded that allowing suits by personal representatives on the estate’s behalf would not cause estate attorneys to have divided loyalties between the estate and the beneficiaries. Similarly, a suit asserting damage to the estate would not require proof of the decedent’s intent regarding distribution of the estate assets. Id. at 787.

Finally, the court acknowledged that because estate beneficiaries often serve as personal representatives, some beneficiaries may try to leverage its holding by recasting a claim for a lost inheritance as a claim brought on behalf of the estate. But the court noted that “[t]he temptation to bring such claims will likely be tempered, however, by the fact that a personal representative who mismanages the performance of his or her duties may be removed from the position.” Id. at 787-88.

A recent San Antonio Court of Appeals case attempts to expand Belt’s holding, although it claims to not disturb the Barcelo rule. O’Donnell v. Smith involves a claim brought by the representative of an estate against the lawyers who had represented the decedent not in the estate planning context, but in connection with his administration of his wife’s estate many years earlier. Smith, 234 S.W.3d 135 (Tex. App.—San Antonio 2007, pet. granted). The now-deceased client, Denny, hired the lawyers to advise him in the independent administration of his second wife’s estate. During the administration a question was raised as to whether certain stock was community or separate property. Denny elected to treat the stock as community property, and thus it was not included in his wife’s testamentary trust. On his death 29 years later the children sued the estate for $25 million they allegedly suffered as a result of the trust being underfunded due to the improper characterization of the stock as community property. The estate settled with the beneficiaries and then sought to recover the amount of the settlement from Denny’s lawyers.

The lawyers asserted privity as a defense, and argued that Belt did not apply because the lawsuit did not result from estate planning advice and because the policy considerations at issue in Belt were distinguishable. The court of appeals rejected these arguments, and concluded that under Belt there is privity whenever a personal representative of an estate
sues the decedent’s attorney, regardless of whether or not the legal representation took place in the estate planning context. Id. at 143-44. What is most troubling about the Smith opinion is that its practical result is to overrule Barcelo (even though it professes not to do so) and to ignore the policy concerns articulated by the supreme court in Belt. In Smith the decedent made a decision about how to treat the property and his lawyers acted in accordance with his wishes. This decision, of course, was beneficial to the decedent at the expense of the trust beneficiaries, the children. While ordinarily the children should not be able to sue their father’s attorney under the privity doctrine, here they were allowed to bypass the doctrine by simply: (1) suit[ing] the estate (of which one of the children was personal representative); and (2) then claiming the amount of the settlement as damages incurred by the estate in the legal malpractice claim. The supreme court has granted petition for review in this case so a resolution of this issue may be forthcoming.

II. ESTABLISHING MALPRACTICE LIABILITY

A. Proving Breach of the Standard of Care

A legal malpractice action in Texas is traditionally based on professional negligence. The elements of a legal malpractice claim are as follows: (1) there is a duty owed by the attorney to the client; (2) that duty was breached; (3) the breach proximately caused the client’s injury; and (4) damages resulted. Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989).

In proving that the lawyer breached the standard of care, the plaintiff must show that the lawyer failed to do that which an attorney of ordinary prudence would have done under the same or similar circumstances. As the supreme court explained in Cosgrove, the standard applied is an objective one:

If an attorney makes a decision which a reasonably prudent attorney could make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable. Attorneys cannot be held strictly liable for all of their clients’ unfulfilled expectations. An attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect. The standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith.

Cosgrove, 774 S.W.2d at 665.

Proof of breach is generally done through expert testimony. The jury may not rely solely upon the fact that the lawyer violated the Texas Disciplinary Rules of Professional Conduct. The Rules will not support a claim of negligence per se, nor do they give rise to a private cause of action. Cayler v. Minns, 60 S.W.3d 209, 214 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Some courts may consider them to be admissible, however, as evidence to demonstrate what the standard of care should be. For example, in one recent opinion, a court of appeals stated that “[b]arring the use of the code and denying that the code is relevant to the duties a lawyer has to his client is not logical and would require the re-creation of a standard of care without reference to verifiable or pre-existing rules of conduct.” See Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 905 (Tex. App.—Dallas 2001), rev’d on other grounds, 145 S.W.3d 150 (Tex. 2004); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2) & cmt. (f) (2000) (stating that the rules of professional conduct may be considered by the trier of fact as evidence of the standard of care).

Although typically the question of whether an attorney breached the standard of care is an issue of fact for the jury, a recent Austin Court of Appeals decision provides an example of a situation in which breach may be decided as a matter of law. In Zenith Star Ins. Co. v. Wilkerson, the plaintiff sued its former attorney for malpractice in an underlying lawsuit based on his failure to raise a particular defense. Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525 (Tex. App.—Austin 2004, no pet.). The attorney moved for summary judgment, arguing that because the defense was not available under Texas law, he could not have breached his duty as a matter of law. The court of appeals agreed, and concluded that the question of whether a defense was legally valid is a question of law that can be decided on summary judgment—regardless of whether the law is settled or unsettled on the question. Id. at 531. The court concluded as a matter of law that the plaintiff could not have validly raised the defense in the underlying lawsuit, and it therefore upheld summary judgment for the attorney. Id. at 533. It also cautioned:

“In rejecting Zenith’s arguments, we note our reluctance to condone a rule that subjects competent attorneys to liability for failing to assert every conceivable defense tactic under the sun... The practice of law is adversarial enough without attorneys having to eschew expense- and time-saving measures such as agreed motions to transfer venue.”

Id. at 534 n.7. Thus, when the question of breach depends partly on a legal determination, it may be resolved on summary judgment as a matter of law.
B. Proving Causation

When a legal malpractice case arises out of litigation, the causation element requires “the client . . . to prove that he or she would have been successful in prosecuting or defending the underlying action, if not for the attorney’s negligence or other improper conduct.” Joseph H. Koffler, Legal Malpractice Damages in a Trial Within a Trial — A Critical Analysis of Unique Concepts: Areas of Unconscionability, 73 MARQ. L. REV. 40, 41 (1989). Thus, a successful legal malpractice action requires that the plaintiff show she would have prevailed in the underlying suit but for the counsel’s negligence. Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied).

This requirement means the plaintiff must conduct a trial within a trial in which both the malpractice claim and the underlying claims are tried to the same jury.

1. Proving Causation Following a Jury Trial—The Typical Case

The Texas Pattern Jury Charge (PJC) for legal malpractice cases provides the following questions and instructions when the case arises out of an underlying jury trial in which the client was the plaintiff and suffered an adverse outcome due to the alleged negligence of the attorney in prosecuting the suit.

**Negligence/proximate cause**

“Did the negligence, if any, of [Attorney/Defendant] proximately cause the . . . [occurrence or injury] in question?”

“Negligence,” when used with respect to the conduct of [the Attorney/Defendant], means failure to use ordinary care, that is, failing to do that which an [attorney] of ordinary prudence would have done under the same or similar circumstances or doing that which an [attorney] of ordinary prudence would not have done under the same or similar circumstances.

“Ordinary care,” when used with respect to the conduct of [the Attorney/Defendant] means that degree of care that an [attorney] of ordinary prudence could use under the same or similar circumstances.

“Proximate cause,” when used with respect to the conduct of [the Attorney/Defendant], means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that an [attorney] using ordinary care would have foreseen that the event, or some similar event, might reasonably result there from. There may be more than one proximate cause of an event.

3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 60.1.

**Damages**

What sum of money, if paid now in cash, would fairly and reasonably compensate [plaintiff/client] for his loss, if any, resulting from the occurrence in question?

You shall award the sum, if any, that [plaintiff/client] would have recovered and collected if [plaintiff’s] original suit against [the underlying defendant] had been properly prosecuted.

3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 61.4, 61.1, 60.1 cmt. B.

The Texas Supreme Court recently held that expert testimony may be required to establish causation when a legal malpractice case arises out of a bench trial. Alexander v. Turtur & Associates, Inc., 146 S.W.3d 113 (Tex. 2004). Alexander arose out of a bench trial and involved “a complicated and very subjective causation issue: whether, in reasonable probability, a bankruptcy judge would have decided the underlying adversary proceeding differently if Alexander had personally tried the case or if he or [his associate] had introduced other evidence.” Id. Subsequent opinions have applied this holding outside of the bench trial context. See, e.g., Lewis v. Nolan, No. 01-04-00865-CV, 2006 WL 2864647, at *5 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (mem. opinion) (expert testimony needed on question of whether failure to file a response to a summary judgment motion caused plaintiff to lose the case); Kothmann v. Cook, No. 07-05-0335-CV, 2007 WL 1075171, at *4 (Tex. App.—Amarillo Apr. 11, 2007, no pet.) (mem. opinion) (holding that expert testimony was needed to prove causation on a breach of fiduciary duty claim that arose out of protracted litigation in multiple counties and in particular a hearing about property rights).

2. Determining Causation in Unusual Cases

One threshold question is whether causation in the legal malpractice case is a question of fact for the jury or a question of law for the judge. The key question is whether causation turns on the outcome of the jury
verdict in the underlying case. If so, then causation in the legal malpractice case is a proper subject for the jury to determine. In such instances, the PJC model can be modified to fit cases where the client was the defendant in the underlying case or cases where both sides assert affirmative claims for relief.

But if causation turns on the outcome of a legal decision by the judge in the underlying case, or if the fact finder in the underlying case was a judge and not a jury, then the question may not be one properly assigned to a jury. Instead, causation may be a question of law for the trial judge in the legal malpractice case.

a. Causation is a question of law in appellate malpractice cases.

The Texas Supreme Court held in *Millhouse v. Wiesenthal*, 775 S.W.2d 626 (Tex. 1989), that causation in an appellate malpractice case is a question of law for the trial judge in the legal malpractice case. The court based its decision on the following reasoning:

The question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules. . . . A judge is clearly in a better position [than a jury] to make this determination. Resolving legal issues on appeal is an area exclusively within the province of judges; a court is qualified in a way a jury is not to determine the merits and probable outcome of an appeal.

*Millhouse*, 775 S.W.2d at 628.

Following the logic of *Millhouse*, causation may also be a question of law if the causation issue turns on the outcome of a legal decision made by the trial judge in the underlying case. The same holds true if the underlying matter was an administrative proceeding determined by an administrative decision maker, who often has specialized knowledge applicable to making the specific administrative decision involved.

b. Effect of the Texas Supreme Court’s recent decision in *Alexander v. Turtur & Associates, Inc.*

It remains unclear whether causation is a question of law when the malpractice case arises out of a bench trial in which the trial judge made both legal and factual determinations. The Texas Supreme Court only indirectly addressed this unresolved issue in its recent opinion, *Alexander v. Turtur & Associates, Inc.*, 146 S.W.3d 113 (Tex. 2004). At a minimum, *Alexander* tells us that the jury cannot decide causation arising out of a bench trial without the guidance of expert testimony.

In *Alexander*, the legal malpractice claim arose out of an adverse outcome in a bench trial. The case was tried as an adversary proceeding to a federal bankruptcy judge, who limited the time available to thirty hours for each side. The bankruptcy judge entered a judgment unfavorable to the Turturs, and after this judgment, the parties settled.

The Turturs then sued their attorneys, claiming that Alexander, an experienced trial lawyer, had negligently turned the case over to an inexperienced associate who ended up trying the case when she was unprepared to do so. Thus, the causation question in the legal malpractice case required the jury to find whether a bankruptcy judge would have entered a “more favorable” judgment but for the attorney’s negligence.

The supreme court opinion describes the jury question on causation as follows: “the jury was asked to decide a complicated and very subjective causation issue: whether, in reasonable probability, a bankruptcy judge would have decided the underlying adversary proceeding differently if Alexander had personally tried the case or if he or [his associate] had introduced other evidence.” The jury in the malpractice case answered “yes” to this question, without any expert testimony regarding causation. The trial judge in the malpractice case rendered judgment notwithstanding the verdict on the basis that there was no evidence of causation because no expert testimony was submitted.

On appeal, the supreme court held that expert testimony is required to prove the causal link when the fact finder in the underlying case was a judge and not a jury. *Id.* at 119. The court held that, without the guidance of expert testimony, the jury was left to speculate as to causation, and that causation, when the underlying outcome was determined by a judge, is not within the common knowledge of jurors. *Id.* at 120.

In his concurring opinion, Justice Hecht points out the many questions raised by this holding. For example, who is qualified to testify as to how a hypothetical or the actual bankruptcy judge would have decided the case on a different record? May the trial judge in the underlying case testify as to how that judge would have decided the case but for the attorney’s negligence or testify that the attorney’s alleged negligence played no role in the judge’s decision in the underlying case? Justice Hecht expressed reluctance to decide these questions without full briefing of authorities on the issues, but made clear that, in his view, the court was not deciding that the issue of causation was “properly one for the jury.” *Id.* at 123 (Hecht, J., concurring).
3. Is Cause-In-Fact an Objective or Subjective Inquiry?

Texas courts also fail to clarify whether an objective or subjective standard should be used to prove causation. Commentators and other states that recognize this distinction hold that the objective standard is the appropriate one. Mallen and Smith, in their treatise, summarize the analysis:

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

5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.8, at 70 (5th ed. 2000) (citations omitted).

Several Texas cases use the ambiguous “would have been” language. See, e.g., Cosgrove v. Grimes, 774 S.W.2d 662, 665-66 (Tex. 1989) (explaining that the plaintiff must show what she “would have recovered and collected... if the suit had been properly prosecuted”); Mackie v. McKenzie, 900 S.W.2d 445, 448 (Tex. App.—Texarkana 1995, writ denied) (showing that the client must prove he “would have been successful”); MND Drilling Corp. v. Lloyd, 866 S.W.2d 29, 31 (Tex. App.—Houston [14th Dist.] 1987, no writ) (stating that the client must prove he “would have been successful but for the negligence of his attorney”). However, no reported Texas case has directly confronted the difference between an objective standard (what should have occurred or what a reasonable judge or jury would have done) and a subjective standard (what the particular judge or jury in the underlying case would have done).

In Alexander, it appears that the jury question on causation was whether the Turturs would have received a more favorable judgment in the adversary proceeding, but for the conduct of the attorneys found negligent. Though the objective/subjective distinction is not discussed explicitly, the question seems to embrace the subjective standard: What would the actual bankruptcy judge have decided if different evidence had been presented and/or a more experienced trial attorney had tried the case? As Justice Hecht points out in his concurring opinion, the best evidence on this issue is testimony from the trial judge himself. Id. at 122 (Hecht, J., concurring). But the majority opinion notes that “the bankruptcy judge . . . quite properly was not asked to, and did not, testify as to how he might have ruled if the case had been presented differently.”

One recent Texas court of appeals opinion, however, suggests an objective standard. In Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc., 48 S.W.3d 865 (Tex. App.—Houston [14th Dist.] 2001, pet. denied), the court held that a malpractice defendant is not limited to the defenses actually raised in the underlying suit, but rather may assert all defenses that should have been raised in the underlying suit in order to disprove causation. Swinehart, 48 S.W.3d at 876. This opinion implies that an objective standard applies because it assumes that the jury will determine what should have happened in the underlying lawsuit.

The Swinehart opinion, however, directly conflicts with the Fifth Circuit’s recent holding in Hall v. White, Getgey, Meyer & Co., 347 F.3d 576, 585-86 (5th Cir. 2003). In Hall, the client sued the attorney who had represented him in a lawsuit against an insurer for disability benefits. The insurer in the underlying case failed to plead, and thus waived, its affirmative defense of offset. In the subsequent legal malpractice case, the attorney-defendant argued that it should be allowed to raise the offset defense, which would substantially reduce the damages to which the plaintiff was entitled. The plaintiff argued that because the offset defense was waived in the underlying trial, it could not be raised in the subsequent malpractice case. The Fifth Circuit agreed with the plaintiff, noting:

In our view [the case within the case rule] admits of no hard and fast rule prohibiting [the plaintiff] from showing that his adversary’s waiver of an affirmative defense in the underlying suit would have allowed him to recover and collect a larger amount of damages than he could have absent the waiver. That parties sometimes reap benefits

1 Under Texas law, a judge may not testify as an expert witness opining about whether or not an attorney was negligent in the underlying case. Joachim v. Chambers, 815 S.W.2d 234 (Tex. 1991). The court in Joachim suggested that judges may still testify as fact witnesses regarding their personal knowledge of relevant facts. Id. at 239. However, judges are also prohibited from testifying about the basis for their judgments. See Tate v. State, 834 S.W.2d 566, 570 (Tex. App.—Houston [1st Dist.] 1992, pet. ref’d). If the judge, arguably the most competent witness on the question of how the attorney’s conduct affected the underlying lawsuit, cannot testify then it is very difficult to prove causation under a subjective standard.
as a matter of law even though they are not entitled to those benefits as a matter of equity is a reality of the adversary system… We therefore predict that the Texas Supreme Court would hold that when a malpractice plaintiff proves both the underlying defendant’s waiver of an affirmative defense and the effect of that waiver on the amount of damages he could have recovered and collected if the underlying suit had been properly prosecuted, the malpractice defendant cannot rely on that defense to negate the causation element of the plaintiff’s claim.

Hall, 347 F.3d at 586.

Thus, it is currently unclear whether a subjective or objective standard should apply to the causation analysis.

C. Proving Causation and Damages Based on Settlement Value

As discussed above, the general rule is that when a plaintiff alleges that an attorney was negligent in handling his/her lawsuit, the plaintiff must show that but for the attorney’s negligence, he/she would have been entitled to judgment in the underlying case, and to show the amount of that judgment that could have been collected. However, several Texas cases have indicated a willingness to at least consider malpractice damages based on “settlement value” when the plaintiff can prove that the settlement amount was altered to the plaintiff’s detriment as a result of the attorney’s negligence.²

² In Heath v. Herron, for example, the Fourteenth Court of Appeals upheld a theory of recovery that was based on the altered “settlement value” of the plaintiff’s case, rather than the amount of the likely judgment. Heath v. Herron, 732 S.W.2d 748, 753 (Tex. App.—Houston [14th Dist.] 1987, writ denied). Thus, the holding does not mean that attorney mishandled the settlement of her underlying suit when an attorney advises a client to settle following his malpractice, the client’s decision to settle the case does not bar recovery of malpractice damages; but when the client refuses to appeal against the attorney’s advice, the decision to settle does bar malpractice damages.

This concept of “settlement value” damages raises a number of unresolved issues and potential problems. If such a measure is based on the difference between a reasonable versus actual settlement amount, is that figure not inherently speculative? In the context of plaintiffs, can a showing of decreased settlement value wholly replace the requirement that a plaintiff prove that he/she was entitled to judgment in the underlying suit? On the other hand, does a strict application of the “case-within-the-case” rule deny the reality that in many cases a plaintiff is unlikely to win the underlying suit but the case may still have some settlement value? The Texas cases that have alluded to the possibility of settlement value damages have yet to wrestle with these issues. It therefore remains unclear whether settlement value damages are generally available, whether they are available absent a showing of likely success in the underlying trial, and how they may be measured without being too speculative.

Although it may seem that the “settlement value” theory of damages is consistent with the “case-within-the-case” requirement, the two concepts are not necessarily mutually exclusive. Heath v. Herron, which is one of the first Texas cases to recognize settlement value as a possible measure of damages, holds not only that damages may be based on “the difference between the value of the settlement handled properly and improperly,” but also that the malpractice plaintiff must prove that he/she had a meritorious defense in the underlying lawsuit. Heath, 732 S.W.2d 748, 753 (Tex. App.—Houston [14th Dist.] 1987, writ denied). Thus, the Heath holding does not mean that the “case-within-the-case” requirement may be replaced by a simple showing of diminished settlement value. Rather, the plaintiff must prove both that he/she had a meritorious claim or defense in the underlying case and the amount of the harm caused by the attorney’s negligence, which in Heath is based on the altered settlement value rather than the value of the case following trial. Heath allows a plaintiff to recover settlement value damages but does not relieve the plaintiff of the burden to prove causation, which is linked to the outcome of the underlying case at trial.

A more recent opinion could be read to suggest that merely proving altered settlement value may be sufficient to establish both case-within-the-case causation and damages. Hoover v. Larkin, 196 S.W.3d 277 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). In Hoover, the plaintiff alleged that her attorney mishandled the settlement of her underlying suit when an attorney advises a client to settle following his malpractice, the client’s decision to settle the case does not bar recovery of malpractice damages; but when the client refuses to appeal against the attorney’s advice, the decision to settle does bar malpractice damages).
lawsuit, and failed to explain that the terms were not as favorable as she understood. The defendant filed a no-evidence summary judgment motion, arguing that the plaintiff had no evidence of causation because she could not show that she would have achieved a more favorable settlement or that she would have been successful at trial. The plaintiff responded by providing the affidavits of two experts, but the court of appeals concluded that the affidavits were not sufficient evidence of causation. The court explained that because the affidavits did not prove either that she could have succeeded in her lawsuit or that she could have achieved the settlement she alleged she was entitled to receive, the plaintiff had not met her burden of proof. Id. at 232. The court did not address whether proof of either would have sufficed. Under the Heath opinion, the failure to prove either would support a summary judgment. The Hoover court simply concluded that because the plaintiff did not have evidence supporting either theory, summary judgment was appropriate. Id.

In Keck, Mahin & Cate v. National Union Fire Insurance Co., 20 S.W.3d 692 (Tex. 2003), the Texas Supreme Court addressed the proper measure of damages in a malpractice case based on allegations of an excessive settlement (i.e., a settlement amount that increased due to a defense attorney’s negligence). The court held that damages in that context are calculated based on the difference between the value of the case after the negligence inflated its worth and the case’s true value, less any amount saved by settlement. Id. at 703. In Keck, the underlying defendant’s excess insurance carrier (National) sued the defendant’s attorney for negligence in handling the lawsuit. National argued that the attorney’s malpractice had caused it to settle for $7 million, which was greater than the actual worth of the case. The supreme court held that, in order to recover, National had to prove that “a judgment for [the underlying plaintiff] in excess of the case’s true value would have resulted from [the] malpractice.” Id. at 703 (emphasis added). The court explained that “true value” means the recovery that the plaintiff would have obtained following trial in which the underlying defendant had a reasonably competent, malpractice-free defense. Id. at 703 n.5. If National could prove that the malpractice inflated the value of the case, the court explained, it could recover as damages “the difference between the true and inflated value less any amount saved by the settlement.” Id. at 703.

The court did not explain, and it remains unclear, whether the court intended for this true versus inflated value measure to supersede the theory of settlement value damages (i.e., damages based on a reasonable settlement amount compared to the actual settlement amount) in all cases. Certainly, an argument can be made that cases have different values at different stages in the litigation process, and that it is unrealistic to require damages to be based only on a “true” value following trial on the merits. The settlement value concept, however, is inherently more subjective than the question of what a case would be worth following trial before a reasonable judge and jury. With that in mind, the supreme court may well have intended for its “true value” measure to be the only appropriate way of calculating damages following an unfavorable settlement.

The “case-within-the-case” approach to causation and damages is the general rule in the vast majority of other states, primarily because of the inherent difficulties with accurately determining causation using any other method.3 As explained by a California Court of Appeals:

Nonetheless, while some arguments of the critics have merit, the trial-within-a-trial burden persists. This is so probably because it is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually caused by a professional’s malfeasance. Certainly to date, no other approach has been accepted by the courts.


3 See, e.g., Garretson v. Miller, 99 Cal. App. 4th 563, 568-69 (Cal. Ct. App. 2002) (“California follows the majority rule that a malpractice plaintiff must prove not only negligence on the part of his or her attorney, but that careful management of the case within a case would have resulted in a favorable judgment ‘“and collection of same . . . .”’”) (quoting Campbell v. Magana, 184 Cal. App. 2d 751, 754 (Cal. Ct. App. 1960)); Mattco Forge, Inc. v. Arthur Young & Co., 52 Cal. App. 4th 820, 834, 843-44 (Cal. Ct. App. 1997) (citing to the trial within a trial method as the general rule and concluding that allowing a plaintiff to value the case without reference to the outcome of the underlying trial would result in speculative damages); Fuschetti v. Bierman, 319 A.2d 781, 784 (N.J. Super. Ct. Law Div. 1974) (excluding expert testimony on reasonable settlement value “[b]ecause no expert can suppose with any degree of reasonable certainty the private blends of hopes and fears that might have come together to produce a settlement before or during trial”). But see Duncan v. Lord, 409 F. Supp. 687, 692-93 (E.D. Penn. 1976) (“We start with the legal proposition that the measure of damages in this legal malpractice action is that amount which plaintiff would have received from a jury or through settlement of her state court action”).
Although the “case-within-the-case” method does have its difficulties, it remains the most reliable method of proving causation in a legal malpractice case. A conclusion that Texas law requires proof of the case within the case even in the context of settlement value damages would be consistent both with out-of-state authority and with Texas law on medical malpractice damages. Texas medical malpractice cases prohibit recovery for lost chance of survival or cure (i.e., for decreasing a patient’s chance of avoiding death where the adverse result likely would have occurred anyway). Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 511 (Tex. 1995); Kramer v. Lewisville Memorial Hospital, 858 S.W.2d 397, 398 (Tex. 1993).

Texas cases that have flirted with the possibility of allowing settlement value damages have not yet analyzed when these damages may be allowed without resulting in a speculative recovery. The best approach may be to allow such recovery only in those rare situations where there is reliable evidence, other than pure opinion testimony, of what the case would have settled for absent the malpractice. Causation, however, should still be shown by proving the case within the case. Opening the door further could essentially make lawyers liable as guarantors regardless of the actual merits of the client’s underlying case.

D. Availability of Attorney’s Fees as Actual Damages

Because legal malpractice claims are torts, attorney’s fees incurred prosecuting the legal malpractice claim or defending an attorney’s claim for unpaid legal fees are not generally recoverable as actual damages. See Haden v. Sacks, 222 S.W.3d 580, 597-98 (Tex. App.—Houston [1st Dist.] 2007, pet. filed). However, when the fees were incurred in the underlying lawsuit as a result of the negligence, the recoverability of the fees is less certain. There is currently a split among Texas intermediate courts on the question of whether such fees may be recovered. Compare Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat’l Dev. and Research Corp., 232 S.W.3d 883 (Tex. App.—Dallas 2007, pet. granted) (declining to award fees incurred in the underlying litigation) to Estate of Arlitt v. Patterson, 995 S.W.2d 713 (Tex. App.—San Antonio 1999, pet. denied) (permitting the recovery of fees as damages incurred in the underlying lawsuit).

The supreme court has granted petition for review of a Dallas court of appeals opinion that holds that attorney’s fees incurred in the underlying lawsuit are not recoverable as actual damages. See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat’l Dev. and Research Corp., 232 S.W.3d 883 (Tex. App.—Dallas 2007, pet. granted). In that case the client sought to recover only the appellate fees it incurred to appeal its loss at trial, which it claimed it would not have paid had malpractice not been committed at the trial. The court of appeals acknowledged that the recoverability of attorney’s fees in such a situation is disputed among Texas courts, but held to a bright line rule against ever allowing attorney’s fees to be recovered as damages in a legal malpractice claim. Id. Interestingly, in the same opinion the court denied the attorneys an offset for the contingency fee they would have recovered had the underlying lawsuit been successful. Id. at *11-12. The court reasoned that to allow offset would credit the attorney with a fee he failed to earn and would fail to fully compensate the plaintiff, who had to incur new attorney’s fees by bringing a legal malpractice case to recover the judgment the plaintiff should have won in the underlying case. The court did not directly address the inconsistency within this holding – which on the one hand does not allow plaintiffs to recover for attorney’s fees they actually paid their lawyers in the underlying suit but on the other hand ignores their contingency fee obligations because of attorney’s fees incurred in the legal malpractice case.

Briefs have been submitted and oral argument heard in the case so a resolution of these issues by the supreme court should be forthcoming.

IV. OTHER COMMON CLAIMS BROUGHT AGAINST ATTORNEYS

As a general rule, Texas law does not allow the “fracturing” of a legal malpractice claim into multiple causes of action. Claims brought against attorneys based on the quality of their representation should be brought only as traditional legal malpractice claims based on professional negligence. Claims based on truly distinct allegations, however, may be brought as separate causes of action. For example, allegations of affirmative misrepresentations of material fact may give rise to separate claims under the Deceptive Trade Practices Act (DTPA) or for fraud. Claims premised on placing the attorney’s interest above the interest of the client may be separately pleaded as breaches of fiduciary duty.

A. Breach of Fiduciary Duty Claims

1. The Difference Between Professional Negligence and Breach of Fiduciary Duty Claims

One of the more difficult fracturing issues in the past was the question of where to draw the line between traditional legal malpractice (professional negligence) claims and breach of fiduciary duty claims. Attorneys owe a fiduciary duty of loyalty to their clients as a matter of law on the basis that “the attorney-client relationship is one of ‘most abundant good faith,’ requiring absolute perfect candor, openness and honesty, and the absence of any
concealment or deception.” Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, no pet.). “The basic fiduciary obligations are two-fold: undivided loyalty and confidentiality.” 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.1, at 530 (5th ed. 2000). A violation of this duty of loyalty gives rise to a cause of action for breach of fiduciary duty and, if the breach is sufficiently clear and serious, to a cause of action for forfeiture of the attorney’s fee. See Burrow v. Arce, 997 S.W.2d 229, 241 (Tex. 1999) (recognizing a new claim of fee forfeiture for certain breaches of fiduciary duty). By contrast, a traditional legal malpractice (professional negligence) claim is based on a breach of the attorney’s duty to exercise ordinary care, i.e., to act as would a reasonably prudent attorney in the same or similar circumstances in representing a client. Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied) (holding that malpractice claims, as distinguished from fiduciary duty claims, are based on “an attorney’s alleged failure to exercise ordinary care”).

Courts have now drawn a workable distinction between malpractice and breach of fiduciary duty claims, and recognize that breach of fiduciary duty claims may be brought against attorneys despite the fracturing rule only if the allegations fit within the proper parameters. In Kimleco Petroleum, for example, the Fort Worth Court of Appeals explained the distinction as follows:

A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client’s interests to his own, retaining the client’s funds, using the client’s confidences improperly, taking advantage of the client’s trust, engaging in self-dealing, or making misrepresentations.

A cause of action for legal malpractice arises from an attorney giving a client bad legal advice or otherwise improperly representing the client.

Id. at 923 (citations omitted). See also Archer v. Medical Protective Group of Fort Wayne, 197 S.W.3d 422, 427-28 (Tex. App.—Amarillo 2006, n.p.h.) (concluding that a plaintiff’s allegations that an attorney neglected the case and failed to communicate with his clients were malpractice claims, whereas his claims that the attorney pursued his own interests over the interests of the client were breach of fiduciary duty claims).

Some question remains, however, over whether allegations of conflict implicate negligence or fiduciary duty causes of action. In a recent opinion, the Dallas Court of Appeals observed:

[S]ome Texas courts have recognized that breach-of-fiduciary-duty claims alleging the lawyer obtained an improper benefit from his representation or improperly failed to disclose his own conflict of interest are not professional negligence claims. But other courts have held the claim is really that the lawyer’s conflict of interest prevented him from adequately representing the client. As is apparent from our review of cases, there is a lack of clarity in this area of the law.

Murphy v. Gruber, 241 S.W.3d 689, 696 (Tex. App.—Dallas 2007, pet. denied). In Murphy, the court ultimately concluded that where allegations of conflict essentially go to the quality of legal representation, they support a professional negligence claim and not a claim for breach of fiduciary duty. Id. at 699.

Other recent cases have dismissed breach of fiduciary duty claims that, although couched in terms of “conflicts of interest”, “failure to disclose,” and even “self-dealing,” in essence amount to complaints about the quality of the legal services provided. For example, in Duerr v. Brown, the Houston Court of Appeals (14th District) upheld a summary judgment dismissing breach of fiduciary duty claims brought against attorneys who had represented the plaintiff in a class action suit for defective hip replacement implants. Duerr v. Brown, 262 S.W.3d 63, 71-75 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The plaintiff had alleged that his lawyers promised him a larger recovery than he ultimately received and had a conflict of interest because they settled his claims along with the claims of four other plaintiffs who were less severely injured. The court of appeals reviewed the pleadings and the plaintiff’s complaints as stated in his deposition testimony, and concluded as follows:

Duerr [plaintiff] contends his interests were compromised by the failure to deliver a promised level of recovery attributable to his lawyer’s inattention to his benefit requests and appeal. That is a malpractice claim as a matter of law.

Id. at 74.

Similarly, in Beck v. Terry, the Austin Court of Appeals upheld a summary judgment dismissing breach of fiduciary duty claims brought against a lawyer that, although couched in terms of “failure to disclose” and “conflict of interest,” were really complaints about the quality of legal services provided. Beck v. Terry, ___ S.W.3d ___, No. 03-07-00635-CV,
The plaintiff in *Beck* complained that his former divorce lawyers had breached their fiduciary duties to him by: (1) failing to disclose that one of the attorneys had substance abuse problems; and (2) failing to disclose that a conflict existed between the plaintiff and his corporations. The plaintiff claimed that, as a result of this conduct, he received less in the mediated property division than he was entitled to receive. On the substance abuse complaint the court of appeals held: “[a] complaint that a lawyer ‘failed to disclose’ such a condition or situation . . . would go to the lawyer’s competence or ability and, ultimately, to the quality of legal services the lawyer provided” and therefore is a professional negligence claim. *Id.* at *11.

The court also held that the plaintiff’s conflict-of-interest allegations were improperly fractured professional negligence claims:

> [T]he focus of appellants’ ‘conflict-of-interest’ complaint is simply that the Terry Defendants failed to advise Beck . . . that the interests of these entities diverged from his own personal interests and that he should obtain separate counsel for these entities. [T]hese allegations complain about the quality of the [Terry Defendants’] representation, specifically, [their] failure to properly advise, inform, and communicate with the [clients], which are claims of professional negligence. Although appellants urge that the Terry Defendants, by their omissions, stood to obtain attorneys’ fees that a separate counsel otherwise would have received . . . both the *Murphy* and *Floyd* courts characterized such a complaint, standing alone, as a negligence claim.

*Id.* at *17* (citing to *Floyd v. Hefner, 556 F.Supp.2d 617, 662* (S.D. Tex. 2008); and *Murphy, 241 S.W.3d* at 698). *See also Avery Pharmaceuticals, Inc. v. Haynes and Boone, L.L.P., No. 2-07-317-CV, 2009 WL 2793334, at *10* (Tex. App.—Fort Worth Feb. 5, 2009, no pet.) (holding that conflict-of-interest allegations were not sufficient to state a fiduciary duty claim where no complaint was made that the lawyer obtained any type of improper benefit).

In sum, the trend in recent cases has been to look beyond the pleadings and focus on the true nature of the allegations in order to determine whether a claim is for professional negligence or breach of fiduciary duty. Unless the plaintiff alleges that the lawyer obtained an improper benefit as a result of the misconduct, the claim will likely be treated as solely a professional negligence cause of action.

2. Elements of a Traditional Breach of Fiduciary Duty Claim

When a traditional breach of fiduciary duty is pled, and damages are requested as a result, Texas courts treat it as a tort closely resembling negligence. In particular, the elements remain as: (1) a duty; (2) a breach of that duty; (3) the breach proximately caused injury; and (4) damages resulted. *Joe*, 60 S.W.3d at 904-06; *see also In re Segerstrom*, 247 F.3d 218, 225 n.5 (5th Cir. 2001) (differentiating among claims for damages and claims for fee forfeiture and explaining that, in the former, the plaintiff must still prove causation and damages). The plaintiff must still prove the existence of an attorney-client relationship, which of course means that the attorney owes a fiduciary duty to the client. *Longaker v. Evans*, 32 S.W.3d 725, 733 (Tex. App.—San Antonio 2000, no pet.). Similarly, the plaintiff must prove causation and damages in the same way as is necessary for a legal malpractice claim that is based on negligence. *In re Segerstrom*, 247 F.3d at 225 n.5.

The requirements for proving a breach of fiduciary duty claim do differ from a legal malpractice claim in some ways. For example, in situations in which the attorney and the client participated in a business deal or the attorney was self dealing in a transaction, the defendant actually bears the burden of proof on the second element—whether the attorney breached a fiduciary duty. *See, e.g., Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974) (where a fiduciary business advisor was an officer/director of a museum but was also advising his sisters to donate their estate to the museum, there was a presumption of unfairness that the fiduciary needed to rebut); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963) (holding the burden on the fiduciaries to prove fairness where the fiduciaries were engaging in transactions for their personal profit). In these situations, “a ‘presumption of unfairness’ automatically arises and the burden is placed on the fiduciary to prove (a) that the questioned transaction was made in good faith, (b) for a fair consideration, and (c) after full and complete disclosure of all material information to the principal.” *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied). However, the fact that the defendant bears the burden of rebutting the presumption of unfairness does not relieve the plaintiff of the burden to prove causation and damages. *MacFarlane v. Nelson*, No. 03-04-00488-CV, 2005 WL 2240949, at *9 (Tex. App.—Austin Sept. 15, 2005, pet. denied) (mem. opinion) (upholding a directed verdict on a breach of fiduciary duty claim where the plaintiff did not carry his burden on damages, and rejecting plaintiff’s argument that the
defendant had to disprove damages when the transaction involved self-dealing).

Courts are beginning to better define what a plaintiff must prove to establish a breach of the duty of good faith and perfect candor. For example, a recent Dallas Court of Appeals decision suggests that the plaintiff must prove the attorney engaged in the misconduct for the purpose of achieving an improper benefit in order to establish breach of fiduciary duty liability. See Gibson v. Ellis, 126 S.W.3d 324, 330 (Tex. App.—Dallas 2004, no pet.) (concluding that a plaintiff had not established breach of fiduciary duty as a matter of law where there was no evidence that the defendant made false statements for the purpose of achieving an improper benefit).

Another recent opinion clarifies that, in the conflict of interest context, merely showing that there is a “substantial relationship” between an attorney’s representation of a former and current client is not sufficient to raise a question of fact on breach of fiduciary duty. Capital City Church of Christ v. Novak, No. 03-04-00750, 2007 WL 1501095, at *4 (Tex. App.—Austin May 23, 2007, Rule 53.7(f) motion filed) (mem. opinion). Novak arose out of a dispute between a church and another co-owner of a building in downtown Austin. After the dispute arose the co-owner hired a law firm to represent him against the church. The church immediately complained that the firm had represented it several years earlier, and the firm eventually withdrew from representation. The church nevertheless sued the firm for breach of fiduciary duty, and the firm moved for summary judgment on breach, arguing there was no substantial relationship between the representations and that it had not used any confidential information it gained in representing the church in connection with the later dispute with the co-owner. The church responded by relying on case law in the attorney disqualification context that holds a presumption of disclosure applies when there is a relationship between the former and current representations. The Austin Court of Appeals held that this presumption does not apply in the context of a claim for breach of fiduciary duty: “We conclude . . . that ‘a substantial relationship’ between prior and subsequent representations, standing alone, ‘cannot raise a fact issue on disclosure of confidences.’” Id. In other words, the presumptions that apply in the disqualification context “cannot substitute for the traditional requirement that the [plaintiff] support its breach-of-fiduciary-duty claim with evidence.” Id.

Finally, an Amarillo court of appeals opinion holds that expert testimony is usually required to establish breach and causation for breach of fiduciary duty claims arising out of litigation. Kothmann v. Cook, No. 07-05-0335-CV, 2007 WL 1075171, at *4 (Tex. App.—Amarillo Apr. 11, 2007, no pet.) (mem. opinion). In Kothmann the client sued for breach of fiduciary duty based on the attorney’s representation of him over a five-year period that involved “litigation in multiple counties, before several different judges, on numerous legal theories.” Id. The attorney filed a no-evidence summary judgment, to which the client responded by submitting affidavit testimony on breach and causation. The trial court struck the testimony and granted summary judgment. The court of appeals affirmed the exclusion of the testimony and held that in this case expert testimony was needed to raise a scintilla of evidence on damages. The court noted that the primary issue was the attorney’s conduct at a hearing that involved the determination of certain property interests and a contempt order. In these circumstances, “as a matter of law, a layman could not be expected to ascertain, without guidance from a legal expert, whether [attorney] breached a fiduciary duty . . . or whether there was a cause in fact relationship between [the] conduct and [the] alleged damages.” Id.

3. Fee Forfeiture Claims Based on Breach of Fiduciary Duty

In 1999, the Texas Supreme Court decided Burrow v. Arce, in which it recognized for the first time the equitable remedy of fee forfeiture for an attorney’s breach of fiduciary duty. Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999). This remedy is significant because it does not require a showing of causation or damages in order for a client to recover all or part of the attorney’s fee. Rather, fee forfeiture is available when the trial court determines that the breach was sufficiently “clear and serious” to justify forfeiture in furtherance of the public interest in preserving the integrity of the attorney-client relationship.

In Arce, the Texas Supreme Court cited a number of factors from section 49 of the proposed Restatement (Third) of the Law Governing Lawyers that should be applied in determining whether a breach was sufficiently clear and serious to warrant fee forfeiture. These factors include “the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer’s work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.” In addition, the court added another factor that was to be given great weight: “the public interest in protecting the integrity of the attorney-client relationship.” Id. at 245.

Following is a discussion of cases that address the issue of what type of conduct is sufficiently clear and serious to warrant fee forfeiture. Many of these cases involve accusations regarding the propriety of an attorney’s fee.

A dispute over a fee arrangement led to a partial fee forfeiture in Jackson Law Office, P.C. v. Chappell,
In Chappell, the lawyers and client failed to reduce their fee agreement to writing. The lawyers also failed to keep billing records, record services rendered, or provide billing statements to their client. Instead, they charged the plaintiff what the court characterized as an inflated fee, and eventually sued the client for non-payment. The court found that “[t]he evidence supports the jury’s finding of breach of fiduciary duty in that there is evidence of failure to disclose, misrepresentation, conflict of interest, and self-dealing” and therefore upheld the trial court’s order of a partial fee forfeiture. The lesson of Chappell is that attorneys should try to keep their fee agreements and billing records in writing and provide a description of the work performed.

In Spera v. Fleming, Hovenkamp & Grayson, P.C., 25 S.W.3d 863 (Tex. App.—Houston [14th Dist.] 2000, no pet.), the Fourteenth Court of Appeals dismissed the defendant attorneys’ motion for summary judgment on a fee forfeiture claim, holding that a question of fact existed regarding whether the attorneys had committed a clear and serious breach of fiduciary duty in connection with their contingency fee. The plaintiffs alleged that the attorneys did not notify them of a hearing on the reasonableness of the fee, which was sought by the attorneys as part of the settlement of a class action, in time for the clients to obtain other counsel with respect to the fee issue. Because of the potential conflict of interest between the attorneys and their clients regarding the fee, the court concluded that a fact question existed regarding the fee forfeiture claim.

In Miller v. Kennedy & Minshew, P.C., 142 S.W.3d 325 (Tex. App.—Fort Worth 2003, pet. denied), the Fort Worth Court of Appeals upheld a trial court’s refusal to award fee forfeiture despite a jury’s finding that the attorney’s collection of his fee should be barred by his breach of fiduciary duty. The jury found that the attorney (Minshew) had breached his fiduciary duty to the client (Miller), made negligent misrepresentations to him, and committed deceptive acts and practices in connection with his representation of Miller and their contingency fee agreement. However, the jury also found that the attorney’s misconduct had not been willful, unconscionable, knowing, or intentional, and that the misconduct had not caused any damages to Miller. On the basis of these findings, the trial court held that fee forfeiture was not appropriate because the timing of the misconduct caused Miller no harm and did not affect the quality of the work performed for him, the violations were not clear and serious, and the misconduct had no impact on the public’s interest in protecting the attorney-client relationship. On appeal, Miller contended that because the jury had found that some of Minshew’s counterclaims for attorneys’ fees were barred by his breach of fiduciary duty, such a finding showed that fee forfeiture should be awarded and was in the public interest. The appellate court confirmed that the question of whether all or part of a fee should be forfeited is a matter for the court, not the jury, and it held that the jury’s findings on point were thus immaterial. The court also found that the trial court’s refusal to award fee forfeiture was not an abuse of discretion. This opinion indicates that, although a client does not have to prove causation and damages in order to recover fee forfeiture, the question of whether or not the attorney’s conduct caused any harm is still a proper consideration in determining whether forfeiture is appropriate.

A fee forfeiture was denied under an unusual set of facts in Haase v. Herberger, 44 S.W.3d 267, 268 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The attorneys represented a couple in a lawsuit arising out of construction defects in their home. Subsequently, the wife filed for divorce. A settlement offer was made by the defendants in the construction litigation, and the wife, through her divorce attorney, filed a motion in family court to obtain the exclusive right to settle the litigation. The motion was granted. The attorneys then filed a plea in intervention in family court requesting a disbursement of their fees. The husband objected and counterclaimed for fee forfeiture and legal malpractice, alleging a conflict of interest between the husband and the wife due to the couple’s difference of opinion as to whether to accept the settlement offer. The court of appeals affirmed summary judgment for the attorneys, holding the trial court’s ruling was not erroneous in refusing to order a forfeiture of attorneys’ fees because this would constitute forfeiture of a fee that the attorneys had ultimately earned by following a court order. Under this line of reasoning, an attorney’s good faith is an important consideration and can be sufficient to defeat a claim of fee forfeiture.

Finally, in an unusual recent case, a plaintiff unsuccessfully tried to expand the equitable remedies available for breach of fiduciary duty in order to justify imposition of a constructive trust against her former attorney. See Baker Botts, L.L.P. v. Cailloux, 224 S.W.3d 723 (Tex. App.—San Antonio 2007, pet. denied). In Cailloux, the son of a client incapacitated by Alzheimer’s disease brought suit on her behalf against the law firm that handled her estate planning. The son claimed that the law firm caused his mother to disclaim her share of the marital estate after her husband’s death, and that the firm had breached its fiduciary duty by allowing that property to go to a number of charities instead of to her. The jury found the law firm liable for breach of fiduciary duty, but concluded that she had not suffered any economic losses as a result. The trial court then imposed what it
termed an “equitable trust” on the law firm and another defendant, essentially ordering them to repay her the full amount of the disclaimed estate plus interest, so that she would be placed in the same position that she would have been in had she not disclaimed her interest on the law firm’s advice. The court of appeals overturned this judgment because the law firm did not hold legal title to the assets she had disclaimed. Rather, the assets had gone to third party charities and were not recoverable. \textit{Id.} at 737.

In sum, the question of what type of breach is sufficiently clear and serious to give rise to forfeiture is fact specific and hard to nail down. But some guidance can be obtained from recent case law. Many of these cases have involved allegations regarding the propriety of an attorney’s fee, particularly in the context of mass torts or class actions. This is therefore an area in which attorneys should take particular care. In addition, while harm to the client is not a required element of recovery, it is an important consideration in evaluating whether forfeiture is appropriate. And finally, the attorney’s intent and good faith appear to be important considerations.

**B. Violations of the Deceptive Trade Practices Act**

Most DTPA claims are subject to the fracturing rule if they are based on the attorney’s failure to comply with the standard of care in representing the client. If the claims are based on affirmative misrepresentations of material fact, however, they may be outside the scope of the fracturing rule.

Some early fracturing cases had suggested that all claims against attorneys arising out of their legal representation, including claims brought under the DTPA, were subject to the fracturing rule and thus should be brought only as legal malpractice claims. But in 1998 the Texas Supreme Court issued \textit{Latham v. Castillo}, 972 S.W.2d 66 (Tex. 1998), which clarified that attorneys are still subject to DTPA liability, despite the fracturing rule, so long as the claims are based on affirmative misrepresentations of material fact and not on mere allegations of inadequate legal representation or negligence. \textit{Latham}, 972 S.W.2d at 69.

In \textit{Latham}, the Castillos alleged and presented some evidence that their attorney, Latham, affirmatively misrepresented to them that he had filed a medical malpractice claim on their behalf when in fact he had not. Latham moved for and received a directed verdict on the ground that the Castillos had offered no evidence that they would have prevailed in their medical malpractice suit against the hospital had Latham timely filed the suit. Latham argued that the DTPA claims were really just restated malpractice claims and thus, were subject to the “case within a case” causation standard of a traditional malpractice suit, in other words, requiring proof that the client would have won the underlying suit but for the attorney’s malpractice. The Texas Supreme Court held that Latham’s affirmative misrepresentations caused the Castillos to lose the opportunity to prosecute their claim against the hospital because the statute of limitations ran out. Since this was an “unconscionable action” that resulted in unfairness to the consumer, the court held that the Castillos were able to bring their suit under the DTPA. Moreover, the court held that the Castillos were not required to prove, as Latham had argued, that they would have won the underlying medical malpractice action in order to prevail in their DTPA cause of action against Latham; rather, they only needed to satisfy the ‘producing cause’ standard under the DTPA.

In addressing Latham’s fracturing argument, the court explained as follows:

Recasting [a] DTPA claim as merely a legal malpractice claim would subvert the Legislature’s clear purpose in enacting the DTPA – to deter deceptive business practices.

If the [plaintiffs] had only alleged that [their attorney] negligently failed to timely file their claim, their claim would properly be one for legal malpractice. However, the [plaintiffs] alleged and presented some evidence that [their attorney] affirmatively misrepresented to them that he had filed and was actively prosecuting their claim. It is the difference between negligent conduct and deceptive conduct. To recast this claim as one for legal malpractice is to ignore this distinction.

\textit{Id.} at 69.

Thus, under \textit{Latham}, DTPA actions against attorneys are available so long as they are based on truly deceptive, rather than negligent, conduct on the part of the attorney.

\textsuperscript{4} See, e.g., \textit{Greathouse v. McConnell}, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding that claims of breach of contract, breach of fiduciary duty, fraud, DTPA violations, and breach of express and implied warranties were “all essentially ‘means to an end’ to achieve one complaint of legal malpractice” and thus could all be defeated by disproof of one element of a legal malpractice cause of action); \textit{Sledge v. Alsup}, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ) (holding that all claims against attorneys regarding their representation should be treated as one cause for legal malpractice).
In addition, tort reform legislation effective September 1, 1995 blocks most professional liability under the DTPA in connection with the providing of advice, judgment, or opinion. Section 17.49(c) of the Texas Business and Commerce Code provides:

(c) Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to:

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

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

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

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

TEX. BUS. & COM. CODE ANN. § 17.49(c) (Vernon Supp. 2002).

This statute, along with the Texas Supreme Court’s holding in Latham, significantly limit the availability of DTPA claims based on the attorney’s representation of a client.

Few published opinions have been issued that apply both the holding in Latham and the new statutory limitations of Section 17.49(c) to DTPA claims against attorneys. It seems, however, that plaintiffs bringing claims that arise out of the attorney’s representation of a client must satisfy both. Because the claims arise out of the rendition of professional advice, they must fall within the specific statutory exceptions listed in Section 17.49(c). In addition to meeting the statutory requirements, they must also satisfy Latham’s requirement of an affirmative misrepresentation in order to not run afoul of the fracturing rule. Thus, claims of unconscionable conduct or factual omissions, which are listed in Section 17.49(c), may be available against other professionals under the DTPA, but may not be brought against attorneys unless they also satisfy Latham’s requirements. This line between legal malpractice and DTPA claims, in light of both Latham and the new statutory amendments, is an area that may require additional clarification from courts in the future.

C. Fraud

It is well-established under Texas law that privity is not a defense to fraud claims brought by third parties against attorneys. In Likover v. Sunflower Terrace II, Ltd., a non-client sued an attorney for fraud and conspiracy to defraud. 696 S.W.2d 468 (Tex. App.—Houston [1st Dist.] 1985, no writ). The court rejected the attorney’s non-duty argument, stating: “An attorney has no general duty to the opposing party, but he is liable . . . . to third parties when his conduct is fraudulent or malicious. He is not liable for breach of a duty to the third party, but he is liable for fraud.” Id. at 472. Because privity is not a defense to a fraud claim, we are beginning to see more and more fraud claims brought against lawyers in Texas.

Fraud is the misrepresentation of a material fact, with the intent that the person or entity to whom the misrepresentation is made will rely upon it. Trenholm v. Ratliff, 646 S.W.2d 927, 930 (Tex. 1983). In the context of attorney liability to non-clients, it must be based on an affirmative misrepresentation rather than a mere failure to disclose.

Bernstein v. Portland Savings & Loan Ass’n first distinguished fraud claims that are based on material misrepresentations from those that are based on a failure to disclose. Bernstein v. Portland Sav. & Loan Ass’n, 850 S.W.2d 694, 701-02 (Tex. App.—Corpus Christi 1993, writ denied). See also Lesikar, 33 S.W.3d at 319-20 (stating that “an attorney has no duty to reveal information about a client to a third party when that client is perpetrating a nonviolent, purely financial fraud through silence”). The court explained that silence can only be fraudulent when the person is under some duty to disclose the information. Id. at 701-02. The duty to disclose is primarily based on some sort of fiduciary or confidential relationship between parties, and although this does exist between attorney and client, it generally does not extend beyond that relationship. The court also relied on Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which prohibits attorneys from revealing client confidences, except when necessary to avert an act that “is likely to result in death or substantial bodily harm to a person.” Id. at 701. The court stated that “[b]ecause the Texas Supreme Court has chosen not to force attorneys to disclose client confidences to avert non-violent fraud by clients, we decline to do so as well.” Id. at 701-02.

5 The duty to disclose arises: “(1) when one is in a fiduciary relationship; (2) when one voluntarily discloses some information, but not all of the pertinent information; (3) when new information makes an earlier representation misleading or untrue; and (4) when one makes a partial disclosure and conveys a false impression.” Lesikar, 33 S.W.3d at 319.
In a footnote, the court recognized the double bind that attorneys could be in if they could be liable to non-clients for fraud through non-disclosure: “If we found a duty in lawyers to disclose confidential information in this situation, we would place lawyers in the difficult position of choosing either to remain silent and risk fraud liability or to betray client confidences and risk jeopardizing that and other attorney-client relationships.” Id. at 702 n.7. Thus, attorneys may follow Rule 1.05 and theoretically also avoid liability for fraud. However, in practice, claims based on fraud by omission are still common.

D. Conspiracy, Aiding and Abetting, and Securities Fraud Claims

A number of lawsuits illustrate the increasing potential for liability to third parties that lawyers now face based on allegations of conspiracy to defraud, aiding and abetting liability, and securities fraud. Several years ago, two major law firms settled lawsuits for millions of dollars based on their alleged participation in fraudulent investment schemes. One of these suits was brought by a class of investors who had allegedly been defrauded by Russell Erxleben, a former University of Texas football star, into investing in a “Ponzi” scheme. The investors alleged that the law firms, which represented Erxleben, engaged in a conspiracy to defraud investors by allowing his company to sell unregistered securities despite the company’s growing losses. A mere five months later, a similar lawsuit was again brought against one of the same firms, this time based on its alleged involvement in assisting Brian Russell Stearns in defrauding investors under a similar scheme. The recent Bernie Madoff and Sir Allen Stanley scandals, and the massive legal and financial fallout resulting therefrom, demonstrate that Ponzi schemes are a continued liability risk.

Another well-publicized example of such potential liability is the claims raised against the law firm of Vinson & Elkins regarding its role in representing Enron. V&E settled the claims raised in the bankruptcy proceeding—for legal malpractice and aiding and abetting breach of fiduciary duty—for $30 million. V&E was also sued by Enron investors for alleged participation in violating federal securities laws.

In addition, Jenkins & Gilchrist recently settled a class action lawsuit brought against it alleging that it had participated in a conspiracy with a bank and certain accounting firms to improperly advise the plaintiffs regarding the legality of certain tax shelters. This lawsuit resulted in a settlement of more than $81 million. Three of the individual lawyers have now been criminally indicted in the Southern District of New York for alleged participation in a scheme to defraud the IRS.7

By alleging conspiracy to defraud and aiding and abetting securities fraud, plaintiffs attempt to bypass the privity requirement and open the door to lawsuits by large numbers of third parties. Conspiracy claims are particularly dangerous because they allow plaintiffs to establish liability without having to prove that any specific misrepresentations were made by the attorney.

1. Conspiracy Liability

An attorney may be liable for conspiring with the client to commit a wrong. Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ); Bourland v. State, 528 S.W.2d 350, 353-57 (Tex. Civ. App.—Austin 1975, writ ref’d n.r.e.). To recover against an attorney for conspiracy, the plaintiff must show that: (1) the attorney knew the object and purpose of the conspiracy; (2) there was an understanding or agreement to inflict a wrong or injury; (3) there was a meeting of minds on the object or cause of action; and (4) there was an unlawful, overt action, coupled with an intent to commit the act that resulted in the injury. Likover, 696 S.W.2d at 472. Privity is not required to bring a conspiracy to defraud cause of action. Id.

Recent cases have held that claims of conspiracy must be based on another, substantive tort with a specific intent. See Walsh v. America’s Tele-Network Corp., 195 F.Supp.2d 840, 850-51 (E.D. Tex. 2002); Grizzle v. Texas Commerce Bank, 38 S.W.3d 265, 285 (Tex. App.—Dallas 2001), rev’d and rendered in part on other grounds, 96 S.W.3d 240 (Tex. 2002). Thus, under this rule, claims of conspiracy to breach a contract or violate a statute will fail because they are not based on another substantive tort. Similarly, claims of conspiring to be negligent or grossly negligent fail because they do not involve a specific fraudulent intent. Firestone Steel Products Co. v. Barajas, 927 S.W.2d 608, 614 (Tex. 1996).

In order to support a finding of civil conspiracy, there is no need that the defendant actually be found liable for a separate tort. See Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1195 (5th Cir. 1995). Rather, “[a] finding of civil conspiracy does require . . . that the plaintiff be able to plead and


7 See Brenda Sapino Jeffreys, Three Former Jenkens & Gilchrist Lawyers Indicted, TEXAS LAWYER, June 15, 2009, at 5.
prove ‘one or more wrongful, overt acts’ in furtherance of the conspiracy that would have been actionable against the conspirators individually.” Id. (quoting Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983)). Both with respect to criminal and civil conspiracy, the evidence used to prove conspiracy may be circumstantial “because conspirators’ work is often clandestine in nature.” Cantrell v. State, 54 S.W.3d 41, 46 (Tex. App.—Texarkana 2001, pet. granted). However, “[m]ere knowledge and silence are not enough to prove conspiracy . . . because of the attorney’s duty to preserve client confidences, there must be indications that the attorney agreed to the fraud.” Bernstein v. Portland Savings & Loan Assoc., 850 S.W.2d 694, 706 (Tex. App.—Corpus Christi 1993, writ denied).

The reason that allegations of conspiracy may result in excessive liability is that “[o]nce a civil conspiracy is proven, each co-conspirator is responsible for the acts done by any of the conspirators in furtherance of the unlawful combination.” Likover, 696 S.W.2d at 474. Thus, if a conspiracy was found where the law firm’s client had engaged in behavior that resulted in millions of dollars of losses, the law firm may be equally responsible for those losses. In many cases, the law firm will be viewed as having a deeper pocket than the client. In addition, because many cases involve allegations of both civil and criminal conspiracy, the clients may become more concerned about protecting themselves from the criminal charges than from denying civil liability, perhaps meaning that the client will agree to waive the attorney client privilege and testify against the firm as part of the client’s criminal plea.

Another problem is that most insurance policies do not cover fraud, which is the claim upon which many conspiracies are based. Adding to the claimants’ collectability problems, most firms are either limited partnerships or professional corporations. This designation means that the individual partners are not jointly and severally liable for the acts of the wrongdoer.

2. Claims for Aiding and Abetting a Breach of Fiduciary Duty

Plaintiffs often attempt to sue lawyers for aiding and abetting a breach of fiduciary duty, but the weight of authority in Texas does not allow such claims to be brought by non-clients. Aiding and abetting fiduciary duty claims are based on the supreme court’s holding in Kinzbach Tool Co. v. Corbett-Wallace Corp., which states:

'It is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.'

Kinzbach, 160 S.W.2d 509, 574 (1942). Texas cases have recognized aiding and abetting fiduciary breach claims when non-lawyers knowingly participate with a fiduciary, such as a trustee, in breaching the fiduciary duty owed to another. See Kinzbach, 160 S.W.2d at 574 (third party assisted an employee in breaching a fiduciary duty owed his employer and thereby became a joint tortfeasor with the employee); Tinney v. Team Bank, 819 S.W.2d 560, 563 (Tex. App.—Fort Worth 1991, writ denied) (applying the doctrine in the context of a third party dealing with the executor of an estate).

A recent federal court opinion applied the Kinzbach aiding and abetting claim to lawyers, holding that such a claim was available despite the fracturing rule and was a separate and distinct claim from a conspiracy claim. Floyd v. Hefner, 556 F.Supp.2d 617, 659-60 (S.D. Tex. 2008). However, the opinion did not address whether such a claim, which would allow a non-client to impose fiduciary duty liability on an attorney, would violate the privity rule.

By contrast, the Texas appellate courts that have analyzed Kinzbach in the context of claims against attorneys have generally declined to apply the claim to lawyers due to the privity doctrine. See, e.g., Kastner v. Jenkens & Gilchrist, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.) (“The supreme court has not extended the reach of McCamish to include an aiding and abetting breach of fiduciary duty claim asserted by a non-client based upon the rendition of legal advice to a tortfeasor client.”); Thompson v. Vinson & Elkins, 859 S.W.2d 617, 624 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (“However, neither Kinzbach nor Kirby involved a beneficiary bringing a fiduciary duty claim against the fiduciary’s attorney. We believe that allowing . . . such a claim . . . . would, under the facts of this case, conflict with the privity rule.”).

The supreme court also recently expressed skepticism about whether such a claim may even be brought against attorneys:

Finally, the jury found that [attorney] knowingly participated, aided, or assisted [client] in breaching his duty to his former wife. Assuming such a claim exists and is somehow different from a conspiracy to breach his fiduciary duty, it too is excluded . . . for the reasons noted above.

Chu v. Hong, 249 S.W.3d 441, 447 (Tex. 2008) (emphasis added). Thus it appears at this time that the privity doctrine remains a defense to non-client claims for aiding and abetting breach of fiduciary duty.
3. Securities Fraud Liability

Attorneys may be subject to civil liability under both federal and state securities laws. Following is a discussion of general liability principles pertaining to lawyers under the federal Securities Exchange Act of 1934 and the Texas Securities Act.

a. Civil liability for attorneys under Section 10(b) of the Securities and Exchange Act of 1934

Section 10(b) of the Securities Exchange Act makes it illegal to “use or employ . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.” Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2000). Although the Act does not explicitly prescribe a cause of action for violating this provision, courts have developed a common law claim for securities fraud, which holds a company liable for misrepresenting its financial position to investors, failing to disclose the factual importance about stock price, or being over-optimistic about future expectations. The elements of a claim for securities fraud arising out of Section 10(b) are: (1) a misstatement or omission; (2) of a material fact; (3) made with scienter; (4) on which the plaintiff relied; and (5) which proximately caused his injury. In re Enron Corp. Securities, Derivative & ERISA Litigation, 235 F.Supp.2d 549, 571 (S.D. Tex. 2002). Scienter has been defined as “intent to deceive, manipulate, or defraud.” Id. (citing to Abrams v. Baker Hughes, Inc., 292 F.3d 424, 430 (5th Cir. 2002)). The Fifth Circuit has also held that scienter may be established by showing severe recklessness that involves “an extreme departure from the standard of ordinary care, and that presents a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it…” Id. (citing to Nathenson v. Zonagen, Inc., 267 F.3d 400, 408 (5th Cir. 2001)).

The United States Supreme Court has held that a private plaintiff may not bring an aiding and abetting claim under Section 10(b) and that liability under that Section is limited only to “primary violators.” Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994). Until recently, however, federal courts were in conflict over when “secondary actors” such as lawyers, accountants and banks can be held liable as primary violators along with their clients. Compare Simpson v. AOL Time Warner, Inc., 452 F.3d 1040 (9th Cir. 2006) (allowing imposition of “scheme liability” on those who participated in creating a deception, even if they did not directly make a public misrepresentation); and Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372 (5th Cir. 2007) (reversing an earlier ruling in the Enron case that had imposed “scheme” liability on third party banks who did not make a public misrepresentation). The Supreme Court has now resolved the issue by limiting primary liability to those who make a direct misrepresentation to the public, and/or who omit to disclose a material fact when they have a duty to disclose. Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 128 S.Ct. 761, 768-770 (2008). Because lawyers will not typically owe a fiduciary duty to investors, the Stoneridge decision has made it more difficult to impose liability on attorneys under the Securities Exchange Act of 1934. However, it is important to note that secondary actors who aided and abetted in securities violations are still subject to criminal penalties and civil enforcement by the SEC. Id. (citing to 15 U.S.C. § 78ff (criminal penalties) and 15 U.S.C. § 78t(e) (civil enforcement)). In addition, as discussed below, aiding and abetting liability is available under the Texas Securities Act.

b. Civil Liability under the Texas Securities Act

Article 581-33(A)(2) of the Texas Securities Act creates civil liability for a primary violator as follows:

A person who offers or sells a security...by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him, who may sue either at law or in equity for rescission, or for damages if the buyer no longer owns the security.


The Texas Securities Act provision for seller liability is based on Section 12 of the federal Securities Act of 1933. Huddleston v. Herman & MacLean, 640 F.2d 534, 551 (5th Cir. 1981), aff'd in part and reversed in part on other grounds, 459 U.S. 375, 103 S. Ct. 683 (1983). Federal case law establishes that attorneys for a seller who perform nothing more than professional services in return for fees are not liable as “sellers” of securities under Section 12. See, e.g., Marshall v. Quinn-L Equities, Inc., 704 F. Supp. 1384,

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1391 (N.D. Tex. 1988) (no seller liability where lawyers participated in seminars directed to potential investors, but there was no competent summary judgment evidence that any direct communications with investors or potential investors was “designed to persuade them to purchase the limited partnership interests in question”). Likewise, payment for legal services, even if traced to the proceeds of the offerings, is insufficient evidence of commissions. Id. Accordingly, attorneys should not typically be liable as primary violators under the Texas Securities Act.

However, section 33F(2) of the Texas Securities Act also provides for liability as an “aider and abettor” in the sale of securities:

A person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C, jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer.


To establish liability of an aider and abettor, a plaintiff must demonstrate that (1) a primary violation of securities law occurred; (2) the aider had general awareness of its role in the violation; (3) the aider rendered substantial assistance in this violation; and (4) the aider either intended to deceive the primary violator or acted with reckless disregard to the truth of the representations made by the primary violator. Sterling Trust Co. v. Adderley, 168 S.W.3d 835, 840 (Tex. 2005); Crescendo Investments, Inc. v. Brice, 61 S.W.3d 465, 472 (Tex. App.—San Antonio 2001, pet. denied) (citing Frank v. Bear, Stearns & Co., 11 S.W.3d 380, 384 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)). Establishing aiding and abetting liability under the Texas Securities Act thus requires that the plaintiff meet the difficult proof requirements of showing intent and substantial assistance in the violation. Brice, 61 S.W.3d at 472.

E. Negligent Misrepresentation

In McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, the Texas Supreme Court specifically adopted section 552 of the Restatement, which allows recovery against one who negligently supplies false information upon which another relies for guidance. McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999). The Restatement provides as follows:

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

RESTATEMENT (SECOND) OF TORTS § 552 (1997).

The Texas Supreme Court specifically rejected the law firm’s argument that section 552 of the Restatement should not apply to attorneys. Id. at 791. The court stated that allowing a non-client to bring a negligent misrepresentation cause of action against an attorney does not undermine the general rule that persons who are not in privity with an attorney cannot sue the attorney for legal malpractice. Id. Furthermore, the court stated that applying section 552 does not implicate the policy concerns behind the court’s strict adherence to the privity rule in legal malpractice cases. Id. It noted that other jurisdictions have held attorneys liable under section 552 based on issuing opinion letters and preparing different types of evaluations, including warranty deeds, title certificates, offering statements, offering memoranda, deeds of trust, and annual reports. The McCamish court, however, reaffirmed Barcelo, under which an attorney does not owe a duty of care that could give rise to malpractice liability to beneficiaries of wills or trusts because the attorney does not represent the beneficiaries. Id. at 793.

The Texas Supreme Court further noted that the Texas Disciplinary Rules of Professional Conduct prohibit an attorney from giving “an evaluation to a third party unless she reasonably believes that making the evaluation is compatible with other aspects of the attorney-client relationship and the client consents after consultation.” Id. (citing TEX. DISCIPLINARY R. PROF’L CONDUCT 2.02). Comments to Rule 2.02 require the lawyer to advise the client of the implications of an evaluation. TEX. DISCIPLINARY R. PROF’L CONDUCT 2.02, cmt. 5. The comments emphasize the lawyer’s responsibility to third persons and the duty to disseminate the findings after determining that no conflict exists between the client and the lawyer or the client and a third party. Id. Thus, Rule 2.02 safeguards a lawyer from “exposure to conflicting duties and ensures that the client makes the ultimate decision of whether to provide an evaluation.” McCamish, 991 S.W.2d at 793. The McCamish court noted that the lawyer should not allow a client to make the decision about providing an evaluation without first
advising the client about the potential impact the evaluation might have on the scope of the attorney-client privilege. *Id.*

Responding to the law firm’s claim that adopting section 552 would threaten lawyers with almost unlimited liability, the *McCamish* court pointed out that section 552 limits liability to situations in which the attorney providing the information is aware of the non-client and intends that the non-client rely on the information. *Id.* at 794. Therefore, a claim is available under section 552 only upon the transfer of information “to a known party for a known purpose.” *Id.* Furthermore,

[a] lawyer may also avoid or minimize the risk of liability to a non-client by setting forth (1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself.

*Id.* Section 552 also limits liability to the misrepresentation of material facts. For example, the supreme court noted that the communication of a client’s negotiating position is not a statement of material fact. *Id.*

Further, justifiable reliance is an element of a cause of action under section 552. Third party reliance may not be justified if the representation is within an adversarial context because of the attorneys’ obligation to pursue the clients’ interest with undivided loyalty. *McCamish* also states that “a non-client cannot rely on an attorney’s statement, such as an opinion letter, unless the attorney invites that reliance.” *Id.* at 795.

Opinions following *McCamish* have confirmed that reliance is not justifiable when the alleged representations were made in the context of litigation. *See*, e.g., *Ortiz v. Collins*, 203 S.W.3d 414 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (“Generally, reliance on representations made in a business or commercial transaction is not justified when the representation takes place in an adversarial context, such as litigation.”); *Lesikar v. Rappeport*, 33 S.W.3d 282, 319 (Tex. App.—Texarkana 2000, pet. denied) (concluding that justifiable reliance must be determined based on the nature of the relationship between attorney, client, and nonclient, and that such reliance would not be present in a litigation context); *Mitchell v. Chapman*, 10 S.W.3d 810, 812 (Tex. App.—Dallas 2000, pet. denied), cert. denied, 531 U.S. 1152 (2001) (holding that attorney conduct while representing a client in a lawsuit “could not create an actionable duty [to the adverse party] under section 552”). This distinction is also consistent with a number of recent decisions in fraud cases, which also distinguish between statements made in an adversarial context from those made in a more congenial, transactional setting.

A recent article points out, however, an inconsistency between the now established line of cases stating that no negligent misrepresentation claim can be available in the adversarial context and the context of the *McCamish* opinion itself. *See* David J. Beck & Geoff A. Gannaway, *The Vitality of Barcelo After Ten Years: When Can an Attorney Be Sued for Negligence by Someone Other Than His Client?*, 58 BAYLOR L. REV. 371, 403 (Spring 2006). The article notes that *McCamish* took place in the context of a negotiated settlement of a lawsuit—in other words, in an adversarial setting. This would seem to conflict with the opinions holding that negligent misrepresentation claims may not be based on litigation conduct. But, as the article also points out, the supreme court did not discuss the question of justifiable reliance in *McCamish*. Rather, it simply concluded that privity was not an absolute bar to the claim and then remanded the case for a determination of the remaining issues.

A recent opinion by the Dallas Court of Appeals demonstrates the importance of the justifiable reliance element to a negligent misrepresentation claim brought by a non-client in the transactional context. In *Kastner v. Jenkins & Gilchrist, P.C.*, the plaintiffs decided to invest in a business venture by purchasing limited partnership shares. *Kastner*, 231 S.W.3d 571 (Tex. App.—Dallas 2007, no pet.). The partnership’s attorney prepared the partnership agreement in accordance with the information provided to him, and sent plaintiffs a copy of the agreement along with a letter describing each partner’s percentages and capital contributions. The business operated at a loss and eventually filed for bankruptcy. The plaintiffs then sued the partnership’s attorney for negligent misrepresentation, alleging that the partnership agreement and cover letter incorrectly described the nature of the contributions made by the various partners and the total amount of capital raised by the partnership. The attorney won summary judgment and the Dallas court of appeals upheld dismissal, ruling that the plaintiffs could not show justifiable reliance as a matter of law. The court cautioned that “[a] non-client cannot rely on an attorney’s representations unless the attorney invites that reliance.” *Id.* at 578. The court explained that the lawyer did not prepare an opinion letter or other type of evaluation on which he knew the limited partners would rely; rather, he simply provided them the partnership agreement and described his understanding of the mechanics of closing. It then held:
Regardless of origin, the mere transmission of a partnership agreement from an attorney to a non-client cannot reasonably be construed as a legal opinion on the validity of the agreement or the propriety of investment in the partnership. We similarly reject [plaintiffs’] attempt to characterize the contents of the partnership agreement as representations made by Dunlap. To do so would effectively require attorneys to adopt as their own the terms of—and representations made in—legal documents they prepare for their clients. Such an expansive interpretation far exceeds the scope of McCamish liability.

Id.. This opinion indicates that negligent misrepresentation liability for representations made to non-clients should be limited to rare situations where attorneys provide opinion letters or other similar evaluations to the non-client and intend that the non-client will rely on those opinions.

F. The “Litigation Privilege” Prohibits Attorney Liability for Conduct in Litigation

Texas courts have protected attorneys involved in litigation against claims by the opposing party by fashioning a litigation privilege, sometimes referred to as “attorney immunity,” which prevents most claims by opposing parties or attorneys. In Bradt v. West, the First Court of Appeals developed this rule in the context of claims made by one attorney to a lawsuit against the adversary attorney. Bradt v. West, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied). The court discussed the potential problems that could arise from allowing an attorney to be potentially liable to the other side in a lawsuit:

An attorney should not go into court knowing that he may be sued by the other side’s attorney for something he does in the course of representing his client; such a policy would favor tentative representation, not the zealous representation that our profession rightly regards as an ideal and that the public has a right to expect. That policy would dilute the vigor with which Texas attorneys represent their clients, which would not be in the best interests of justice.

Id. It therefore held that the opposing attorney had no right of action, “under any cause of action,” against his adversary in the lawsuit based on his discharge of his duties in representing a party to the litigation. Id. The rule announced in Bradt has since been expanded to prevent claims made by the opposing party against the adversary attorney in the underlying case. See Taco Bell Corp. v. Cracken, 939 F. Supp. 528, 532-33 (N.D. Tex. 1996) (following Bradt in the context of a suit by the opposing party and dismissing all claims raised, including claims for fraud and conspiracy); Renfroe v. Jones & Assoc., 947 S.W.2d 285, 288 (Tex. App.—Fort Worth 1997, writ denied).

The litigation privilege rule focuses 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. For example, the Bradt court explained that an attorney would not be immune from physical assault “because such conduct would not be part of the discharge of the [attorney’s] duties in representing a party in the lawsuit.” Bradt, 892 S.W.2d at 72.

Recently, some courts have held that the litigation privilege will not overcome an opposing party’s allegation of fraud or conspiracy to defraud against an attorney. See Toles v. Toles, 113 S.W.3d 899, 910 (Tex. App.—Dallas 2003, no pet.); Mendoza v. Fleming, 41 S.W.3d 781, 787-88 (Tex. App.—Corpus Christi 2001, no pet.); Querner v. Rindfuss, 966 S.W.2d 661, 666 (Tex. App.—San Antonio 1998, pet. denied) (refusing to apply the privilege to an attorney representing a client in its collection efforts who “demanded access to the premises and, under threat of force, inspected, inventoried, and videotaped plaintiff’s ‘personal and intimate’ property and effects.”). Accordingly, the privilege turns on whether the attorney’s conduct was part of discharging his duties in representing his client. If the conduct is within this context, it is not actionable even if it is meritless.

However, other opinions find that the privilege applies equally to allegations of fraud and conspiracy to defraud so long as the conduct was part of representing an opposing party in a lawsuit. See Alpert v. Craig, Caton & James, P.C., 178 S.W.3d 398, 408 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (concluding that conduct undertaken in representing a client in litigation was not foreign to the duties of an attorney and upholding dismissal of a conspiracy to defraud claim); Chapman Children’s Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 442 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (distinguishing alleged fraudulent conduct in a transactional setting from conduct in adversarial litigation and upholding summary judgment on fraud and conspiracy claims under the litigation privilege); Dallas Independent School Dist. v. Finlan, 27 S.W.3d 220, 234-35 (Tex. App.—Dallas 2000, pet. denied), cert. denied, 534 U.S.
949 (2001) (rejecting argument that an attorney can be liable as a co-conspirator when the conduct involved judicial proceedings). See also Lewis v. Am. Exploration Co., 4 F. Supp. 2d 673, 679 (S.D. Tex. 1998) (“Characterizing the attorney’s actions in defending his client as fraudulent or as part of a conspiracy to defraud does not change the rule or provide a basis for recovery.”).

An unclear issue is who bears the burden of proving that the privilege applies. Some opinions hold that, when allegations are raised based on conduct of an opposing attorney in litigation, no cause of action exists against the attorney. See, e.g., White v. Bayless, 32 S.W.3d 271, 276 (Tex. App.—San Antonio 2000, pet. denied); Querner, 966 S.W.2d at 669; Bradt, 892 S.W.2d at 73. Under this line of authority, the burden is on the plaintiff to plead and prove the existence and violation of a duty and, therefore, that the conduct did not take place in the litigation context. Cf. IBP, Inc. v. Klumpe, 101 S.W.3d 461, 471 (Tex. App.—Amarillo 2001, pets. denied). Others treat the privilege as an affirmative defense on which the defendant-attorney bears the burden of proof. Mendoza, 41 S.W.3d at 787; Klumpe, 101 S.W.3d at 471. Until this issue is resolved, attorneys should take care to plead this privilege as an affirmative defense.

G. Potential Attorney Defamation Liability and Applicability of the Absolute Litigation Privilege

Another tort claim that third parties may try to bring against attorneys is defamation. Defamation claims allege either slander, a defamatory statement published orally, or libel, a written or printed defamation. The elements of a claim for defamation vary depending on the precise nature of the allegations, but in general the plaintiff must prove the following: (1) the defendant published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff is a public figure, or negligence, if the plaintiff is a private individual, regarding the truth of the statement; and (4) the plaintiff was injured as a result. WFAA-TV v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998); see also TEX. CIV. PRAC. & REM. CODE § 73.001.

An “absolute privilege” protects lawyers against defamation claims that arise out of statements they make in the course of representing their clients in judicial or quasi-judicial proceedings. See James v. Brown, 637 S.W.2d 914, 917 (Tex. 1982); Helfland v. Coane, 12 S.W.3d 152, 157 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). It has been long-established in Texas that this privilege protects statements made in the course of a judicial proceeding, such as statements made in open court, pretrial hearings, depositions, affidavits, and any of the pleadings. Coane, 12 S.W.3d at 152. A more recent development, however, has been the application of this privilege to out-of-court statements by attorneys that are made in connection with a lawsuit. Id.

In Russell v. Clark, the Dallas Court of Appeals considered for the first time whether out-of-court statements could be protected by the privilege. Russell v. Clark, 620 S.W.2d 865 (Tex. Civ. App.—Dallas 1981, writ ref’d n.r.e.). The alleged defamatory statements were made by an lawyer in a letter to the plaintiffs’ investors seeking information relevant to a lawsuit between the lawyer’s client and the plaintiff. The investors were not parties to the lawsuit. The court of appeals held, based on section 586 of the Restatement (Second) of Torts and policy concerns, that the statements should nevertheless be protected by the privilege:

[W]e think the doctrine should be so extended. Public policy demands that attorneys be granted the utmost freedom in their efforts to represent their clients. To grant immunity short of absolute privilege to communications relating to pending or proposed litigation, and thus subject an attorney to liability for defamation, might tend to lessen an attorney’s efforts on behalf of his client. The conduct of litigation requires more than in-court procedures. An attorney must seek discovery of evidence, interrogate potential witnesses, and often resort to ingenius methods to obtain evidence; thus he must not be hobbled by the fear of reprisal by actions for defamation. Yet this absolute privilege must not be extended to an attorney carte blanche. The act to which the privilege applies must bear some relationship to a judicial proceeding in which the attorney is employed, and be in furtherance of that representation.

Id. at 868. The court ultimately articulated the standard as follows:

[W]e hold that the question of the relationship of the defamatory matter to a proposed or existing judicial proceeding is a question of law, to be determined by the court. In doing so, the court must consider the entire communication in its context, and must extend the privilege to any statement that bears some relation to an existing or proposed judicial proceeding. All doubt should be resolved in favor of its relevancy.
Id. at 870. See also Riley v. Ferguson, No. 01-98-00350-CV, 1999 WL 191654, at *4 (Tex. App.—Houston April 8, 1999, pet. denied) (“The standard is not relevance but only some relation, and all doubt should be resolved in favor of the communication’s relation to the proceeding.”) (emphasis in original).

Since Russell, Texas courts have applied the privilege to the following types of out-of-court statements: (1) pleadings delivered to the media, Hill v. Herald-Post, 877 S.W.2d 774, 783-84 (Tex. App.—El Paso 1994), aff’d in part/rev’d in part on other grounds, 891 S.W.2d 638 (Tex. 1994); (2) statements or remarks made during settlement negotiations, Bennett v. Computer Assoc. Int’l, 932 S.W.2d 197, 201 (Tex. App.—Amarillo 1996, writ denied); and (3) correspondence sent in advance of, and regarding, potential litigation, Watson v. Kaminski, 51 S.W.3d 825, 827 (Tex. App.—Houston [1st Dist.] 2001, no writ).

It is uncertain when an attorney’s communications to the press regarding a lawsuit are protected by the absolute privilege. In Levingston Shipbuilding Co. v. Inland West Corp., the Beaumont Court of Appeals held that, by filing a lawsuit and then sending copies of the suit to the press in order to try to sabotage a contract to build a competing shipyard, the defendant was liable for defamation and that the privilege was not applicable. Levingston, 688 S.W.2d 192, 196-97 (Tex. App.—Beaumont 1985, writ ref’d n.r.e.). However, a subsequent opinion criticizes Levingstone, noting that its “facts seem to justify the affirmance [but] the holding has no support in the case law and is a deviation from the general rule of absolute privilege.” Hill, 877 S.W.2d at 783. The Hill court explained that the “harm resulting to the defamed party by delivering a copy of the suit or motion . . . [is] no greater than . . . if the news media reporters got a tip from someone or found the pleadings on their own.” Id.

Interestingly, Hill states in dicta that the absolute privilege does not extend to a press conference. Id. at 782-83 (citing to RESTATEMENT (SECOND) OF TORTS, Appendix § 586 (1981)). However, it extends the privilege to both the pleadings an attorney sent to the press and the attorney’s accompanying statements to a reporter regarding those pleadings. Id. But see Matta v. May, 118 F.3d 410, 417 (5th Cir. 1997) (holding that statements to a reporter that mischaracterized the pleadings in an ongoing proceeding were not protected by the absolute privilege). It is unclear why statements made in a press conference are not privileged but comments made in a telephone interview are protected.

More recent cases have upheld the applicability of the privilege to a lawyer’s statements to the press regarding an ongoing lawsuit. See Daystar Residential, Inc. v. Collmer, 176 S.W.3d 24, 28-29 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (holding that statements made by a lawyer in multiple interviews were protected because they related to a proposed lawsuit); and Dallas Ind. School Dist. v. Finlan, 27 S.W.3d 220, 238-39 (Tex. App.—Dallas 2000, pet. denied), cert. denied, 534 U.S. 949 (2001) (applying the privilege to statements made in a press release). It does appear, therefore, that the trend is to protect even communications with the press so long as they relate to an ongoing lawsuit. However, lawyers should exercise caution when communicating with the press because the exact parameters of the privilege in that context are still unclear.

V. RECENT DEVELOPMENTS REGARDING ATTORNEYS’ ETHICAL OBLIGATIONS

While violations of the Texas Disciplinary Rules of Professional Conduct do not necessarily give rise to a legal malpractice claim, they are often admissible as some evidence of the standard of care. See Two Thirty Nine Joint Ventures v. Joe, 60 S.W.3d 896, 905 (Tex. App.—Dallas 2001), rev’d on other grounds, 145 S.W.3d 150 (Tex. 2004). Similarly, they may be admissible as some evidence of the duty of loyalty applicable to breach of fiduciary duty claims. Cf. Stephenson v. LeBoeuf, 16 S.W.3d 829, 838 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). It is therefore important that litigators keep informed of changes to the disciplinary rules, as well as recent ethics opinions issued that interpret those rules.

With that in mind, following is a discussion of recent case law and ethics opinions that potentially impact a litigation practice.

A. Attorneys’ Obligations to Preserve Confidentiality of Client and Former Client Information

A recent opinion by the federal district court for the Southern District of Texas warrants discussion because of its broad interpretation of an attorney’s duty to preserve the confidentiality of client information. Sealed Party v. Sealed Party, No.Civ.A. H-04-2229, 2006 WL 1207732 (S.D. Tex. 2006). In this case, a client sued its former attorney for breach of fiduciary duty based on his disclosure in a press release that the client had settled a lawsuit. The attorney had represented the client during part of the underlying suit, but had ceased representing the client as of the date of settlement. The attorney was, nevertheless, aware before he issued the press release that the client had entered into a confidentiality agreement with the other side by which it was obligated not to publicly reveal the terms of the settlement. The client sued the attorney for breach of fiduciary duty and fee forfeiture on the basis of the attorney’s disclosure of confidential information without the client’s permission and in violation of the confidentiality agreement.
The court evaluated the attorney’s liability to the former client by analyzing the scope of Texas Disciplinary Rule of Professional Conduct 1.05. It noted that under Rule 1.05, an attorney’s obligation to preserve confidential information continues after the attorney-client relationship has terminated, and therefore concluded that the attorney was under a continuing fiduciary duty not to disclose the information. *Id.* at *9.

More significantly, the court considered whether an attorney must continue to protect information that was once confidential client information (which is broadly defined by Rule 1.05 to include all information acquired by the lawyer in the course of representation) but that was revealed in pleadings filed of public record. The court concluded that, even if the information is otherwise available in the public record, the attorney nevertheless still owes the client a duty not to disclose its contents without client permission. *Id.* at *13-14. The court further noted: “To the extent the Attorney contends he did not act knowingly because he did not know the details of the [confidentiality agreement], the argument misses the mark. The issue is whether the Attorney breached his fiduciary duty not to reveal to others a former client’s confidential information; the issue is not whether he personally breached the Confidentiality Provision, knowingly or otherwise.” *Id.* at *16 n.52. In other words, disclosing the existence of the settlement was a breach of fiduciary duty regardless of the existence of the confidentiality agreement.

In this case, the court ultimately concluded that, although a fiduciary duty was breached, the client could not recover because it could not prove actual damages and the breach was not sufficiently clear and serious to warrant fee forfeiture. *Id.* at *19-20. However, the holding as to breach remains problematic because it has such far reaching and impractical implications. In essence, the opinion concludes that a revelation of any information received from a client in the course of representation constitutes a breach of fiduciary duty, even if the information is already public record. This could be problematic in a number of situations, such as attorney or law firm websites that publish information regarding results achieved in prior lawsuits. Attorneys should take care to obtain client permission before posting this type of information on their websites.

A recent opinion by the Texas Court of Criminal Appeals is also noteworthy because it makes clear that attorneys must protect as privileged communications with non-clients that are made during an initial consultation, even if the lawyer is never retained as counsel. See *Mixon v. State*, 224 S.W.3d 206, 212 (Tex. Crim. App. 2007). In *Mixon*, the prospective client consulted with an attorney about possibly hiring him as counsel but the attorney declined the representation. The Court of Criminal Appeals concluded that, even though no attorney-client relationship was formed, the communications during that initial consultation should be protected by the attorney-client privilege. *Id.* at 212. The court’s holding was based on its interpretation of the disciplinary and evidentiary rules, in addition to important policy considerations:

Such a policy [of recognizing the privilege only after an attorney-client relationship was established] would have a chilling effect on defendants’ willingness to be candid with the lawyers whose services they seek to obtain. . . Moreover, such a lack of candor on the potential client’s part would not be in the lawyer’s best interest either, because the lawyer would then have to decide whether to represent a person before that person could feel free to give him or her all the information necessary to make the decision. *Id.* at 211-212.

Lawyers therefore should take care to preserve the confidences of all individuals with whom they consult about possible legal representation, regardless of whether they are ultimately retained as counsel.

### B. Case Law Regarding Unconscionable Attorney’s Fees

Recent ethics opinions and case law have provided guidance regarding whether particular attorney’s fee arrangements are unconscionable. In *Hoover Slovacek v. Walton*, the Texas Supreme Court held that it is unethical for a retention agreement to entitle an attorney to the present value of an unearned contingent fee in the event the attorney was terminated before a judgment was obtained. *Walton*, 206 S.W.3d 557, 562-63 (Tex. 2006). The court noted that there are “ethical considerations overlapping the attorney-client relationship” and explained that attorneys who are terminated before the representation is completed may seek to recover in quantum meruit or may collect the fee from any damages the client ultimately recovers. *Id.* at 561. But to allow the collection of a fee before it is earned presents a number of problems, especially that it impairs the client’s ability to change legal representation “for any reason or for no reason at all.” *Id.* at 562.

A recent Austin court of appeals decision provides important guidance regarding the use of non-refundable retainers. See *Cluck v. Comm’n for Lawyer Discipline*, 214 S.W.3d 736, 739-40 (Tex. App.—Austin 2007, no pet.). In *Cluck*, an attorney charged a client a total retainer of $20,000 for his work on a
divorce. Although labeled non-refundable, the
attorney’s hourly fees were to be billed against the
retainer for his services on the case. The client
terminated the representation and demanded return of
the unearned portion of the fee. The lawyer refused to
reimburse the client. The trial court granted summary
judgment for the State Bar, holding that as a matter of
law this conduct had violated a number of disciplinary
rules, including Rules 1.04 and 1.14. The Austin Court
of Appeals affirmed, citing to a 1986 ethics opinion
that was directly on point. Id. at 740 (citing to Ethics
Opinion 431). The court drew a line between advance
payments for legal services, which must be held in
trust and reimbursed to the client upon termination of
the representation if not earned, and true retainers,
which are treated as earned upon receipt and thus not
reimbursable to the client.

The court further explained that a true retainer “is
not a payment for services. It is an advance fee to
secure a lawyer’s services, and remunerate him for loss
of the opportunity to accept other employment.” Id.
at 739-40 (quoting Ethics Opinion 431). “If the lawyer
can substantiate that other employment will probably
be lost by obligating himself to represent the client,
then the retainer fee should be deemed earned at the
moment it is received.” Id. at 740. But “money that
constitutes the prepayment of a fee belongs to the
client until the services are rendered and must be held
in a trust account.” Id. at 740. Attorneys who collect
retainers that will be applied against future legal
services therefore should take care to treat the retainers
as client funds until they are actually earned.

C. Proper Construction of Attorney-Client Fee
Agreements
A recent opinion addresses the proper
construction of ambiguous attorney-client fee
contracts. See Anglo-Dutch Petroleum v. Greenberg
Peden, 267 S.W.3d 454 (Tex. App.—Houston [14th
Dist.] 2008, pet. filed). The case involved a dispute
between lawyer and client over the potential
recoverability of a contingent fee. The trial court
concluded the agreement was ambiguous and the jury
made factual findings that supported recovery of the
fee. On appeal, the client argued that the ambiguous
agreement should have been automatically construed
against the attorney under the doctrine of contra
proferentem.

The court of appeals noted that the supreme court
has not yet addressed this issue, and therefore relied on
section 18 of the RESTATEMENT (THIRD) OF THE LAW
GOVERNING LAWYERS for guidance. The key question
under the Restatement approach is: “What would a
‘reasonable person in the client’s circumstances’
understand or expect?” Id. at 472 (quoting the
Restatement). The Restatement does not require that a
contract be construed against the lawyer, but rather
contemplates that all the standard rules for contract
interpretation be considered. It does, however, state
that the “lawyer bears the burden of ensuring that the
contract states any terms diverging from a reasonable
client’s expectations.” Id. at 471.

Applying the Restatement approach, the court
noted that this case involved a sophisticated client who
vigorously negotiated the fee agreement with the
attorney, who was told about the attorney’s
interpretation of the contract. The court concluded as
follows:

These circumstances make the present case
an inappropriate vehicle for applying the
doctrine of contra proferentem—either
broadly with respect to all ambiguities that
may arise in connection with attorney-client
agreements, or specifically with respect to
the particular ambiguity at issue here . . .

Id. at 472. In sum, the opinion does not foreclose the
possibility of construing fee agreements against the
attorney in certain circumstances, but rather holds that
such a construction would not make sense on the facts
of that case. Attorneys must continue to be vigilant to
draft fee agreements in a very clear manner and to
suggest that their prospective clients consult with
independent counsel on the terms of the agreement if
they desire.

D. Recent Ethics Opinions
1. Opinion 570: Attorney Notes and Other Work
Product Belong to the Client
Opinion 570 addresses whether attorney notes are
considered client documents that must be turned over
to the client upon request. It concludes that all
documents in the file, including attorney work product
such as notes, belong to the client and must be turned
over. The Opinion further specifically rejects the
application of Section 46 of the Restatement (Third) of
the Law Governing Lawyers, which allows lawyers to
hold back documents reasonably intended only for
internal review.

The Opinion does, however, allow an exception
for specific circumstances, such as notes that contain
information subject to a protective order, notes that
contain information such that their disclosure would
violate an obligation owed to a third party, and notes
that could reasonably be expected to cause “serious
harm” to a mentally ill client. The Opinion cautions
that these exceptions are not based on the lawyer’s self interest, but rather on the lawyer’s duties to others.

2. Opinion 581: Engagement Agreement May Require the Client to Pay the Lawyer’s Defense Costs if the Lawyer is Joined in the Lawsuit

Ethics Opinion 581 concludes that a lawyer can ask a client to pay his/her defense costs if he is joined in the lawsuit as a defendant. The lawyer submitting the question to the Ethics Committee frequently represents clients in lawsuits brought by beneficiaries of estates. However, in that capacity he has often been joined as a defendant via claims of conspiracy and fraud. The lawyer wished to include a provision in future engagement agreements that, in such a case, the client would pay his defense costs.

The Opinion concludes that, in most cases, such an arrangement would not result in a conflict of interests between attorney and client. However, it noted that the nature of the allegations against the attorney could create a potential conflict, and cautioned that in such a case the client should be immediately advised. Further the Opinion stated that the engagement agreement must not limit the lawyer’s potential malpractice liability and must not be unconscionable under Texas Disciplinary Rule 1.04(a). For example, if the costs of defending the attorney exceed the total value of the matter to the client, the arrangement may be unconscionable.

VI. CONCLUSION AND POINTERS FOR AVOIDING LIABILITY

In conclusion, the nature of claims available against attorneys continues to evolve. To protect themselves from potential liability, attorneys should make a point to stay up-to-date on malpractice law developments and changes in the Disciplinary Rules. Following is a list of pointers to keep in mind in order to avoid liability to clients and non-clients:

- Be clear who you are representing. If in doubt, put it in the engagement letter.
- Put all critical decisions and legal advice in writing, to the extent possible.
- Be careful who you pass confidential information to, and if in doubt obtain the consent of current and former clients before revealing any confidential information.
- Check the conflicts rules any time you have a doubt about representing multiple parties.
- If you do represent multiple parties, get a clear waiver from them when needed.