St. Mary's Law Journal

Volume 34 | Number 4 Article 6

1-1-2003

# Tactical Considerations in Defending Assigned Legal Malpractice Claims Essay.

William D. Cobb Jr.

# ESSAY

## TACTICAL CONSIDERATIONS IN DEFENDING ASSIGNED LEGAL MALPRACTICE CLAIMS

WILLIAM D. COBB, JR.*



The general rule in Texas is that causes of action are freely assignable.[1] Like many rules of law, this general rule is subject to several exceptions, each grounded on specific public policy considerations. When the Texas Supreme Court declined to hear

* B.A., University of Denver; J.D., University of Texas. Mr. Cobb practices law with the Dallas-based firm of Cowles & Thompson, A Professional Corporation, where he is head of the Professional Liability Practice Group. He gratefully acknowledges the assistance of his colleague Gregory J. Lensing in the preparation of this Essay.

1. *See* State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 707 (Tex. 1996) (stating that "[p]racticalities of the modern world have made free alienation of choses in action the general rule").

the case of *Zuniga v. Groce, Locke & Hebdon*[2] with the notation "writ refused" in 1994,[3] legal malpractice causes of action joined the narrow ranks of the "unassignable." Simultaneously, every Texas lawyer with a legal malpractice defense docket took note of another potential defense to raise in his or her pending cases.

If anyone thought that *Zuniga* would simply put an end to trafficking in legal malpractice claims, nine years of experience have taught quite a different story. Necessity is the mother of invention, and the irresistible deep pockets of attorneys and their malpractice insurance carriers inspired a number of innovators to test the limits of the *Zuniga* doctrine. In the handful of published decisions expounding the scope of *Zuniga*, courts have begun to make clear that *Zuniga* is not a "third rail" that invalidates every contract or transaction that somehow involves a legal malpractice claim.[4] Still less does *Zuniga* eliminate the legal malpractice claim itself. *Zuniga* and its progeny still have a substantial effect, however, on the prosecution and defense of legal malpractice claims when the client who properly owns the claim attempts to bargain away some portion of her rights in that claim.

This Essay briefly outlines the source and scope of the *Zuniga* anti-assignment rule. Some of the attempts to avoid the effects of *Zuniga* that the author has encountered in his legal malpractice defense practice are also described. Finally, the Essay concludes with a few observations about tactical considerations in dealing with assignments and similar agreements affecting the litigation of legal malpractice claims.

## I. *ZUNIGA v. GROCE, LOCKE & HEBDON* AND THE PROBLEM OF THE INSOLVENT JUDGMENT DEBTOR

The *Zuniga* court was exactly right when it observed that "[m]ost legal malpractice assignments seem to be driven by forces other than the ordinary commercial market."[5] Frequently, the assign-

2. 878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref'd).

3. Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref'd).

4. *See Gandy*, 925 S.W.2d at 718 (allowing enforcement of a judgment against an insurer where the insured, disregarding a policy provision only allowing enforcement through a judgment obtained after a trial, negotiated a settlement, and the insurer failed to provide coverage or a defense for the insured).

5. *Zuniga*, 878 S.W.2d at 316.

ment is inspired by the entry of a judgment against a defendant who is insolvent, uninsured, underinsured, or simply lacks sufficient collectable assets.[6] Faced with the prospect of recovering nothing on what may be a sizable judgment, the judgment creditor and its attorney have every incentive to find deeper pockets that can fund their recovery. Personal factors may come into play, as when a frustrated litigant transfers some of his animus for the opposing party to that party's most visible agent and champion—the opponent's lawyer.

The *Zuniga* case itself involved an effectively or at least potentially insolvent defendant.[7] The Zunigas brought a personal-injury products-liability lawsuit against Bauer Manufacturing Corporation.[8] Bauer's liability insurer became insolvent, and as the trial date approached the Zunigas argued that some of Bauer's discovery responses admitted part of their negligence case against Bauer.[9] Fearing that a large and effectively uninsured judgment could put it out of business, Bauer accepted the Zunigas' offer to settle in exchange for Bauer's legal malpractice action against its defense attorneys.[10] Bauer then agreed to the entry of a $25 million judgment against itself and assigned its legal malpractice claim to the Zunigas.[11] In return, the Zunigas released their claims against all individuals connected with Bauer.[12] The Zunigas further agreed to allow Bauer to transfer all Bauer's assets to a new corporation and the Zunigas waived all rights to those assets.[13] So armed, the Zunigas sued Bauer's former defense counsel.[14]

The defendant's motion for summary judgment in the legal malpractice case was granted, and the San Antonio Court of Appeals affirmed.[15] The appellate court found that the majority of Ameri-

---

6. *Id.*
7. *Id.* at 314.
8. *Id.*
9. *Id.*
10. *Zuniga*, 878 S.W.2d at 314.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *See* Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 314, 318 (Tex. App.—San Antonio 1994, writ ref'd) (affirming the previous judgment of dismissal and holding that assignments of legal malpractice actions from litigation are invalid).

can jurisdictions prohibit the assignment of legal malpractice claims, and it cogently summarized the pros and cons of the rule:

> In the present case, the Zuniga–Bauer assignment is a transparent device to replace a judgment-proof, uninsured defendant with a solvent defendant. To allow such assignments would serve two principal goals: enabling the defendant-client to extricate himself from liability, and funding the original plaintiff's judgment. But to allow assignments would exact high costs: the plaintiff would be able to drive a wedge between the defense attorney and his client by creating a conflict of interest; in time, it would become increasingly risky to represent the underinsured, judgment-proof defendant; and the malpractice case would cause a reversal of the positions taken by each set of lawyers and clients, which would embarrass and demean the legal profession.[16]

The court weighed the public policies at stake and embraced the majority rule: "We hold that an assignment of a legal malpractice action arising from litigation is invalid."[17] The Texas Supreme Court refused the Zunigas' application for writ of error,[18] thereby essentially adopting the San Antonio Court's opinion as its own.[19]

## II. *ZUNIGA*'S PROGENY

Of course, the decision in *Zuniga* did not resolve the problem of the insolvent judgment debtor, nor did this opinion cause judgment creditors to abandon all hope of obtaining satisfaction from the hapless debtor's attorneys. Taking an outright assignment of the judgment debtor's legal malpractice claim might be forbidden, but *Zuniga* did not purport to invalidate all agreements that happen to touch on or involve the disposition of such a claim.[20] Innovative creditors' attorneys began to test the limits of *Zuniga* by drafting agreements that left the judgment debtor with some continuing interest in his legal malpractice claim but promised the creditor some

16. *Id.* at 317 (citation omitted).

17. *Id.* at 318.

18. Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref'd).

19. *See* State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 707-08 (Tex. 1996) (discussing *Zuniga* as though the Texas Supreme Court had issued the opinion itself).

20. *See* Mallios v. Baker, 11 S.W.3d 157, 164 (Tex. 2000) (noting that the Supreme Court of Texas has not precluded transfer of legal malpractice claims in all circumstances and that equitable subrogation of such claims are still permitted in some situations).

or all of the fruits of the claim.[21] A typical agreement will incorporate some or all of the following provisions:

- A promise by the judgment debtor to waive or abandon any appeal of the judgment.
- A promise by the judgment debtor to bring the legal malpractice claim and to prosecute it diligently.
- A promise by the judgment debtor to allow the judgment creditor to direct or control the legal malpractice litigation and/or to control settlement decisions.
- A promise by the judgment debtor to split the proceeds of the legal malpractice claim with the judgment creditor (or to cede all proceeds to the creditor).
- A promise by the judgment creditor to fund necessary fees and expenses (since the judgment debtor is presumably unable to do so).
- A promise by the judgment creditor not to execute on the underlying judgment against the judgment debtor or to limit the assets subject to execution. This promise may be accompanied by a promise to release the judgment at the conclusion of the legal malpractice suit.[22]

Once legal malpractice lawsuits were filed pursuant to these agreements, the malpractice defense bar naturally took to the barricades, demanding summary judgment based on the spirit, if not the letter, of the *Zuniga* case. The defense often found some success in the trial courts, but Texas's appellate courts proved to be reluctant to expand *Zuniga* to encompass these innovative nonassignments.

*MALLIOS.* The Texas Supreme Court was first to clip *Zuniga*'s wings, in the case of *Mallios v. Baker*.[23] *Mallios* differed from *Zuniga* in that the party with the legal malpractice claim resulting from the underlying suit was the plaintiff rather than the defen-

21. *See* Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 633 (Tex. App.—Dallas 2000, pet. denied) (summarizing the party's position that the agreement involved fell short of the assignment barred by *Zuniga* because Tate brought the suit in his own name and merely contemplated a future assignment of any proceeds).

22. *See, e.g., Tate*, 24 S.W.3d at 630-31 (outlining the pertinent provisions of the settlement agreement between the parties); *Mallios*, 11 S.W.3d at 158 (recounting the provisions of an agreement between the legal malpractice claimant and a third party who received an assignment of an interest in the proceeds of the claim); *see also* Appendix 1 (detailing the terms in the *Tate* agreement through redacted excerpts).

23. 11 S.W.3d 157 (Tex. 2000).

dant.[24] Attorney Mallios represented Baker as the plaintiff in a personal injury, dram shop case.[25] He sued the entity that he believed owned the dram shop and obtained a $1 million default judgment.[26] That judgment was apparently uncollectible because Baker then responded to a newspaper advertisement run by one T. J. Herron, in which Herron offered to buy judgments in excess of $25,000.[27] Herron investigated the case and concluded that Baker's attorneys had sued the wrong (and impecunious) defendant, allowing the statute of limitations to lapse, precluding a claim against the true dram shop owner.[28] Then Herron struck a deal with Baker whereby Herron would fund a legal malpractice lawsuit against his former lawyers and any proceeds from the suit would be split between Baker and Herron.[29]

The defendant attorneys sought and obtained summary judgment based on the theory that Baker's claim contravened public policy in light of his assignment of part of the claim to Herron.[30] However, the Dallas Court of Appeals reversed and the Texas Supreme Court agreed with the court of appeals.[31] The bottom line was that the defense's theory—that Baker's contract with Herron violated public policy—did not match the relief they sought. If the attorneys were right and the contract was invalid, Baker still retained the right to sue his lawyers.[32] Furthermore, if the attorneys were wrong and the contract was enforceable, Baker still retained a portion of his claim.[33] Either way, Baker retained the right to sue, and the supreme court found it unnecessary to decide whether his contract with Herron was valid or not.[34]

---

24. Mallios v. Baker, 11 S.W.3d 157, 158 (Tex. 2000).

25. *See id.* (claiming he should not have been served alcohol because he was clearly intoxicated and, thus, a "danger to himself and others").

26. *Id.*

27. *Id.*

28. *Id.*

29. *Mallios*, 11 S.W.3d at 158.

30. *Id.*

31. *Id.* at 159.

32. *See id.* (noting that whether or not the underlying agreement was invalid, Baker could continue his suit).

33. *See id.* (stating that Baker had a right to sue regardless of the validity of the underlying agreement).

34. *Mallios*, 11 S.W.3d at 159.

*TATE.* Only a few months after the decision in *Mallios*, the Dallas Court of Appeals considered the legal effect of a contract between a judgment creditor and its insolvent debtor that arguably stopped somewhere short of being an outright assignment of the debtor's legal malpractice claim. In *Tate v. Goins, Underkofler, Crawford & Langdon*,[35] Tate was involved in ongoing commercial disputes with a company doing business as SIDCO International Distribution Corporation of Texas (SIDCO).[36] SIDCO obtained a default judgment against Tate, and Tate's motion to set the default judgment aside was denied.[37] Tate obtained new counsel, and instead of taking an appeal from the default judgment, Tate settled with SIDCO on terms similar to those in *Mallios*.[38] SIDCO covenanted not to execute on the default judgment and Tate promised to sue his former lawyers with the intent of giving SIDCO complete control over the litigation and the lion's share of any proceeds.[39] Ultimately, the parties agreed to execute mutual releases at the conclusion of the legal malpractice suit.[40] When Tate sued his former lawyers, the trial court granted defendant's summary judgment.[41]

The court of appeals reversed, despite agreeing with the legal malpractice defendant's assertion that some provisions of the Tate–SIDCO agreement ran afoul of *Zuniga*.[42] In particular, the appellate court was troubled by the terms of the agreement that gave SIDCO "absolute control over the [malpractice] litigation, including the unfettered right to settle the malpractice suit on such

35. 24 S.W.3d 627 (Tex. App.—Dallas 2000, pet. denied).

36. Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 630 (Tex. App.—Dallas 2000, pet. denied).

37. *Id.*

38. *See id.* (stating that Tate's new counsel settled with SIDCO before the court ruled on the petition "to reconsider the motion for new trial").

39. *Id.* at 630-31.

40. *See id.* at 631 (noting that term thirteen of the Tate-SIDCO agreement required parties to execute mutual releases).

41. *See Tate*, 24 S.W.3d at 631 (noting that the trial court did not specify the exact grounds for granting summary judgment). However, the trial court detailed each of the five grounds for summary judgment filed by defendant Goins. *Id.* One of the five grounds alleged that SIDCO was the real party in interest and the contract between Tate and SIDCO constituted an assignment violative of public policy. *Id.*

42. *See id.* at 633-34 (characterizing the Tate-SIDCO agreement as "demonstrat[ing] the same evils as the assignment in *Zuniga*").

terms as SIDCO determine[d]."[43] Thus, the court held that "the provisions of the agreement related to Tate's malpractice claim constitute[d] an assignment that violate[d] public policy."[44] The defendants, however, found themselves in much the same position as the defendant in *Mallios v. Baker*—even though the agreement was an invalid assignment, at least in part, the court held that they were not entitled to summary judgment because Tate had sued the defendants *in his own name*.[45] The appellate court found *Mallios* to be controlling, and ultimately reversed the summary judgment and remanded the case for trial.[46]

## III. The Future of the *Zuniga* Rule in Legal Malpractice Litigation

### A. *The Immediate Impact of* Zuniga

*Zuniga*, *Mallios*, and *Tate* contain lessons for both sides of the bar. Attorneys representing judgment creditors and potential legal malpractice plaintiffs must exercise care in drafting agreements whereby the judgment creditor seeks to profit from the debtor's legal malpractice claim. Most obviously, an outright assignment of a legal malpractice claim will not be enforced, and an assignee who attempts to prosecute such a claim will quickly find himself on the losing end of a motion for summary judgment. After *Zuniga* such contracts are rare, but pre-*Zuniga* contracts were not always drafted in anticipation of that development in the law.

In the last dozen years, we have seen increasingly sophisticated agreements clearly designed to accomplish what *Zuniga* did not directly allow. An example illustrates this point. In the mid-1990s, a legal malpractice defendant won summary judgment based on a "pre-*Zuniga*" 1991 assignment that was later held to violate

---

43. *Id.* at 633.

44. *See Tate*, 24 S.W.3d at 634 (noting that the court did not elaborate on this holding, leaving an open question as to whether some unspecified portion of the agreement might survive the court's ruling).

45. *See* Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 634 (Tex. App.—Dallas 2000, pet. denied) (agreeing with Tate's argument that because "he sued in his own name" the summary judgment prevented him from bringing a malpractice claim).

46. *Id.* at 634, 637. After remand, the lawyer defendants prevailed at trial, winning a take-nothing judgment. Tate v. Goins, Underkofler, Crawford & Landgon, No. 95-05442-L (193d Dist. Ct., Dallas County, Tex. Dec. 16, 2002).

*Zuniga*.[47] The legal malpractice defendant had represented the defendants in a commercial lawsuit that ended in a multimillion-dollar plaintiffs' verdict. The plaintiffs and defendants then executed an agreement whereby the defendants' legal malpractice claims, and certain other assets, were assigned to a newly created trust.[48] The trust itself was created for the sole purpose of gathering and liquidating the judgment debtors' assets, including their choses in action.[49] The trust was assigned total control over the legal malpractice claim.[50] At the conclusion of that malpractice litigation, all trust assets were to be liquidated and divided between the underlying plaintiffs and underlying defendants in a 90/10 ratio.[51] Moreover, the assignment called for the entry of an order of dismissal with prejudice in the underlying case, and the underlying plaintiffs fully released the underlying defendants.[52] After *Zuniga*, the attorney won a take-nothing summary judgment in the trust's legal malpractice lawsuit.

### B. *First-Generation Attempts to Avoid the* Zuniga *Rule*

However, even before *Zuniga* parties were beginning to draft agreements designed to circumvent the anti-assignment rule. The parties in *Tate*, for example, avoided making an outright assignment of the judgment debtor's legal malpractice claims and even left a small interest in the proceeds of the legal malpractice case vested in the judgment debtor.[53] The judgment debtor did, however, cede total control of the legal malpractice litigation to the judgment creditor, including the right to settle.[54] The judgment creditor astutely caused the legal malpractice litigation to be filed in the name of the judgment debtor (the former client of the defendant law firm).[55] The defendant law firm won a summary judgment based in part on the *Zuniga* rule, but the differences between the agreements and the procedural postures in *Tate* and *Zuniga* led to

47. The identities of the parties are withheld at the author's request.
48. Appendix 2, § 5.3.
49. *Id.* §§ 5.2, 5.3.
50. *Id.* § 5.3.
51. *Id.* § 5.5.
52. *Id.*
53. Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 630-31 (Tex. App.—Dallas 2000, pet. denied).
54. *Id.* at 630.
55. *Id.* at 631.

a reversal on appeal.[56] Although the court of appeals concluded that the agreement ran afoul of the *Zuniga* rule insofar as it ceded complete control over the prosecution and settlement of the legal malpractice claim to a nonclient, this holding could not support outright dismissal of the case when the former client (1) brought suit in his own name and (2) retained some pecuniary interest in the outcome of the lawsuit.[57]

Even though the agreement involved in *Tate* did not defeat the plaintiff's cause of action for the reasons proffered in the defendant law firm's summary judgment motion, that agreement remained important in the lawsuit.[58] After remand, one question was whether the judgment creditor's covenant not to execute and the parties' promise to execute mutual releases effectively negated the legal malpractice claim by eliminating the necessary element of damages to the judgment debtor.[59] The measure of damages in a legal malpractice case, like any negligence case, is the amount necessary to compensate the injured party for the harm caused.[60] The only concrete harm plaintiff claimed he had suffered as a result of the alleged legal malpractice in *Tate* was the $233,166.66 adverse judgment with which the judgment debtor was saddled.[61] However, by virtue of his shrewd bargain with the judgment creditor, that debt was effectively erased.[62]

---

56. *Id.*

57. *See* Mallios v. Baker, 11 S.W.3d 157, 170 (Tex. 2000) (Hecht, J. concurring) (discussing that even if the transfer was invalid the client could still sue). In a concurring opinion in *Mallios*, Justice Hecht, relying heavily upon the *Tate* court, identified the transfer of "a significant right of control over the prosecution of the claim" as the hallmark of an invalid assignment. *Id.*

58. *See Tate*, 24 S.W.3d at 632 (appealing the validity of the agreement).

59. *See id.* (arguing that any damage Tate suffered was "too speculative to permit recovery").

60. *See* Smith v. Nelson, 53 S.W.3d 792, 795 (Tex. App.—Austin 2001, pet. denied) (stating that "[c]ontract damages award the non-breaching party the value of the expected contractual bargain, while tort damages compensate an injured party for loss caused by the alleged tort"); *see also* Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 910 (Tex. App.—Dallas 2001, no pet.) (stating that "[g]enerally, the proper measure of damages in a legal malpractice case is that amount of damages that would have been collectible but for the wrongful act or omission of the attorney"); TEXAS PATTERN JURY CHARGES: MALPRACTICE PREMISES PRODUCTS 84.2 & cmt. (2000) (stating that it should be asked what would be fair and reasonable compensation for the loss resulting from the incident).

61. *Tate*, 24 S.W.3d at 630.

62. *Id.*; *cf.* Whatley v. City of Dallas, 758 S.W.2d 301, 309-10 (Tex. App.—Dallas 1988, writ denied) (holding that a covenant not to execute eliminated an insured's claim for

Alternative sources of "harm" are limited. Mental-anguish damages are generally not recoverable at all in the legal malpractice context.[63] Other damages, such as injury to credit reputation, may be available,[64] but such damages are often speculative and difficult to prove. In sum, even though a *Tate*-style assignment of proceeds may pass muster under *Zuniga* (at least to the extent the assignment does not purport to transfer control of malpractice litigation), the consideration that the judgment creditor gives the judgment debtor in exchange for those proceeds may effectively extinguish, or at least substantially diminish, the value of the debtor's legal malpractice claim.

The agreement involved in the *Mallios* case is even shorter and simpler than the one involved in *Tate*, in part because the *Mallios* agreement was a purely "commercial" transaction between a judgment creditor and a stranger to the underlying litigation rather than the result of a judgment debtor's desperate attempt to escape liability.[65] The salient provisions of the *Mallios* agreement are:

1. Assignee, in and for the consideration as set forth herein, shall perform the following:
   1.1 Assignee shall negotiate the terms and conditions of an employment contract with the attorney (the "Attorney") who will handle the investigation, pursuit and prosecution of the Claims and shall during the term of that contract be liable for and pay as required by the contract all attorney's fees, costs and expenses of the investigation, pursuit and prosecution of the Claims; and
   1.2 As reasonable and necessary, Assignee shall provide support services in the form of the coordination of matters pertaining to the Claims.
2. In consideration for those services to be performed by Assignee as set forth hereinabove, Assignor does hereby agree that As-

---

extra-contractual *Stowers* damages, although it did not negate his claim for the policy amount).

63. *See* Douglas v. Delp, 987 S.W.2d 879, 883-85 (Tex. 1999) (holding that mental anguish is a consequence of economic loss and denying plaintiff's recovery).

64. *See* State Farm Lloyds, Inc. v. Williams, 960 S.W.2d 781, 787 (Tex. App.—Dallas 1997, pet. dism'd by agr.) (stating that "an unpaid judgment injures a judgment debtor not only because it affects the judgment debtor's credit, but also because it subjects his non-exempt property to sudden execution and forced sale").

65. *See* Mallios v. Baker, 11 S.W.3d 157, 160 (Tex. 2000) (Hecht, J., concurring) (confirming agreement between judgment creditor and third party).

> signee shall be entitled to 50% of any net recovery resulting from the Claims. Net recovery shall mean cash, assets or other consideration received or to be received by Assignor from any party whatsoever as consideration or in satisfaction or in settlement of the Claims, less: (i) legal fees, costs and expenses (to be reimbursed to Assignee or paid directly to the Attorney as the case may dictate); and (ii) other reasonable costs and expenses incurred by Assignee in the investigation, pursuit or prosecution of the Claims. Assignee shall be reimbursed from the gross recovery, those legal fees, costs and expenses expended by him/her, as set forth in subparagraphs (i) and (ii) hereinabove.[66]

The assignor further promised that he would "fully cooperate in the investigation, pursuit and prosecution" of claims against his former attorney, and that the assignee could terminate the agreement if he ever decided that the malpractice litigation was not economically feasible.[67] Moreover, the parties agreed that the malpractice claims could be settled only by mutual consent, which would not be unreasonably withheld.[68]

The *Mallios* majority refused to address the enforceability of the agreement as between assignor and assignee; the court only held that the assignor could continue to prosecute his legal malpractice claim regardless of the validity of the agreement.[69] Because a *Mallios*-type agreement does not contain a covenant not to execute against the assignor, or any similar feature, the attorney-defendant in the legal malpractice case cannot mount the argument that is available in a *Tate* situation—that the covenant not to execute conclusively negates the essential element of damages in the legal malpractice case. The remaining question in the wake of the *Mallios* decision, then, is whether legal malpractice defendants derive any advantage from the existence of the assignment. Perhaps. As Justice Hecht pointed out in his concurring opinion, the validity of the agreement can have a very real and direct effect on the legal malpractice action if the assignee is funding the prosecution of the

66. Appendix 3 (detailing the terms in the *Mallios* agreement through redacted excerpts).

67. *See Mallios*, 11 S.W.3d at 161 (Hecht, J., concurring) (detailing the agreement between the assignee and assignor).

68. *Id.*

69. *See id.* at 159 (asserting that even if the agreement was deemed invalid, the assignor's right to pursue his malpractice claim would not be vitiated).

claim based on the assumption that the agreement is enforceable.[70] Although the supreme court ducked the issue in *Mallios*, it is quite possible that a legal malpractice defendant (or a party to the assignment of proceeds) could persuade the trial court to resolve the enforceability issue in that litigation—possibly through the device of a declaratory-judgment claim and partial summary judgment.

### C. *The Next Generation of Agreements After* Zuniga

Enough time has passed since 1994 for sophisticated parties to develop agreements of ever-greater complexity in attempts to escape the toils of the *Zuniga* rule. In a recent case, the litigants dealt with a complex quasi-assignment agreement that was developed in the context of the standard fact pattern.[71] The plaintiffs won a sizable judgment in a commercial dispute with a number of defendants.[72] Moreover, the plaintiffs' claims were of a type potentially not dischargeable in bankruptcy. During the appeal of the underlying case, two defendants (judgment debtors) struck a complicated bargain with the plaintiffs (judgment creditors) for the purpose of funding the judgment with proceeds from a legal malpractice claim against the judgment debtors' attorney.[73] The judgment debtors agreed to the following:

- They agreed to dismiss their appeal of the adverse judgment.
- They agreed to commence a legal malpractice action against their former attorney and to prosecute that action diligently unless advised by their malpractice counsel to discontinue the action.
- They agreed to establish and maintain a specific bank account into which they would deposit any and all proceeds they might receive from the legal malpractice action, and to notify the judgment creditors of any deposits into said account. They further agreed not to withdraw, transfer, or encumber any funds in the account until sixty days after the final, nonappealable conclusion of their legal malpractice action. Finally, they agreed to take all

70. *See id.* at 159-60 (discussing the various factors that could affect whether the malpractice claim is pursued).

71. *See* Appendix 4 (setting out redacted excerpts from an agreement apparently designed to avoid the *Zuniga* rule).

72. Appendix 4 was redacted to protect the identity of the parties at the author's request.

73. *See* Appendix 4 (providing, under Recital B, that the debtors will pursue a malpractice claim if the creditors abate collection efforts).

> reasonable steps to provide the judgment creditors with priority over all other creditors in executing on the bank account.[74]

The judgment creditors agreed to the following:

- They agreed not to execute on any of the judgment debtors' assets during the pendency of the legal malpractice action and for sixty days thereafter.
- They agreed never to execute on certain specified assets owned by the judgment debtors (which constituted almost all of the debtors' nonexempt property).
- They agreed not to assert the nondischargeability of the judgment against the judgment debtors in the event the judgment debtors ever filed for bankruptcy.[75]

This "next generation" agreement avoids the pitfall of attempting to transfer nominal control from the former client to someone outside the attorney-client relationship. The assignees rely instead on the assignors' covenant to prosecute their legal malpractice claim "diligently and continuously," and on the accompanying threat of execution on assets if the case is not so prosecuted in the eye of the judgment creditor.[76] Instead of agreeing to an apportionment of proceeds from the legal malpractice action, the parties agree that any proceeds will go into a special bank account that will remain excepted from the assignees' general covenants not to execute.[77] Presumably the judgment creditors would simply garnish any money that might someday land in the bank account by virtue of their judgment against the judgment debtors, which the parties expressly stipulated remained in full force and effect. Additionally, assets not specifically listed in the agreement and after-acquired assets remained subject to execution sixty days after the termination of the agreement.[78]

The legal malpractice claim filed by the judgment debtors pursuant to the above described agreement was eventually dismissed on summary judgment for reasons unrelated to the agreement. Thus, it is undecided whether the innovative features of this agreement

---

74. *Id.*

75. *Id.*

76. *See id.* (asserting that debtors will prosecute the malpractice claim until they are advised by malpractice counsel to discontinue prosecution).

77. *See id.* (stipulating that judgment creditors and judgment debtors designate the account structure).

78. Appendix 4.

will help the legal malpractice plaintiffs avoid adverse effects from the *Zuniga* rule. The parties ostensibly have avoided the transfer-of-control problem that the appellate court perceived in *Tate*, but the substantial covenants not to execute given by the judgment creditors may still create a significant obstacle to the proof of damages in a legal malpractice case.

## IV. Concluding Observations

The future development of the *Zuniga* rule is uncertain. It is not clear whether the *Zuniga* rule will be applied to all legal malpractice claims, be limited to assignments of legal malpractice claims based on conduct during litigation, or be further limited to assignments that occur in the judgment-creditor/judgment-debtor context.[79] Two facts, however, are clear. First, *Mallios* instructs that the *Zuniga* rule is not a per se bar to the prosecution of legal malpractice claims by a client who attempts to assign away some of his rights in the claims or proceeds. Second, as long as circumstances create substantial financial incentives to assign legal malpractice claims, parties and their attorneys will devote themselves to crafting novel and innovative agreements that test the outer limits of the *Zuniga* rule.

From the legal malpractice defense perspective, the appearance of a quasi-assigned legal malpractice claim represents an opportunity, but one that requires careful study rather than an impetuous rush to (summary) judgment. As the *Tate* case illustrates, *Zuniga* is not a magic talisman that can eliminate quasi-assigned claims on contact. However, the typical features of these agreements often present other avenues of defense, particularly relating to the elements of causation and damages, which can lead to favorable results for the defendant. Whether future generations of post-*Zuniga* agreements can avoid these pitfalls remains to be seen.

---

79. *See* Mallios v. Baker, 11 S.W.3d 157, 159 (Tex. 2000) (discussing variations on assigning legal malpractice claims); *see also id.* at 170 (Hecht, J., concurring) (arguing that the *Zuniga* rule should apply to any assignment "if the assignee takes the interest purely as an investment unrelated to any other transaction and acquires not merely a financial interest in the outcome but a significant right of control over the prosecution of the claim"); *id.* at 172 (Enoch, J., concurring) (stating that "I write separately because I do not share Justice Hecht's view that so-called 'commercial' legal malpractice claim assignments are against public policy").

## REDACTED EXCERPTS FROM THE AGREEMENT IN THE *TATE* CASE

### APPENDIX 1

*Agreement*

WHEREAS, the parties hereto, [Tate] and [SIDCO], in resolution of the above styled Causes of Action and in order to avoid [SIDCO] from executing on its JUDGMENT . . ., enter into this agreement and; . . .

WHEREAS, [Tate] while denying liability in Cause No. XXX, admits that a JUDGMENT was rendered against [Tate] in Cause No. XXX, and

WHEREAS, [Tate] has determined that he/she has no, or at the least minimal, grounds for appeal and lack the ability to post a supersedeas bond in order to avoid [SIDCO] from executing on its JUDGMENT and putting [Tate] out of business.

NOW THEREFORE, for and in consideration of the mutual covenants contained herein and other valuable consideration, the parties agree as follows:

1. [Tate] will terminate Cause No. XXX . . . in a manner acceptable to [SIDCO].

2. [SIDCO] will indemnify [Tate] from any and all causes of actions, claims, demands, damages or expenses, including attorney's fees, arising out of or associated with the prosecution of any claim or cause of action against [Lawyers] provided [Tate] is not in violation of the terms of this agreement.

3. The JUDGMENT in Cause No. XXX (JUDGMENT) shall become final.

4. [SIDCO] covenants not to execute on its JUDGMENT against [Tate] for any amounts owed [SIDCO] to the extent the JUDGMENT exceeds the amounts recovered from [Lawyers]. . . .

5. In further consideration of [SIDCO]'s covenant not to execute or seek to satisfy its judgment from any other source other than [Tate]'s claim against [Lawyers] and to look only to the proceeds from the recovery from [Lawyers], [Tate] assign[s] to [SIDCO] all such recoveries, subject to the terms and conditions of this agreement contained hereinbelow, including actual and puni-

tive damages, attorney's fees and any other awards, arising out of all causes of action, rights, claims, remedies and damages, including but not limited to Legal Malpractice and Texas Deceptive Trade Practices Act violations, against [Lawyers]. . . .

6. [Tate] agree[s] to prosecute, fully cooperate and diligently pursue any and all claims against [Lawyers] as directed by [SIDCO]; [SIDCO] having without limitation the rights to direct the litigation, negotiate and settle any and all claims between the parties. [SIDCO] agrees to consult with [Tate] regarding any such action but reserves all rights of final decision. Should [SIDCO], in its sole discretion determine that its best interest are served by an assignment, [Tate] agree[s] that upon demand they will assign, transfer, set over and deliver to [SIDCO] all claims, demands, and causes of action of whatsoever kind and nature which [Tate] have against [Lawyers] or any other person or persons, and in each and any of them, whether jointly or severally arising out of the relationship between [Tate] and [Lawyers]. All costs of litigation are to be advanced by [SIDCO]. [Tate] shall not be responsible for any costs of litigation, attorney's fees or other expenses associated with the prosecution of the case of . . . .

7. [SIDCO] hereby agrees and covenants that it shall not attempt to collect, levy, execute, garnish or effectuate any other collection process, including abstract of JUDGMENT against any assets, or property, of any kind, character or description, of [Tate], with the sole exception of those rights and causes of action belonging to [Tate] against [Lawyers].

. . . .

9. Gross Recovery (GR) shall mean the total amount collected of, from, or through [Lawyers] before all attorney's fees, court cost and litigation expenses related to the prosecution of [Lawyers] are deducted. Adjusted Gross Recovery (AGR) shall mean the GR after payment of all cost of prosecution and attorney's fees. [Tate] shall only receive from the AGR (a) credit for outstanding legal fees owed [Lawyers] if any; and (b) the outstanding balance on the original contract between [Tate] and [SIDCO].

10. Net Recovery (NR) shall mean that AGR amount received from [Lawyers] less those amounts payable to [Tate] or for [Tate]'s benefit pursuant to Paragraph 9, less all attorney's fees, court cost

and litigation expenses actually incurred by [SIDCO] in Cause No. XXX. [Tate] shall receive Ten Percent (10%) of the NR of the first $250,000 or $3,250, whichever is greater, and Fifty Percent (50%) of any amount in excess of $250,000, but in no event shall [Tate] receive a total amount in excess of $75,000 from the GR.

. . . .

13. The parties upon the conclusion of the litigations against [Lawyers] as contemplated herein shall execute mutual releases.

Agreed to between the parties.

__[signatures]__

## REDACTED EXCERPTS FROM A PRE-*ZUNIGA* AGREEMENT

## APPENDIX 2

*Settlement Agreement*

[selected provisions]

*Section 5.0*: *Name and Creation.* A Trust is hereby established . . .

. . . .

*Section 5.2*: *Purpose.* The purpose of the Trust shall be to receive, collect, administer, sell and liquidate, on an orderly basis, all Trust assets and to make distribution of such proceeds to the parties hereinafter provided in the ratios hereinafter set forth.

*Section 5.3*: *Transfer of Property.* SAVE AND EXCEPT the properties listed in Exhibit A hereto, all property now owned by [Judgment Debtors], individually or in any assumed name; is hereby awarded to the Trust, subject to the terms and the provisions herein set forth. Other than excluding the property interests described in Exhibit A, the term "all property" as used in the above sentence is to be construed as broadly as the human mind can conceive and shall include, but shall not be limited to, all property of whatsoever kind and character, whether real, personal or mixed, and shall include all beneficial interests in property, rights to property held by another, contract rights, and choses in action.

*Section 5.5*: *Trust Distributions.* Upon the sale or other liquidation of any of the assets comprising the initial Trust corpus, such proceeds shall, together with any accumulated income of the Trust, after satisfaction of any and all administrative expenses from the management and operation of the Trust and after allowance for any reasonable reserve as determined by the Trustee, be distributed on or before December 31 of each year of the Trust in the following ratios:

1. From the first $_____ in trust distribution:

| Category | Payee | Percentage |
|---|---|---|
| A | Plaintiffs | 90% |
| B | [Judgment Debtors] | 10% |

2. From all trust distributions after the distribution of $_____:

| Category | Payee | Percentage |
|---|---|---|
| A | Plaintiffs | 75% |
| B | [Judgment Debtors] | 25% |

The Trustee shall distribute to the firm of _____ _____ from the first funds otherwise distributable to the Category A payees, the sum of $_____, in reimbursement of litigation expenses. Thereafter, the Trustee shall pay to the firm of _____, as allowed attorney's fees, from any distribution to the Category A payees a sum equal to twenty percent (20%) of the total distribution to be paid to the Category A payees. The remaining eighty percent (80%) of the total distributions to the Category A payees shall be distributed by the Trustee to the individual Plaintiffs and Class Members in the same proportion or percentage as the amounts set forth opposite their respective names on Exhibit C hereto bears to the total of all such amounts.

*Compromise And Settlement*

All claims and causes of action against the contributing parties, and each of them, of the Plaintiffs and of the Class, and all members thereof, arising out of or in any way pertaining to [the original claims] are hereby settled, compromised, and released save and except such claims and causes of action, or rights, if any, which may arise pursuant to the terms and provisions of this instrument, the attachments hereto, and the performance or failure of performance hereunder. All claims and causes of action of Plaintiffs and of the Class, and all members thereof, subject to the exception next above, are hereby released and discharged as against [the Judgment Debtors].

*Dismissal*

This Order shall constitute a final Order of dismissal, with prejudice, in the above styled and numbered cause and no further proceedings shall occur in such cause, save and except as herein provided or as may be necessary for the enforcement or application of this Order.

SIGNED and ENTERED this _____ day of _____.

_____

PRESIDING JUDGE OF THE DISTRICT COURT
OF _____ COUNTY, TEXAS

## REDACTED EXCERPTS FROM THE AGREEMENT IN THE *MALLIOS* CASE

### APPENDIX 3

*Agreement*

This agreement is made this the _____ day of _____ _____, by and between [Baker] ("Assignor") and [Herron] ("Assignee").

WHEREAS, Assignor hereby warrants and represents that he/she believes that they are the owner of certain causes of actions and/or claims ("Claims") against [Lawyers] ("Defendants").

WHEREAS, Assignor desires to pursue these Claims, however, is without the necessary resources to pursue same;

WHEREAS, in addition to the necessary resources, Assignor also needs assistance from Assignee in the form of coordination of various matters relating to the Claims; and

WHEREAS, Assignee desires to assist Assignor with the resources necessary to pursue the Claims and also assist Assignor with the coordination of issues possibly relating to the Claims.

NOW, THEREFORE, in consideration of the premises and promises, contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Assignor and Assignee agree as follows:

1. Assignee, in and for consideration as set forth herein, shall perform the following:

    1.1 Assignee shall negotiate the terms and conditions of an employment contract with the attorney (the "Attorney") who will handle the investigation, pursuit and prosecution of the Claims and shall during the term of that contract be liable for and pay as required by the contract all attorney's fees, costs and expenses of the investigation, pursuit and prosecution of the Claims; and

    1.2 As reasonable and necessary, Assignee shall provide support services in the form of the coordination of matters pertaining to the Claims.

2. In consideration for those services to be performed by Assignee as set forth hereinabove, Assignor does hereby agree that

Assignee shall be entitled to 50% of any net recovery resulting from the Claims. Net recovery shall mean cash, assets or other consideration received or to be received by Assignor from any party whatsoever as consideration or in satisfaction or in settlement of the Claims, less: (i) legal fees, costs and expenses (to be reimbursed to Assignee or paid directly to the Attorney as the case may dictate); and (ii) other reasonable costs and expenses incurred by Assignee in the investigation, pursuit or prosecution of the Claims. Assignee shall be reimbursed from the gross recovery, those legal fees, costs and expenses expended by him/her, as set forth in subparagraphs (i) and (ii) hereinabove.

3. Assignor, subject to his/her/its approval, hereby authorizes Assignee to recommend an attorney to represent Assignor in pursuit of the Claims and authorizes Assignee to negotiate the terms of the employment or engagement contract with the Attorney. The parties agree that no settlement of the Claims shall be entered into without the consent of the other, and such consent will not unreasonably be withheld.

4. Assignor hereby warrants and represents that he/she/it is the sole owner of the Claims and that the Claims include any and all claims that Assignor has against the Defendants and that Assignor has not otherwise assigned or transferred or encumbered these Claims, and Assignor warrants that it shall not in the future otherwise assign, transfer or encumber these Claims.

5. Assignor makes no representations or warranty as to the merits of the Claims other than to represent and warrant that the facts which Assignor has provided to Assignee are within his/her/its best knowledge, true and correct and that Assignor has provided all available information concerning these Claims which Assignor has within his/her/its possession, custody or control to Assignee. Further Assignor agrees that he/she/it will continue to fully cooperate in the investigation, pursuit and prosecution of these Claims.

6. In the event and at his sole discretion, should Assignor through further investigation decide that pursuit of the Claims would prove not to be economically feasible then, at his sole option, Assignee may upon notice to Assignor terminate this agreement. Upon termination of this agreement by Assignee, Assignee shall continue to bear those liabilities for attorney's

fees and costs and expenses incurred by him to that date, however, neither party shall otherwise be obligated under the terms and conditions of this agreement.

Entered into effective as of the date for above written.

___[signatures]___

## REDACTED EXCERPTS FROM A "NEXT GENERATION" AGREEMENT

### APPENDIX 4

*Agreement*

This Agreement is made to be effective as of _____ by and between: [the Judgment Creditors] and [the Judgment Debtors].

RECITALS:

A. [Creditors] holds a judgment against each of the [Debtors] (and others), jointly and severally, in the amount of $[ ] of actual damages, plus $[ ] in prejudgment interest, plus post-judgment interest as provided by law, plus costs of court, all as provided in the Final Judgment filed on [date] and entered on the docket on _____ in _____, Civil Action No. _____.

B. [Debtors] have indicated that they wish to marshal assets by pursuing a legal malpractice claim, and that they will do so if [Creditors] agree to abate, under the terms and provisions set forth below, any collection efforts regarding the Final Judgments.

AGREEMENT:

In consideration of the mutual covenants set forth below, each of which is a material inducement to the other, [Creditors] and [Debtors] agree as follows:

1. [Debtors] represent and warrant that they have engaged in trial counsel to prosecute a malpractice action against [Lawyers]. [Debtors] covenant that they will diligently and continuously prosecute such malpractice action (herein, the "*Malpractice Action*"), unless and until they are advised to discontinue prosecution thereof by their malpractice counsel.

2. [Debtors] hereby designate account no. XXX, maintained by [Debtors] at [Bank]. [Debtors] covenant that during the Depository Period (hereinafter defined), they shall:

(a) maintain [Debtors] Depository Account in good standing at such bank or any legal successor to such bank, and pay all fees and costs as are required so to maintain such ac-

count, and keep on deposit all minimum deposits required to accomplish same;

(b) deposit or cause to be deposited directly into such account all proceeds of the Malpractice Action (whether pursuant to judgment, settlement, or otherwise) paid to or for the benefit of or at the direction of the plaintiffs in the Malpractice Action, less only the fees of malpractice counsel and the expenses of the Malpractice Action (whether advanced in the first instance by malpractice counsel or by [Debtors], but in no event including any interest thereon);

(c) immediately furnish a true and complete copy of this Agreement to their malpractice counsel, and obtain the written agreement of such malpractice counsel that he/she shall cause all such proceeds to be deposited into [Debtor's] Depository Account in accordance with the foregoing subparagraph (b);

(d) give to [Creditors] through [their attorney] . . . (i) written notice of all deposits into the [Debtor's] Depository Account, within two business days after each such deposit is made, and (ii) a copy of all account statements showing a balance exceeding $1,000 within two business days of receiving each such statement.

For purposes of this Agreement, the "*Depository Period*" shall mean the time period commencing with the effective date of this Agreement and continuing until [Debtors] cause the Malpractice Action to be filed, and continuing further for so long as the Malpractice Action is pending (including any pending on appeal), and continuing further for an additional 60 days after the later to occur of (A) the date on which the Malpractice Action becomes subject to a final, non-appealable judgment (including any judgment of voluntary or involuntary dismissal), and (B) the date on which the last of the proceeds payable in respect of the interests of the plaintiffs (or any one of them) under the Malpractice Action is deposited into [Debtor's] Depository Account. [Debtors] covenant that, during the Depository Period, they shall not withdraw from, pledge or otherwise encumber, or assign or otherwise transfer [Debtor's] Depository Account or any funds that may from time to time be deposited therein.

> [Debtors] covenant that they will take all reasonable and necessary steps to provide [Creditors] with priority over all other creditors in executing on the [Debtor's] Depository Account and all funds therein, and acknowledge and agree that the taking of such steps in a material inducement to and condition of this Agreement. Notwithstanding the foregoing, the rights of [Creditors] in and to the amounts in the Depository Account shall be limited to proceeds from the Malpractice Action deposited therein, and shall not include any balance maintained therein to keep the account in existence and good standing before the deposit of such Malpractice Action proceeds.
>
> 3. During the Depository Period, [Creditors] shall not (unless [Debtors] are in material breach of this Agreement) attempt to collect any portion of the Final Judgments against any assets owned by [Debtors].
>
> 4. After the end of the Depository Period, and provided that [Debtors] have fulfilled in all material respects all of their obligations under this Agreement, [Creditors] shall not assert the non-dischargeability of the Final Judgments against [Debtors] in any proceeding that may be filed by [Debtors] under the United States Bankruptcy Code . . . .
>
> 5. During and after the Depository Period, [Creditors] shall not, (unless [Debtors] are in material breach of this Agreement) attempt to collect, in partial satisfaction of the Final Judgments, any direct or indirect interest of [Debtors] in the following entities: (a) [specified assets making up most all of Debtors' non-exempt property].
>
> . . . .
>
> 9. [Debtors] shall immediately dismiss their appeal of the Final Judgment.
>
> . . . .
>
> 11. Nothing in this Agreement releases or discharges, or shall be construed to release or discharge, in any respect, the Final Judgments, which [Debtors] acknowledge remain in full force and effect.

___[signatures]___