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Legal Malpractice Committed While Working on Cases Which Result in Litigation Tolls the Statute of Limitations for the Malpractice Claim Until All Appeals for the Underlying Causes of Action Are Exhausted.

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RECENT DEVELOPMENTS

LIMITATION OF ACTIONS—LEGAL MALPRACTICE—LEGAL MALPRACTICE COMMITTED WHILE WORKING ON CASES WHICH RESULT IN LITIGATION TOLLS THE STATUTE OF LIMITATIONS FOR THE MALPRACTICE CLAIM UNTIL ALL APPEALS FOR THE UNDERLYING CAUSES OF ACTION ARE EXHAUSTED. *Hughes v. Mahaney*, 821 S.W.2d 154 (Tex. 1991).

James and Patti Hughes hired Robert Mahaney in October 1982 to assist them in adopting a child. On the baby's birth date, the child's biological mother signed an affidavit, irrevocable after sixty days, which terminated her parental rights. This affidavit named Mahaney, not the Hugheses, as temporary managing conservator for the child.

As planned, the Hugheses brought suit to terminate the mother's parental rights and to complete the adoption process. However, in February of 1983, after the sixty day period expired, the biological mother attempted to revoke her affidavit of relinquishment and sought a writ of habeas corpus for possession of the child. The Hugheses then amended their adoption pleadings, seeking involuntary termination of the biological mother's parental rights.

The trial judge named the Hugheses as the temporary managing conservators and refused to issue the habeas corpus writ. However, knowing that Mahaney, and not the Hugheses, was named on the affidavit as temporary conservator of the child, the biological mother moved to dismiss the Hugheses' suit because they lacked standing. Following a jury trial, the court awarded permanent custody to the Hugheses and terminated the biological mother's rights. On March 7, 1985, the Waco Court of Appeals reversed the custody award to the Hugheses and ordered dismissal of their suit because they lacked standing to terminate the biological mother's rights.

On May 21, 1987, the Hugheses instituted a malpractice suit against Mahaney and his law firm for negligence and for violations of the Texas Deceptive Trade Practices Act (DTPA).[1] The Hugheses alleged that Mahaney's

1. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Vernon 1987).

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failure to name them as temporary conservators on the affidavit to terminate the biological mother's parental rights rendered them unable to adopt the child.

Mahaney moved for summary judgment on the ground that the two-year statute of limitations for both the negligence claims and DTPA violations had elapsed. The trial court granted summary judgment for both of these claims. The Hugheses only appealed the granting of summary judgment for the negligence claim. The court of appeals found that the malpractice claim accrued on March 7, 1985, when the Waco Court of Appeals rendered its decision and when the Hugheses discovered or should have discovered Mahaney's negligence. Therefore, the Mahaney's 1987 malpractice suit was barred.

Without determining when the malpractice cause of action accrued, the Texas Supreme Court reversed the appellate court decision and remanded the case to the trial court. The Texas Supreme Court held that the statute of limitations for the malpractice claim was tolled until the parties exhausted all the appeals of the underlying adoption lawsuit.

Since the adoption of the Model Rules of Professional Responsibility in 1969, regulation of the legal profession through malpractice actions has greatly increased.[2] Attorneys are held accountable for negligence committed while performing their services, as are other professionals.[3]

Legal malpractice takes several forms: giving faulty or inaccurate advice; not providing advice when legally required; disregarding a client's directions; performing acts when the client clearly instructs the attorney otherwise; delinquently handling a client's matters; or violating the appropriate standard of care in preparing, handling, and presenting a client's litigation.[4] The lawyer's standard of care is that which is "exercised by a reasonably prudent attorney, based on the information the attorney has at the time of the alleged act of negligence."[5] Because the attorney-client relationship is one of loyalty and trust, establishing that an attorney has breached his duty of care is not an insurmountable barrier in legal malpractice claims.[6] Rather, the difficulty lies in establishing the remaining elements of the claim:

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2. *See* Jay H. Henderson, Comment, McClung v. Johnson: *Limitations in Legal Malpractice Actions*, 34 BAYLOR L. REV. 269, 269 (1982) (recently claims for attorney malpractice have multiplied exponentially).

3. Zidell v. Bird, 692 S.W.2d 550, 553 (Tex. App.—Austin 1985, no writ).

4. *Id. See generally* Steven K. Ward, *Legal Malpractice in Texas*, 19 S. TEX. L.J. 587 (1978) (discussing history of legal malpractice).

5. Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc., 779 S.W.2d 474, 477 (Tex. App.—El Paso 1989, writ denied).

6. *Cf.* Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (discussing fiduciary relationship existing between attorney and client).

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that the attorney's breach of duty proximately caused damages to the client.[7]

Statutes of limitations are defenses to a cause of action and require a party to bring an action within a specified time period.[8] While oftentimes statutes of limitations can be the ultimate adjudicator of a cause of action by curtailing an injured party's right to seek redress, they are based on principles of fairness. A party should prosecute his or her claims within a reasonable amount of time so that the opponent has an adequate opportunity to defend, witnesses remain accessible and able to remember, and other forms of evidence still exist.[9]

Although injured clients attempt to classify their legal malpractice claims as breach of contract actions in order to obtain the benefits of a longer statute of limitations period, Texas courts emphatically state that a claim for legal malpractice is based in common-law negligence.[10] Therefore, the two-year statute of limitations for torts applies.[11] However, with legal malpractice actions, the statute of limitations only begins to run when "the claimant *discovers or should have discovered*, through the exercise of reasonable care and diligence, the facts establishing the elements of his cause of action."[12] While this "discovery rule" applies to toll the statute of limitations, the in-

7. *See Zidell*, 692 S.W.2d at 554 (maintaining cause of action only if some damage, even if completely incalculable, established as resulting from negligence); Fireman's Fund Am. Ins. Co. v. Patterson & Lamberty, Inc., 528 S.W.2d 67, 69 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (requiring claimant to prove that damage resulted); *see also* Paul D. Rheinhold, *Legal Malpractice: Plaintiff's Strategies*, 15 LITIG. 13, 16 (1989) (malpractice in "case within a case" still requires showing of proximate cause).

8. BLACK'S LAW DICTIONARY 835 (5th ed. 1979).

9. United States v. Kubrick, 444 U.S. 111, 123 (1979); Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988); Robinson v. Weaver, 550 S.W.2d 18, 20 (Tex. 1977); Price v. Estate of Anderson, 522 S.W.2d 690, 692 (Tex. 1975); Gaddis v. Smith, 417 S.W.2d 577, 578 (Tex. 1967); *see also* Joseph H. Koffler, *Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crisis*, 20 AKRON L. REV. 209, 211 (1986); David M. Ledbetter, *Malpractice*: Black v. Littlejohn: *A New Discovery Formula for Non-Apparent Injuries under the Professional Malpractice Statute of Limitations*, 64 N.C. L. REV. 1438, 1443 (1986); Jay H. Henderson, Comment, McClung v. Johnson: *Limitations in Legal Malpractice Actions*, 34 BAYLOR L. REV. 269, 270 (1982) (limitations periods are established to prevent litigating stale or false claims).

10. Woodburn v. Turley, 625 F.2d 589, 592 (5th Cir. 1980); *Willis*, 760 S.W.2d at 644; Liles v. Phillips, 677 S.W.2d 802, 807 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); Citizens State Bank of Dickinson v. Shapiro, 575 S.W.2d 375, 386 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

11. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986); *Willis*, 760 S.W.2d, at 644; Ernest E. Figari, Jr. et al., *Texas Civil Procedure*, 43 SW. L.J. 485, 497-98 (1989). *Compare* Pham v. Nguyen, 763 S.W.2d 467, 469 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (no matter how plaintiff attempts to plead legal malpractice claim, statute of limitations is two years) *with* First Nat'l Bank of Eagle Pass v. Levine, 721 S.W.2d 287, 288-89 (Tex. 1986) (two-year statute of limitations for trespass and tortiously interfering with business).

12. *Willis*, 760 S.W.2d at 646 (emphasis added).

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jured party still must exercise reasonable diligence in uncovering factors that put the injured party on sufficient notice that a claim exists for the alleged wrongdoing.[13] Therefore, when a cause of action "accrues" is a very important, yet often difficult question to answer.

Determining when a cause of action "accrues" for limitations periods is a question of law for the court to decide.[14] In determining when a claim for legal malpractice accrues, Texas courts follow the "damage rule" which states that the claim begins once the attorney committed a tort and at least some damage to the client is calculable.[15] Texas courts have previously held that a third-party's threatened litigation for attorney malpractice will not invoke the statute of limitations because only the potential for suit exists at that time.[16]

While the plaintiff has the burden of pleading and proving that the discovery rule applies, the defendant must present sufficient evidence that discovery was made prior to the running the statute of limitations.[17] However, on many occasions Texas courts have found that if the plaintiff failed to establish that the discovery rule applied, the plaintiff's cause of action would accrue under the "legal injury" rule. The rule has been defined as:

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13. Nichols v. Smith, 507 S.W.2d 518, 521 (Tex. 1974); Courseview, Inc. v. Phillips Petroleum Co., 158 Tex. 597, 312 S.W.2d 197, 204-05 (1957); Slay v. Burnett Trust Co., 143 Tex. 621, 187 S.W.2d 377, 394 (1945); Jay H. Henderson, Comment, McClung v. Johnson: *Limitations in Legal Malpractice Actions*, 34 BAYLOR L. REV. 269, 270 (1982).

14. Gaddis v. Smith, 417 S.W.2d 577, 580 (Tex. 1967) (quoting Fernandi v. Strully, 173 A.2d 277, 285-86 (N.J. 1961)); *see also* Jay H. Henderson, Comment, *McClung v. Johnson: Limitations in Legal Malpractice Actions*, 34 BAYLOR L. REV. 269, 270 (1982). For a discussion on when the limitations periods for all jurisdictions begins for attorney malpractice, *see* Francis M. Dougherty, Annotation, *When Statute of Limitations Begins to Run upon Action against Attorney for Malpractice*, 32 A.L.R. 4TH 260 (1984).

15. McClung v. Johnson, 620 S.W.2d 644, 646 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); *see also* DENNIS J. HORAN & GEORGE W. SPELLMIRE, ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE 21-7 (1989) (discussing difference between occurrence rule and damage rule for establishing when a legal malpractice claim accrues); Joseph H. Koffler, *Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crisis*, 20 AKRON L. REV. 209, 224 (1986) (courts often require ascertainable damages but not complete amount for malpractice claim to accrue).

16. Independent Life & Accident Ins. Co. v. Childs, Fortenbach, Beck & Guyton, 756 S.W.2d 54, 55 (Tex. App.—Texarkana 1988, no writ); Cox v. Rosser, 579 S.W.2d 73, 75-76 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.); Atkins v. Crosland, 417 S.W.2d 150, 153 (Tex. 1967).

17. *See* Burns v. Thomas, 786 S.W.2d 266, 267 (Tex. 1990) (limitations statute no bar when, after applying discovery rule, defendant failed to establish accrual date for attorney negligence claim); *Independent Life & Accident*, 756 S.W.2d at 55 (defendant-attorney failed to establish that plaintiff discovered or should have discovered defendant's negligence within two years of filing suit); Ernest E. Figari, Jr. et al., *Annual Survey of Texas Law: Civil Procedure*, 45 SW. L.J. 73 (1991) (discussion of cases during survey period, including cases finding that defendant must negate discovery rule).

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> [A] cause of action sounding in tort generally accrues when the tort is completed, that is, the act committed and damage suffered. . . . The date of the legal injury is not the time it is discovered or the date when actual damage is fully ascertained. . . . If the defendant's conduct results in an invasion of the plaintiff's legally protected interest, so that he may obtain an immediate remedy in court, his right of action "accrues" with the invasion, provided some legally cognizable injury, however slight, has resulted from the invasion or would necessarily do so.[18]

The legal injury rule has some harsh results. In *Smith v. McKinney*,[19] the plaintiff-client hired an attorney to represent her in a divorce matter in November 1981. However, the attorney incorrectly advised her to sign a document which, as the facts established, gave away her interest in retirement benefits. The client discovered this problem in April 1985, long after she finalized the divorce decree which failed to address the retirement benefits. In October 1986, the client then instituted her malpractice action but failed to prove that the discovery rule applied.[20] Therefore, in applying the legal injury rule, the court found her injuries occurred in 1981 and her malpractice claim was time-barred.[21]

The analysis used by the Texas Supreme Court in *Hughes* resembles previous decisions applying the discovery rule to legal malpractice cases.[22] In *Willis v. Maverick*,[23] Justice Kilgarlin, writing for the majority stated,

> Were we to follow the general rule, the client could protect himself fully only by ascertaining malpractice at the moment of its incidence. To do so, he would have to hire a second attorney to observe the work of the first. This costly and impractical solution would but serve to undermine the confidential relationship between attorney and client.[24]

Thus, Justice Kilgarlin reasoned that preserving the sanctity of the attorney-client relationship justifies extending the period of time in which an attorney is subject to malpractice until the client discovers or should have discovered the problems.[25]

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18. Black v. Wills, 758 S.W.2d 809, 816 (Tex. App.—Dallas 1988, writ denied).

19. Smith v. McKinney, 792 S.W.2d 740 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

20. *Id.* at 741.

21. *Id.* at 742.

22. *Compare* Hughes v. Mahaney, 821 S.W.2d 154, 156 (Tex. 1991) (discussing application of discovery rule to legal malpract claims) *with Willis*, 760 S.W.2d at 646 (applying discovery rule to legal malpractice action).

23. 760 S.W.2d 642 (Tex. 1988).

24. *Id.* at 646.

25. *See id.* at 645 (special fiduciary duty of attorneys to their clients justifies the discovery rule).

In *Hughes*, the court's holding again asserts that an attorney's duty to his client outweighs his own interest in avoiding malpractice liability.[26] Accordingly, applying the discovery rule to legal malpractice claims is justified. Justice Cornyn states that absent application of the discovery rule, a client would be forced to compromise both the malpractice claim and the underlying appeal because they represent inconsistent arguments. In one case, the client must argue that the attorney committed malpractice which greatly affected the client's position. However, concerning appellate review of the second underlying claim, the client must advocate that the attorney's conduct was proper or only slightly injurious.[27] Therefore, if the legal process precludes an individual from seeking his or her legal remedy, the time in which the plaintiff may seek redress should not include the period in which he or she is prevented from seeking such a remedy.[28] However, nationally, jurisdictions are split on whether to apply this tolling rule for legal malpractice cases.[29]

Although the *Hughes* Court did not emphasize this point, Texas courts have found other instances which toll the statute of limitations for legal malpractice. The legal malpractice statute of limitations is tolled in two other situations: when the attorney fraudulently conceals facts which establish a legal malpractice claim,[30] and when the attorney-client relationship continues after the negligence occurred.[31] Thus, *Hughes* simply establishes an-

26. *See Hughes*, 821 S.W.2d at 157 (concluding that statute of limitation tolled pending all underlying appeals).

27. *Id.*; *see* Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323, 1326 (Fla. 1990) (inconsistency exists when forced to appeal underlying claim while prosecuting malpractice claim).

28. *Hughes*, 821 S.W.2d at 157; Walker v. Hanes, 570 S.W.2d 534, 540 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); Cavitt v. Amsler, 242 S.W.2d 246, 249 (Tex. Civ. App.—Austin 1922, writ dism'd).

29. *See* Zupan v. Berman, 491 N.E.2d 1349, 1351 (Ill. App. Ct. 1986) (legal malpractice claims accrue when duty breached, not when damage occurs, and courts will not toll statute to determine full extent of damages); *see also* Richardson v. Denend, 795 P.2d 1192, 1195 n.7 (Wash. Ct. App. 1990) (client is on notice of potential legal malpractice claim when trial court enters adverse judgment, as a matter of law). *But see* Amfac Distrib. Corp v. Miller, 673 P.2d 795, 797 (Ariz. Ct. App.) (limitations statute should be tolled until plaintiff's damages are not conditioned on the appeals process), *aff'd as supplemented*, 673 P.2d 792, 793 (Ariz. 1983) *and Peat, Marwick, Mitchell & Co.*, 565 So.2d at 1326 (although case concerns accounting malpractice, court analogizes rules for legal malpractice and finds that arguing malpractice while appealing underlying claim is inconsistent).

30. *See* Owen v. King, 111 S.W.2d 695, 697-98 (Tex. 1938) (fraudulent concealment); Liles v. Phillips, 677 S.W.2d 802, 807-08 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (fraud or fraudulent concealment).

31. Jimenez v. Maloney, 646 S.W.2d 673, 675-76 (Tex. App.—San Antonio 1983, writ dism'd) (continuation of attorney-client relationship); McClung v. Johnson, 620 S.W.2d 644, 647 (Tex. App.—Dallas 1981, writ ref'd n.r.e.) (attorney still has employment relationship with client); *see also* Jay H. Henderson, Comment, McClung v. Johnson: *Limitations in Legal*

other tolling exception for the statute of limitations for legal malpractice claims.[32]

Tolling the statute of limitations until all appeals for the underlying claim are exhausted will help establish the true extent of the client's damages.[33] Previously, the discovery rule required the plaintiff to bring the malpractice claim after discovering *any* harm, even if the harm was slight.[34] In *American Medical Electronics v. Korn,*[35] the court determined that although the damage caused by a third party suit for patent infringement was more substantial, the client knew of his attorney's malpractice when he sought a second opinion on the patent matter.[36] Now, even if the attorney's negligence adversely affects the client at the trial court, the client will suffer no actionable damage if the harm is rectified on appeal.[37]

However, in the *Hughes* decision, the court fails to address when a cause of action for malpractice accrues.[38] Presumably, the date that all appeals for the underlying claim are exhausted establishes the accrual date for the legal malpractice claim. This raises the issue of whether the statute of limitations is tolled if an attorney commits malpractice in "prosecuting or defending a claim that results in litigation" but the client does not seek appellate review. In *Aduddell v. Parkhill,*[39] decided the same day as *Hughes*, the Texas Supreme Court found that a client's legal malpractice action was not barred when the defendants-attorneys failed to file the client's asbestosis lawsuit within the statute of limitations.[40] Again, the supreme court did not decide when the plaintiff's malpractice claim accrued even though the defendants alleged that it accrued on the day the limitations expired on the asbestosis claim. However, the plaintiff did not appeal the asbestosis claim and, on remand, the court could find that the statute of limitations still barred Adud-

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Malpractice Actions, 34 BAYLOR L. REV. 269, 269 (1982) (discussing fraud and continuing-relationship tolling exceptions to statute of limitations).

32. *Cf.* DENNIS J. HORAN & GEORGE W. SPELLMIRE, ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE 21-1 (1989) (recently, the ability to assert the statute of limitations as defense for legal malpractice claims is lessening as various courts accept exceptions to when the claim accrues).

33. *Cf.* Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, 15 LITIG. 13, 13 (1989) (for plaintiff to recover in "cases within legal malpractice cases," client must prove that had lawyer completed requisite work, result might have been different).

34. American Medical Electronics v. Korn, 819 S.W.2d 573, 577 (Tex. App.—Dallas 1991, writ denied).

35. 819 S.W.2d 573 (Tex. App.—Dallas 1991, writ denied).

36. *Id.* at 578.

37. *Cf.* Amfac Distrib. Corp. v. Miller, 673 P.2d 792, 794 (Ariz. 1983) (en banc) (damages in legal malpractice claims will only be ascertainable when appellate time frame is completed, but if some negligence exists, no damages to client translates into no cause of action).

38. *Hughes*, 821 S.W.2d at 157.

39. 821 S.W.2d 158 (Tex. 1991).

40. Aduddell v. Parkhill, 821 S.W.2d 158, 159 (Tex. 1991).

dell's claim because he did not attempt to appeal the underlying cause of action.[41] Thus, the possibility exists that a client will attempt to take another "bite at the apple" by reaping the benefits of the tolling rule rather than appealing the underlying cause of action.[42]

Although the *Hughes* decision preserves the attorney-client relationship and ensures that the plaintiff did suffer actual damages before being forced to sue or lose the malpractice claim, this decision leaves open additional issues. The United States Supreme Court has held that a court-appointed attorney for federal criminal matters may remain liable for legal malpractice under state law.[43] Therefore, the Texas Supreme Court's new tolling rule could apply to criminal matters.

Also, the *Hughes* decision does not make clear how tenuous the claim "resulting in litigation" must be. Several of the cases analyzed by Justice Cornyn in *Hughes* discuss malpractice in advising clients and not in litigating a claim; their discussion of the "exhaustion of appeals" rule was in dicta.[44] Presumably, out of some fairness for the attorney, the malpractice must be in preparing for litigation rather than merely giving advice. A contrary application could feasibly result in the indefinite possibility of malpractice liability.[45]

Additionally, *Hughes* does not make clear the type of damages the plaintiff must show once the underlying appeals are completely exhausted.[46] Damages would certainly be more concrete and less speculative once the

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41. *Id.*

42. *Cf.* 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, 47 (1989) (legal malpractice action may be only available avenue for client to recover damages for attorney's alleged misconduct).

43. Ferri v. Ackerman, 444 U.S. 193, 205 (1979); *see also* THOMAS P. BROWN III, HOW TO AVOID BEING SUED BY YOUR CLIENT: PREVENTIONS AND CURES FOR LEGAL MALPRACTICE 9-10 (1981) (brochure discusses *Ferri* while presenting various steps an attorney may take to avoid malpractice claims).

44. *See, e.g.*, Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323, 1324 (Fla. 1990) (accounting malpractice regarding tax advice); Dixon v. Shafton, 649 S.W.2d 435, 436 (Mo. 1983) (en banc) (advice over contract dispute but not litigation); Zimmie v. Calfee, Halter & Griswold, 538 N.E.2d 398, 399 (Ohio 1989) (malpractice in drafting antenuptial agreement); Hennekens v. Hoerl, 465 N.W.2d 812, 813-14 (Wis. 1991) (drafting of financing contingency clause in land purchase contract).

45. In probate law, for example, negligence may not be discovered for a generation. As such, an attorney could feasibly be liable for malpractice indefinitely.

46. *See* 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) (client may be required to establish success regarding the underlying action but for the attorney's improper conduct). The *Hughes* decision does not appear to change the requirement that the plaintiff in negligence cases must plead and prove that the statute of limitations should be tolled. *Willis*, 760 S.W.2d at 647; Weaver v. Witt, 561 S.W.2d 792, 794 n.2 (Tex. 1977).

case has been heard before the trial court and one or more appellate courts. However, the longer the courts extend the time in which an attorney remains liable, the more difficult it will be to preserve and evaluate the evidence for a malpractice claim.[47] Although the tolling effect will definitely extend the time in which an attorney may remain liable for his malpractice, the Texas Supreme Court believes this burden of extending liability should be borne by the attorney rather than the client.[48]

Unfortunately, the decision in *Hughes* will require attorneys to question whether their malpractice insurance coverage adequately covers their work. Most policies require that the policy be effective when the claim is made.[49] As a consequence, attorneys will basically be forced to maintain their insurance coverage for periods long after they retire.[50]

The Texas Supreme Court appears content to follow its new tolling exception for the statute of limitations as formulated in *Hughes*.[51] In *Gulf Coast Investment Corporation v. Brown*,[52] the plaintiff, Gulf Coast, attempted to foreclose on property held by Thomas and Darlene Smith.[53] In response, the Smiths filed and won a wrongful foreclosure action against Gulf Coast for giving improper notice on the foreclosure sale.[54] The Texas Supreme Court, in a per curiam opinion, held that the tolling exception could apply when legal malpractice results in a third-party wrongful foreclosure suit as opposed to an appeal of underlying claims.[55]

Therefore, *Hughes* has a major impact on the extent of attorney malpractice liability. Although studies show that most attorneys facing malpractice claims eventually win the lawsuit, attorneys still face greater liability for their actions.[56] The fact that legal malpractice is generally found only in the most egregious of cases should come as no surprise because attorneys con-

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47. 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, 48-50 (1989).

48. *Cf. Willis*, 760 S.W.2d at 646 (any burden on attorney by applying discovery rule is less burdensome than injustice in denying relief to injured clients).

49. Steven K. Ward, *Developments in Legal Malpractice Liability*, 31 S. TEX. L.J. 121, 137 (1990).

50. *See id.* (discovery rule requires retired attorneys to maintain insurance coverage).

51. Gulf Coast Investment Corp. v. Brown, 821 S.W.2d 159, 160 (Tex. 1991); Aduddell v. Parkhill, 821 S.W.2d 158, 159 (Tex. 1991).

52. 821 S.W.2d 159 (Tex. 1991).

53. *Id.* at 160.

54. *Id.*

55. *Id.*

56. Roger M. Baron, *The Expansion of Legal Malpractice Liability in Texas*, 29 S. TEX. L.J. 355, 355, 359 (1988); *see* Steven K. Ward, *Developments in Legal Malpractice Liability*, 31 S. TEX. L.J. 121, 122 (1990) (trend will continue that lawyers face greater liability).

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tribute so much financially to the elected judiciary system in Texas.[57] However, the opinion in *Hughes* indicates that the judiciary is inclined to find exceptions to the statute of limitations on legal malpractice claims and thereby extend the time period during which lawyers are justifiably subject to lawsuits. Given the ramifications of the *Hughes* outcome and the growing awareness of the courts' hostilities towards attorney malpractice, attorneys should take advantage of numerous liability-avoidance articles.[58]

The *Hughes v. Mahaney* decision reflects the growing interest in preserving the attorney-client relationship throughout the appellate process. The decision makes a great deal of sense because an attorney may commit some error during the initial stages of prosecuting or defending a claim which is rectified on appeal. Unfortunately, the lawyer who commits the malpractice may be subject to a client's lawsuit years after the incident in question occurred.

Dina Bernstein

57. *Cf.* Roger M. Baron, *The Expansion of Legal Malpractice Liability in Texas*, 29 S. TEX. L.J. 355, 357 (1988) (attorneys exert much political and economic clout over the Texas judiciary).

58. *See, e.g.*, Duke N. Stern, *How to Avoid Being Sued—Special Problems of the Lawyer Engaged in the Litigtion Process*, in PROFESSIONAL LIABILITY OF TRIAL LAWYERS: THE MALPRACTICE QUESTION 116 (A.B.A. ed., 1979) (article on malpractice avoidance for litigators); THOMAS P. BROWN III, HOW TO AVOID BEING SUED BY YOUR CLIENT: PREVENTIONS AND CURES FOR LEGAL MALPRACTICE 9-10 (1981) (guidebook to avoid legal malpractice claims).