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A ROSE IS A ROSE IS A ROSE—OR IS IT? FIDUCIARY AND DTPA CLAIMS AGAINST ATTORNEYS

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I. INTRODUCTION

Clients can bring "legal malpractice" actions against their attorneys through several different causes of action, such as negligence, breach of contract, breach of fiduciary duty, and violations of the Texas Deceptive Trade Practices Act (DTPA).[1] Texas courts, however, have attempted to draw lines around each of these actions so that a plaintiff may not transform one claim into another or take advantage of the benefits of a cause of action not applicable to the facts of the case. "Texas law . . . does not permit a plaintiff to divide or fracture her legal malpractice claims into additional causes of action."[2]

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1. Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 184-85 n.1 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (explaining a potential nomenclature problem). As noted in the *Deutsch* opinion,

> [t]o avoid confusion . . . a claim that the attorney did not exercise that degree of care, skill, and diligence as attorneys of ordinary skill and knowledge commonly possess and exercise is referred to as a "negligence claim". . . . [W]e use the term "legal malpractice" to refer to any claim brought by a client against that client's attorney, regardless of whether the claim asserts negligence, fraud, breach of fiduciary duty, breach of contract, or any other allegation.

Id. at 185 n.1. Courts, however, have referred to negligence and legal malpractice interchangeably. *See id.* (noting that references to "legal malpractice" are often used where there is actually a negligence claim).

2. Goffney v. Rabson, 56 S.W.3d 186, 190 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

Texas courts have repeatedly attempted to define and clarify the various legal malpractice causes of action. These definitions and guidelines, however, appear unavoidably vague. In 1989, the Texas Supreme Court noted that a legal malpractice claim finds its basis in negligence and arises from an attorney's failure to exercise a "standard of care . . . exercised by a reasonably prudent attorney."[3] "A cause of action for legal malpractice arises from an attorney giving a client bad legal advice or otherwise improperly representing the client."[4] Although many cases involving legal malpractice have been decided since the hallmark case of *Cosgrove v. Grimes*,[5] in 2002, the Fourteenth District Court of Appeals illustrated that this definition remains basically the same:

> If the gist of a client's complaint is that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be pursued as a negligence claim, rather than some other claim. If, however, the client's complaint is more appropriately classified as another claim, for example, fraud, DTPA, breach of fiduciary duty, or breach of contract, then the client can assert a claim other than negligence.[6]

Courts have expounded on this definition to some degree in their attempts to define other causes of action. For example, the Fourth District Court of Appeals held that "[t]he focus of such a breach [of fiduciary duty] is whether an attorney obtained an improper benefit from representing a client, while the focus of a legal malpractice claim is whether an attorney adequately represented a client."[7]

In *Goffney v. Rabson*,[8] the Fourteenth District Court of Appeals also attempted to further illustrate the breach of fiduciary duty

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3. Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989).

4. Aiken v. Hancock, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, pet. denied) (citing Greathouse v. McConnell, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)); Sullivan v. Bickel & Brewer, 943 S.W.2d 477, 481 (Tex. App.—Dallas 1995, writ denied) (citing Sledge v. Alsup, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ)).

5. 774 S.W.2d 662 (Tex. 1989).

6. *Deutsch*, 97 S.W.3d at 189 (citation omitted).

7. *Aiken*, 115 S.W.3d at 28.

8. 56 S.W.3d 186 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

cause of action through a list of examples.[9] The court noted that a cause of action for breach of fiduciary duty may be substantiated by an attorney failing to adhere to the duty to disclose conflicts of interest, misappropriating a client's funds, or making material misrepresentations to the client.[10] In terms of self-dealing, the court also noted that an attorney may be in breach by placing "personal interests over the client's interests," violating a client's trust, or improperly using a client's confidences.[11]

On the other hand, the Third District Court of Appeals has also attempted to define a claim for legal malpractice. In *Zidell v. Bird*,[12] the court noted that an attorney can commit legal malpractice by providing "an erroneous legal opinion . . . failing to give any advice or opinion when legally obliged to do so," or acting in contrast to a client's wishes or instruction.[13] Along these same lines, the court also stated that an attorney should not take any action when not instructed by the client to do so, or delay in handling the client's affairs entrusted to the attorney.[14] Furthermore, an attorney's want of "ordinary care in preparing, managing, and presenting litigation that affects the client's interests" could also support a legal malpractice action.[15]

However, despite the courts' attempts to clarify these issues, the conclusions reached within these cases paint a somewhat hazy picture for litigants to follow.

II. Attorney Liability for Negligence and Breach of Fiduciary Duties

Plainly stated, the "elements of [a negligence claim] are: (1) duty, (2) breach of duty, (3) [the] breach proximately caused [the] injury, and (4) resulting damages."[16] "In Texas, a lawyer is held to the standard of care that would be exercised by a reasonably pru-

9. Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

10. *Id.*

11. *Id.*

12. 692 S.W.2d 550 (Tex. App.—Austin 1985, no writ).

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

14. *Id.*

15. *Id.*

16. Hall v. Rutherford, 911 S.W.2d 422, 422 (Tex. App.—San Antonio 1995, writ denied).

dent attorney."[17] An attorney's actions are measured by "the information the attorney has at the time of the alleged act of negligence."[18] Based on a reasonable prudent standard, if an attorney similarly situated *could* make the same decision, there is no negligence, "even if the result is undesirable."[19] Therefore, the attorney is measured on whether he exercised professional judgment.[20]

To establish a breach of fiduciary duty, a plaintiff must show that the plaintiff and defendant had a fiduciary relationship, the defendant breached his fiduciary duty to the plaintiff, and the breach resulted in injury to the plaintiff or benefit to the defendant.[21] It has also been noted that the term "fiduciary" refers to integrity and fidelity.[22] The attorney-client relationship is one of "most abundant good faith [requiring] absolute and perfect candor . . . openness and honesty[, and] the absence of any concealment or deception. . . ."[23]

Moreover,

> [t]he relationship existing between attorney and client is characterized as "highly fiduciary," and requires proof of "perfect fairness" on the part of the attorney. . . . A fiduciary has much more than the traditional obligation not to make any material misrepresentations; he has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes.[24]

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17. *Id.* at 424.

18. Ramsey v. Reagan, No. 030100582, 2003 Tex. App. LEXIS 276, at *12 (Tex. App.—Austin Jan. 16, 2003, no pet.) (not designated for publication) (citing *Cosgrove*, 774 S.W.2d at 664).

19. *Id.*

20. *Id.*

21. *See* Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied) (discussing the attorney-client relationship and noting that whether a lawyer obtained improper benefit is the focus of a breach of fiduciary claim).

22. Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (citing Perez v. Kirk & Carrigan, 822 S.W.2d 261, 263-66 (Tex. App.—Corpus Christi 1991, writ denied)).

23. Hefner v. State, 735 S.W.2d 608, 624 (Tex. App.—Dallas 1987, writ ref'd) (quoting State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.)).

24. Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied) (citing Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1965) and Montgomery v. Kennedy, 669 S.W.2d 309, 312-14 (Tex. 1984)).

A. *Advantages of Categorizing a Claim As a Breach of Fiduciary Duty*

It is common for a legal malpractice opinion to contain a discussion regarding whether the claim should be categorized as a negligence claim or a claim for breach of fiduciary duty. The practical effect of this distinction is often important for two reasons: to determine the applicable statute of limitations and whether fee forfeiture is an available remedy. The statute of limitations for negligence and the DTPA, for example, is two years.[25] The limitations period for a breach of contract and breach of fiduciary duty is four years.[26] Additionally, forfeiture of an attorney's fee constitutes an available remedy in a breach of fiduciary duty claim without requiring proof of damages.[27]

In 1999, the Texas Supreme Court, in *Burrow v. Arce*,[28] provided a framework for analyzing whether a fee forfeiture is an appropriate remedy where a breach of fiduciary duty has occurred.[29] First,

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25. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon 2002); Morriss v. Enron Oil & Gas Co., 948 S.W.2d 858, 869 (Tex. App.—San Antonio 1997, no writ). While the statute of limitations for a breach of implied warranty claim is four years under Section 2.725 of the Texas Business & Commerce Code, and a breach of implied warranty claim is one avenue of recovery under the DTPA, the statute of limitations for all actions arising under the Act requires that such claims be brought within two years of the conduct or within two years after the consumer discovered the deceptive act or practice. *See* McAdams v. Capitol Prod. Corp., 810 S.W.2d 290, 293 (Tex. App.—Fort Worth 1991, writ denied) (stating that "[t]he statute of limitations of an action brought under the Texas Deceptive Trade Practices Act is governed by section 17.565, the limitations applicable to all DTPA actions, not the statute dealing generally with the underlying cause of action brought under the Act").

26. Prior to 1999, there was a split among the courts of appeals as to whether breach of fiduciary duty carried a two or four year statute of limitations. Prostok v. Browning, 112 S.W.3d 876, 899 nn.35-37 (Tex. App.—Dallas 2003, pet. filed). The conflict was resolved by the legislature in 1999 when it amended the four-year statute of limitations to include claims for fraud and breach of fiduciary duty. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(4)-(5) (Vernon 2002).

27. *See* Whiteside v. Hartung, No. 14-97-00111-CV, 1999 Tex. App. LEXIS 5584, at *7, 12 (Tex. App.—Houston [14th Dist.] July 29, 1999, pet. denied) (not designated for publication) (reiterating that "recovery of fees paid to an attorney may [also] be appropriate when his or her negligence rendered the services of no value" (citing Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 507 (Tex. App.—Houston [1st Dist.] 1995, no writ))); *see also* Haase v. Herberger, 44 S.W.3d 267, 271 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (discussing fee forfeiture as an available remedy for a breach of contract cause of action rather than a breach of fiduciary duty claim).

28. 997 S.W.2d 229 (Tex. 1999).

29. Burrow v. Arce, 997 S.W.2d 229, 246 (Tex. 1999).

as previously noted, a determination of actual damages is not required since actual damages are not a prerequisite to a claim for fee forfeiture.[30] Second, the court must ensure resolution of any factual disputes among the parties before determining whether a serious violation has occurred.[31] After consideration of certain factors articulated by the court, the court then determines "whether a clear and serious violation of duty has occurred . . . and . . . whether all or [a portion] of the attorney's fees should be forfeited."[32] Therefore, as a result, it can often be beneficial to a plaintiff to bring his legal malpractice claims as a breach of fiduciary duty cause of action since the limitations period is longer and the availability of forfeiture of the attorney's fees is a viable remedy.

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30. *Id.* at 240.

31. *Id.* at 246. Such factual disputes to be resolved by the jury include determining whether the misconduct claim is substantiated, evaluation of the attorney's mental state at the time of the occurrence, and whether the client has been harmed by the attorney's actions. *Id.*

32. *Id.* The *Deutsch* opinion noted that under *Burrow*, a clear and serious breach of a fiduciary duty is based on the following considerations: "(1) the gravity and timing of the violation; (2) its willfulness; (3) its effect on the value of the attorney's work; (4) any other threatened or actual harm to the client; (5) the adequacy of other remedies; and (6) the public interest in maintaining the integrity of attorney-client relationships." Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 196 (Tex. App.—Houston [14th Dist.] 2002, no pet.). The determination of "clear and serious" does not require actual damages, intentional breach, or inadequacy of other available remedies. *Id.*

Similarly, the First Court of Appeals in Houston addressed a fee dispute between almost 100 plaintiffs and their attorneys arising out of asbestos litigation. Malone v. Abraham, Watkins, Nichols & Friend, No. 01-99-01192-CV, 2002 Tex. App. LEXIS 5462, at *2-3 (Tex. App.—Houston [1st Dist.] July 24, 2002, no pet.) (not designated for publication). In addressing the allegation of the dissemination of confidential information, the court noted that the client "need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client." *Id.* at *12. Secondly, the court noted that fee forfeiture is restricted to "'clear and serious' violations of duty." *Id.* The court recognized that "[s]ome violations are inadvertent or do not significantly harm the client." *Id.* The court concluded that where the attorney believed he had filed the attachment under seal, and then subsequently revisited the courthouse and filed a motion to seal while the file was still in the intake process, "[s]ummary judgment was properly granted on the fiduciary duty claim." *Id.* at *13. Notably, this opinion could be used to make the argument that where no significant harm is caused to the client (i.e., no damages), a violation is not clear and serious—in essence, negating the *Burrow* holding that the plaintiff need not suffer actual damages to make a claim for fee forfeiture in a breach of fiduciary case. *Burrow*, 997 S.W.2d at 240.

B. *Categorization of Claims by Texas Courts*

As noted, Texas courts are consistent in their application of the guidelines defining the various causes of action. However, the results produced from these guidelines can be contradictory:

	Legal Malpractice (negligence)	Breach of Fiduciary Duty	Breach of contract	DTPA	Case Source
Failing to Give or Giving Erroneous Advice					
Giving an erroneous legal opinion	x				*Zidell*[33]
Failing to give any advice or opinion or erroneous advice	x				*Zidell*[34]
Providing bad legal advice	x				*Greathouse*[35]
Failing to advise client to retain separate counsel in light of conflicts		x			*Deutsch*[36]
Failing to counsel client about indemnity language in engagement letter, the ramifications of making representations on the record, or client's potential liability	x				*Deutsch*[37]
Failing to advise client to consult another attorney regarding the fee dispute		x			*Piro*[38]
Requiring client to execute assignment of properties without disclosure of legal effect of assignment		x			*Jackson Law Office*[39]

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

34. *See id.* (adding that an attorney can be liable for failing to give legal advice when he is obliged to do so).

35. Greathouse v. McConnell, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (claiming malpractice for the improper execution of an estate).

36. *See Deutsch*, 97 S.W.3d at 190 (recognizing that the law firm's failure to advise the client regarding separate counsel is a breach of fiduciary duty).

37. *See id.* at 187 (alleging that the law firm breached its fiduciary duty in failing to counsel the client).

38. Piro v. Sarofim, No. 01-00-00398-CV, 2002 Tex. App. LEXIS 2656, at *28 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002, no pet.) (not designated for publication) (holding that the jury had sufficient evidence to find breach of fiduciary duty based on the attorney not advising the client to consult with outside counsel regarding fee receipt).

39. Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22-23 (Tex. App.—Tyler 2000, pet. denied).

	Legal Malpractice (negligence)	Breach of Fiduciary Duty	Breach of contract	DTPA	Case Source
Withholding Information from Clients					
Failing "to disclose conflicts of interest"		x			*Goffney*[40]
Failing to disclose conflicts of interest	x				*Mecom*[41]
Not sending client copies of contracts they had signed		x			*Cantu*[42]
Failing to advise client about conflicts of interest arising during representation		x			*Deutsch*[43]
Failing to disclose that contingent fees are rarely justified in divorce cases		x			*Piro*[44]
Failing to provide billing statements		x			*Jackson Law Office*[45]
Refusing to provide client with itemized statement		x			*Jackson Law Office*[46]

40. Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (asserting that counsel withdrew because the attorney believed it was not in her economic interest to try a case on a contingency fee when she expected to lose).

41. Mecom v. Vinson & Elkins, No. 01-98-00280-CV, 2001 Tex. App. LEXIS 3088, at *18, *31-32 (Tex. App.—Houston [1st Dist.] May 10, 2001, pet. dism'd) (not designated for publication) (distinguishing between negligence and breach of fiduciary duties in terms of fraud).

42. *See* Cantu v. Butron, 921 S.W.2d 344, 351, 355 (Tex. App.—Corpus Christi 1996, writ denied) (affirming that Cantu breached his fiduciary duty by not sending the client's copies of the signed contract as promised).

43. *See* Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 187 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (classifying failure to disclose a conflict of interest as a breach of fiduciary duty).

44. *See* Piro v. Sarofim, No. 01-00-00398-CV, 2002 Tex. App. LEXIS 2656, at *17, *23 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002, no pet.) (upholding the sufficiency of the evidence for a breach of fiduciary claim).

45. *See* Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22-23 (Tex. App.—Tyler 2000, pet. denied) (upholding the breach of fiduciary duty finding by the jury based on the attorney's failure to disclose billing statements).

46. *See id.* (concluding that the evidence is sufficient to support the jury's finding of breach of fiduciary duty).

	Legal Malpractice (negligence)	Breach of Fiduciary Duty	Breach of contract	DTPA	Case Source
Self-Dealing					
Subordinating the client's interests to the attorney's interests		x			*Goffney*[47]
Obtaining improper benefit		x			*Kimleco*[48]
Engaging in a personal romantic relationship with the client		x			*Piro*[49]
Deceptively obtaining client's signature on subsequent contracts raising attorney's percentage fee without explanation		x			*Cantu*[50]
Engaging in self-dealing		x			*Goffney*[51]
Using Confidential Information					
"[T]aking advantage of the client's trust"		x			*Goffney*[52]
Disclosing confidential information	x				*Judwin*[53]
Informing employee that attorneys also represented employer and that any statement made would be kept confidential and then wrongfully disclosing privileged statement to the district attorney		x			*Perez*[54]

47. *See* Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (listing examples of breach of fiduciary duty, including subordinating the client's interests to that of the attorney).

48. *See* Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied) (noting that whether the lawyer obtained an improper benefit is the focus of a breach of fiduciary claim).

49. *See Piro,* 2002 Tex. App. LEXIS 2656, at *25 (upholding the jury's finding of the attorney's breach of fiduciary duty).

50. *See* Cantu v. Butron, 921 S.W.2d 344, 350-51 (Tex. App.—Corpus Christi 1996, writ denied) (affirming the lower court's conclusion of the existence of a breach of fiduciary duty).

51. *See Goffney*, 56 S.W.3d at 193 (citing examples of breach of fiduciary duty, including engaging in self-dealing).

52. *See id.* (enumerating types of breach of fiduciary duty).

53. *See* Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 507 (Tex. App.—Houston [1st Dist.] 1995, no writ) (characterizing an improper disclosure claim as one for legal malpractice).

54. *See* Perez v. Kirk & Carrigan, 822 S.W.2d 261, 266 (Tex. App.—Corpus Christi 1991, writ denied) (holding that a breach of fiduciary claim arose from the disclosure of a

	Legal Malpractice (negligence)	Breach of Fiduciary Duty	Breach of contract	DTPA	Case Source
Publicly disclosing confidential information	x				*Judwin*[55]
Using the client's confidences improperly		x			*Goffney*[56]
Disobeying Client's Instruction					
"[D]isobeying a client's lawful instruction"	x				*Zidell*[57]
"Taking an action when not instructed by the client to do so"	x				*Zidell*[58]
Failing to confer with client before making misrepresentations to the bankruptcy court	x				*Deutsch*[59]
Transferring title to client's house to attorney's wife rather than to healthcare worker as instructed		x			*Acevedo*[60]
Not Properly Managing Case					
"[Delaying or failing to handle a matter entrusted to the attorney's care by the client"	x				*Zidell*[61]
Failing to protect and maximize separate property estate	x				*Mecom*[62]

privileged statement or from misrepresenting that an unprivileged statement would not be disclosed).

55. *See Judwin*, 911 S.W.2d at 507 (concluding that the stated claim is one for legal malpractice and not breach of fiduciary duty).

56. *See Goffney*, 56 S.W.3d at 193 (listing examples of breach of fiduciary duty, including using the client's confidences improperly).

57. *See* Zidell v. Bird, 692 S.W.2d 550, 553 (Tex. App.—Austin 1985, no writ) (discussing examples of attorney negligence).

58. *Id.*

59. *See* Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 187, 189-90 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (characterizing allegations as negligence).

60. *See* Acevedo v. Stiles, No. 04-02-0077-CV, 2003 Tex. App. LEXIS 3854, at *1, *5 (Tex. App.—San Antonio May 7, 2003, pet. denied) (mem. op.) (not designated for publication) (concluding without explanation that the attorney's transfer of the client's property against the client's wishes gave rise to a breach of fiduciary duty claim).

61. *See Zidell*, 692 S.W.2d at 553 (discussing attorney negligence).

62. Mecom v. Vinson & Elkins, No. 01-98-00280-CV, 2001 Tex. App. LEXIS 3088, at *29-33 (Tex. App.—Houston [1st Dist.] May 10, 2001, pet. dism'd) (not designated for publication).

	Legal Malpractice (negligence)	Breach of Fiduciary Duty	Breach of contract	DTPA	Case Source
Abandoning client on the day of trial	x				*Goffney*[63]
Failing to avoid conflict of interest		x			*239 Joint Venture*[64]
Failing to exercise ordinary care	x				*Cosgrove*[65]
Failing to timely designate expert	x				*Kimleco*[66]
Failing to timely designate and identify witnesses	x				*Cuyler*[67]
Failing to conduct any discovery, call witnesses at trial, or file counterclaims	x				*Deutsch*[68]
Not using an attorney's "ordinary care in preparing, managing, and presenting litigation that affects the client's interests"	x				*Zidell*[69]
Misrepresentations					
Making misrepresentations		x			*Goffney*[70]

63. *See* Goffney v. Rabson, 56 S.W.3d 186, 192-93 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (alleging the attorney engaged in an unconscionable action or course of action in violation of Section 17.50 of the DTPA by refusing to represent, and abandoning, the client at trial).

64. Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 904-10 (Tex. App.—Dallas 2001, pet. granted) (serving as both public official and attorney led to a breach of fiduciary duty due to a conflict arising out of a decision made in attorney's capacity as city council member that was against the client's interest).

65. Cosgrove v. Grimes, 774 S.W.2d 662, 664-65 (Tex. 1989) (discussing the standard of care required of Texas attorneys).

66. Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied) (characterizing failure to timely designate experts as a legal malpractice claim and not a breach of fiduciary duty).

67. Cuyler v. Minns, 60 S.W.3d 209, 216-17 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

68. Deutsch v. Hoover, Bax & Stovacek, L.L.P., 97 S.W.3d 179, 187 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

69. *See* Zidell v. Bird, 692 S.W.2d 550, 553 (Tex. App.—Austin 1985, no writ) (discussing examples of conduct qualifying as attorney negligence based on earlier Texas decisions).

70. Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (listing examples of breach of fiduciary duty, including making misrepresentations to the client).

	Legal Malpractice (negligence)	Breach of Fiduciary Duty	Breach of contract	DTPA	Case Source
Representing to clients that lower percentage fee arrangement would be accepted		x			*Cantu*[71]
Misleading clients that case is ready for trial	x				*Kimleco*[72]
Falsely representing that attorney is prepared to go forward	x				*Aiken*[73]
Falsely representing that expert witness was prepared	x				*Aiken*[74]
Negligently failing to file a lawsuit following an affirmative misrepresentation by the attorney that the claim had been filed				x	*Latham*[75]
Handling Fees and Funds/ Excessive Fees					
Failing to turn over settlement funds received on behalf of client		x			*Avila*[76]
Retaining the client's funds		x			*Goffney*[77]
Not reducing fee agreement to writing		x			*Jackson Law Office*[78]

71. Cantu v. Butron, 921 S.W.2d 344, 349-50 (Tex. App.—Corpus Christi 1996, writ denied) (finding that the attorney deceptively obtained signatures on contracts raising the contingency fee, and that such conduct supported a claim for breach of fiduciary duty).

72. Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 922, 924 (Tex. App.—Fort Worth 2002, pet. denied) (holding that allegations including failure to advise the client of problems with qualifications of expert witness and misleading the client as to readiness for trial constitute a negligence claim, not a breach of fiduciary duty).

73. Aiken v. Hancock, 115 S.W.3d 26, 29 (Tex. App.—San Antonio 2003, pet. denied) (holding that the attorney's misrepresentation to the client that he was prepared to go forward with the trial and that the expert was prepared to testify support the legal malpractice claim).

74. *Id.*

75. Latham v. Castillo, 972 S.W.2d 66, 68-69 (Tex. 1998) (claiming that a statement by an attorney to the client that a lawsuit was filed when it was not was evidence to support the client's DTPA cause of action).

76. Avila v. Havana Painting Co., 761 S.W.2d 398, 400 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (finding that failing to deliver funds to the client supported a breach of fiduciary cause of action against the attorney).

77. Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (listing examples of breach of fiduciary duty, including the retention of client funds).

78. Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22-23 (Tex. App.—Tyler 2000, pet. denied).

	Legal Malpractice (negligence)	Breach of Fiduciary Duty	Breach of contract	DTPA	Case Source
Failing to record services rendered		x			*Jackson Law Office*[79]
Inflated hours charged during representation		x			*Jackson Law Office*[80]
Disputed legal fees			x		*Judwin*[81]
Failing to indicate on bills that a second retainer fee was kept		x			*Piro*[82]
Failing to prevent dissipation and commingling of separate property	x				*Mecom*[83]
Excessive legal fees			x		*Jampole*[84]
All Claims					
All claims	x				*Sledge*[85]

79. *Id.* at 22 (determining that failing to maintain billing records substantiated a claim for breach of duty to fully disclose).

80. *Id.*

81. *See* Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, no writ) (denying breach of warranty and breach of fiduciary duty claims).

82. Piro v. Sarofim, No. 01-00-00398-CV, 2002 Tex. App. LEXIS 2656, at *28 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002, no pet.).

83. Mecom v. Vinson & Elkins, No. 01-98-00280-CV, 2001 Tex. App. LEXIS 3088, at *18, *31-32 (Tex. App.—Houston [1st Dist.] May 10, 2001, pet. dism'd) (not designated for publication).

84. Jampole v. Matthews, 857 S.W.2d 57, 62 (Tex. App.—Houston [1st Dist.] 1993, writ denied). The *Jampole* court reversed a summary judgment in favor of the defendant law firm after determining the correct limitations period for a breach of contract action. *See id.* (concluding that the limitations period for the breach of contract claim was four years).

85. Sledge v. Alsup, 759 S.W.2d 1, 1 (Tex. App.—El Paso 1988, no writ). *Sledge* has been cited for the argument that *all* claims against attorneys should be treated as legal malpractice claims. *See id.* at 3 (stating that all attorney malfeasance should be labeled as legal malpractice). In 1988, the *Sledge* court held that

> [i]f a lawyer's error or mistake is actionable, it should give rise to a cause of action for legal malpractice with one set of issues which inquire if the conduct or omission occurred, if that conduct or omission was malpractice and if so, subsequent issues on causation and damages. . . . The real issue remains one of whether the attorney exercised that degree of care, skill and diligence as lawyers of ordinary skill and knowledge commonly possess and exercise.

Id. at 2.

One court has followed the *Sledge* reasoning. *See* Cuyler v. Minns, 60 S.W.3d 209, 216 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (characterizing claims for negligence, breach of contract, and breach of fiduciary duty as the tort of malpractice or negligence). The *Cuyler* court, however, separately addressed the plaintiff's DTPA claims. *Id.* at 216-17.

Based on this chart, it becomes clear that while there are some consistencies within the decisions of the courts, these decisions do not provide a predictable or reliable basis for categorizing causes of action. Most notably, in *Two Thirty Nine Joint Venture v. Joe*,[86] the Fifth District Court of Appeals demonstrated the fuzziness of the line drawn between negligence and breach of fiduciary duty when it stated:

> Because avoiding conflicts of interest and thereby observing the fiduciary duty of loyalty is an action that *a reasonably prudent lawyer would observe* in relation to the client, a lawyer can be civilly liable to a client if the lawyer breaches a fiduciary duty to a client by not avoiding impermissible conflicts of interest, and the breach is a legal cause of injury.[87]

The court has, in effect, inserted the reasonably prudent lawyer standard for negligence into the standard for breach of fiduciary duty.[88] Indeed, it is not a difficult jump to argue that an attorney breaches his fiduciary duty to a client by committing negligence or other legal malpractice.

More often than not, the reality of the situation is that a single action committed by an attorney can fall within two or more of these legal malpractice causes of action. If the courts are to continue making these distinctions between the causes of action, further explanation is required. This is particularly true if attorneys are now subject to liability, potentially including treble damages, for acts which might otherwise be considered inherent to the attorney-client relationship, despite the legislature's attempts to limit legal "services" from coverage of the DTPA.[89]

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86. 60 S.W.3d 896 (Tex. App.—Dallas 2001, pet. granted).

87. Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 905-06 (Tex. App.—Dallas 2001, pet. granted) (emphasis added).

88. *See* Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) (finding that "[i]f 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"); Hall v. Rutherford, 911 S.W.2d 422, 424 (Tex. App.—San Antonio 1995, writ denied) (stating that an attorney is "held to the standard of care that would be exercised by a reasonably prudent attorney").

89. "[S]ection 17.49 of the DTPA was amended by the 74th Legislature. The new statute, effective September 1, 1995, exempts 'the rendering of professional services' from DTPA claims." Castillo v. Latham, 973 S.W.2d 312, 316 n.3 (Tex. App.—Corpus Christi 1996) (citing TEX. BUS. & COM. CODE ANN. § 17.49(c)(g) (Vernon Supp. 1996)), *aff'd in part, rev'd in part by* Latham v. Castillo, 972 S.W.2d 66 (Tex. 1998). Despite this amendment, courts have held that a consumer of legal services may be a consumer under the

III. Liability of Attorneys Under the Texas Deceptive Trade Practices Act

In general, to recover under the DTPA, a plaintiff must establish that: (1) she was a consumer of the defendant's goods or services; (2) the defendant committed "false, misleading, or deceptive acts" in connection with the lease or sale of the goods or services or committed an unconscionable act; and (3) such acts were a producing cause of actual damages to the plaintiff.[90] Thus, the examination of if and how an attorney can be liable under the DTPA requires an examination of each of these factors.

A. *Consumer Status of Clients in an Attorney-Client Relationship*

It is axiomatic that under the DTPA, a person must be a "consumer," as that term is defined by the Act, to bring a claim.[91] Under the Act, a consumer is one who has sought or acquired goods or services by purchase or lease.[92] Moreover, the services involved must necessarily be the basis of the plaintiff's allegations.[93] Thus, to the extent that a client directly seeks to obtain the services of a lawyer, there is not much question that clients can be consumers under the DTPA.[94]

DTPA. Perez v. Kirk & Carrigan, 822 S.W.2d 261, 268 (Tex. App.—Corpus Christi 1991, writ denied); Latham v. Castillo, 972 S.W.2d 66, 71 (Tex. 1998).

90. *See* Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 478 (Tex. 1995) (reviewing the elements of a DTPA claim); *see also* Tex. Bus. & Com. Code Ann. § 17.50(a) (Vernon Supp. 2003) (stating the elements of a cause of action and relief available to consumers under the DTPA).

91. *See* Tex. Bus. & Com. Code Ann. § 17.45(4) (Vernon 2002) (defining consumer); Reed v. Israel Nat'l Oil Co., 681 S.W.2d 228, 233 (Tex. App.—Houston [1st Dist.] 1984, no writ) (noting that whether a plaintiff is a consumer under the DTPA is a question of law).

92. Tex. Bus. & Com. Code Ann. § 17.45(4) (Vernon 2002).

93. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 352 (Tex. 1987).

94. *See* DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Civ. App.—Houston [1st Dist.] (1980) (holding that clients can be consumers for the purposes of the DTPA since "[t]he attorney sells legal services and the client purchases them"), *aff'd by* 612 S.W.2d 924 (Tex. 1981) (per curiam); *see also* DeBakey v. Staggs, 612 S.W.2d 924, 924 (Tex. 1981) (per curiam) (agreeing with the court of appeals, the Texas Supreme Court stated "that [the clients] were 'consumers' as defined by the DTPA"); Johnson v. DeLay, 809 S.W.2d 552, 554 (Tex. App.—Corpus Christi 1991, writ denied) (noting that the plaintiff paid for a portion of the legal services directly, was not simply a third-part beneficiary, and was therefore a consumer under the DTPA).

Moreover, because privity is generally not required in a DTPA case against an attorney, a person need not actually seek to acquire the services from the lawyer before DTPA liability can attach.[95] Thus, a plaintiff may be the "consumer" of the legal services if a third party actually purchases the services for her benefit.[96] For example, in *Parker v. Carnahan*,[97] a wife brought a DTPA suit against her husband's attorneys for allegedly providing negligent assistance in connection with her husband's case.[98] The attorneys disputed that the wife was a consumer, claiming that she had never sought their legal services and that their services had been purchased solely by the husband.[99] The court of appeals rejected this argument, finding that even though the attorneys' services were purchased by the husband alone, the wife was a consumer because the services were actually rendered to both husband and wife.[100]

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95. *See* Thompson v. Vinson & Elkins, 859 S.W.2d 617, 625 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (stating that a plaintiff's status under the DTPA is determined by the plaintiff's relationship to the transaction and not by contract). The court in *Thompson* specifically agreed that the plaintiffs had not directly attempted to "seek or acquire" any "goods or services" from the attorneys. *Id.* The court noted, however, that the plaintiff can establish standing as a consumer by the relationship to the transaction, not by a contractual relationship with the defendant. *Id.*; *see also* Roberts v. Healey, 991 S.W.2d 873, 881 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (acknowledging that consumer status is distinct from the attorney-client relationship). *But see* Orso v. Saccomanno & Clegg, No. 14-95-00170-CV, 1996 WL 528965, at *5 (Tex. App.—Houston [14th Dist.] Sept. 19, 1996, writ denied) (not designated for publication) (discussing that without an attorney-client relationship, there could be no acquisition of legal services which formed the basis of a DTPA complaint).

96. *See* Perez v. Kirk & Carrigan, 822 S.W.2d 261, 268 (Tex. App.—Corpus Christi 1991, writ denied) (asserting that a plaintiff is still considered a "consumer" even though a third party purchased the good or service for the plaintiff); *see also* Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 815 (Tex. 1997) (stating that because accountants knew that the audit they were preparing for their client would be used by a third party in deciding whether to purchase the client's company, the third party had "sought or acquired" the accountants' services for purposes of the DTPA).

97. 772 S.W.2d 151 (Tex. App.—Texarkana 1989, writ denied).

98. *See* Parker v. Carnahan, 772 S.W.2d 151, 153 (Tex. App.—Texarkana 1989, writ denied) (contending that the husband's attorneys were negligent in their failure to disclose to his wife the potential liability in filing a joint return).

99. *Id.* at 158. The wife agreed in her deposition that she had never sought the services of the attorneys. *Id.*

100. *Id.* Despite finding consumer status, the court ultimately rejected the plaintiff's DTPA claims, finding that there was no evidence that the attorneys' conduct had been deceptive or otherwise violated the DTPA. *Id.* at 159.

Likewise, in *Perez v. Kirk & Carrigan*,[101] after a horrific accident, attorneys hired by a truck driver's employer's insurer visited the driver in the hospital to take a statement from him regarding the accident.[102] The driver claimed that the lawyers informed him that they were his lawyers also and that his statement would be kept confidential.[103] Sometime thereafter, the attorneys turned the statement over to the district attorney, and an indictment of the driver was later issued.[104] The driver sued the lawyers on multiple grounds, including violations of the DTPA, and the attorneys obtained a summary judgment that the plaintiff was not a consumer as to them under the DTPA.[105] The court of appeals reversed the summary judgment, finding that although the driver "did not pay for the legal services he received" from the firm, he had "acquired" these services by "purchase or lease" through the actions of his employer or its insurance carrier.[106] The court noted that "[s]imply because those services were actually purchased by someone else does not disqualify [the driver] from claiming to be a consumer for purposes of his DTPA claim against the provider of those services."[107]

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101. 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, writ denied).

102. Perez v. Kirk & Carrigan, 822 S.W.2d 261, 263 (Tex. App.—Corpus Christi 1991, writ denied).

103. *Id.* at 264.

104. *Id.*

105. *Id.*

106. *See id.* at 268 (applying its analysis of the definition of "consumer" (citing Kennedy v. Sale, 689 S.W.2d 890, 892 (Tex.1985))); *see also* Parker v. Carnahan, 772 S.W.2d 151, 158-59 (Tex. App.—Texarkana 1989, no writ) (finding that the definition of consumer under the DTPA includes both persons for whom services were specifically purchased and persons for whom the services were rendered).

107. *See Kirk & Carrigan*, 822 S.W.2d at 268. One court has gone even further, finding that a plaintiff could recover DTPA damages from the opposing counsel in litigation for unconscionable and/or fraudulent actions taken by that attorney in his handling of litigation for a client against that plaintiff. *See* Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 476 (Tex. App.—Houston [1st Dist.] 1985, no writ) (holding that where a seller knowingly engages in unconscionable actions in a sale and such conduct causes injury, a plaintiff may recover attorney's fees). In *Likover*, however, the court did not examine how it was possible for the plaintiff to be a "consumer" of the services of the other parties' attorney, and therefore, the decision has been repeatedly distinguished and is of questionable precedential value. *See, e.g.*, Lewis v. Am. Exploration Co., 4 F. Supp. 2d 673, 678, 679 (S.D. Tex. 1998) (distinguishing *Likover* as not concerning actions taken during litigation, but rather an attorney who helped his clients in fraudulent transactions); Chapman Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 442 (Tex. App.—Houston. [14th Dist.] 2000, pet. denied) (stating that where an attorney's conduct is not fraudulent, but involves

However, there are also a number of cases in which consumer status has been denied to persons attempting to bring suit against attorneys under the DTPA. For example, in *Vinson & Elkins v. Moran*,[108] executors of an estate hired lawyers in connection with the administration of the estate.[109] Later, the beneficiaries of the estate sued the lawyers for negligence and violations of the DTPA, claiming that they were consumers of the lawyers' services.[110] The court agreed that the estate beneficiaries benefitted incidentally by the executor's hiring of the law firm, as they assisted with the orderly administration of the estate.[111] The primary purpose of the attorneys' services was to assist the executors with the administration of the estate, and any additional benefit the benefactors received "was merely incidental to the main purpose."[112]

The court explained that in modern practice, it is common for nonclients to incidentally benefit from legal services provided to an attorney's clients.[113] "The mere fact that these third parties are benefitted, or damaged, by the attorney's performance does not make the third parties consumers with rights to an action under the DTPA."[114] The court stated that the legislature did not intend to confer consumer status on "incidental beneficiaries."[115] Therefore, although "[b]eneficiaries of a will or trust . . . may incidentally benefit or be damaged by the attorney hired to represent [an] execu-

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omissions, fees may not be recovered); Bernstein v. Portland Sav. & Loan Ass'n, 850 S.W.2d 694, 702 (Tex. App.—Corpus Christi 1993, writ denied) (indicating that *Likover* does not apply where there is no proof of the attorney's duty in the case).

108. 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.)

109. Vinson & Elkins v. Moran, 946 S.W.2d 381, 386 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.)

110. *See id.* at 407 (taking note of the argument that the court must find the beneficiaries' status to be that of consumers in order to assert a claim under the DTPA).

111. *See id.* at 408 (explaining that any benefit would extend to the beneficiaries through orderly administration of the estate).

112. *See id.* (reasoning that the executors did not hire Vinson & Elkins for the principle purpose of providing legal services to the beneficiaries (citing Goldberg v. Frye, 266 Cal. Rptr. 483, 488 (Cal. Ct. App. 1990))).

113. *Id.* The court noted several examples, including "successful labor litigation on behalf of a union" that benefits union members, and "representation of a city, county, or other governmental entity" that confers benefits to its citizens. *Id.* (citing *Goldberg*, 266 Cal. Rptr. at 489). While in these and other instances the third parties are indirectly affected by the attorney's performance, such indirect effect should not give them consumer status under the DTPA. *Id.*

114. *Moran*, 946 S.W.2d at 408.

115. *Id.*

tor," they do not obtain consumer status for the purposes of asserting a DTPA claim.[116]

Another situation in which a plaintiff was found not to be a consumer in a claim against a lawyer can be found in *Wright v. Gundersen*.[117] In *Wright*, the attorney was retained to draft a will and to execute a durable power of attorney naming the testator's daughter as his attorney-in-fact.[118] Both documents were prepared and signed, with the testator devising his residuary estate, including an individual retirement account, to his two children.[119] Unfortunately, the testator never changed the IRA itself, which designated his brother as the beneficiary.[120] When the testator died, the bank paid the benefits of the IRA to the brother. The daughter sued the lawyer as executrix, claiming that the lawyer had misrepresented to the testator and to his daughter that the IRA funds would be distributed under the terms of the will and failed to inform them that the testator needed to amend the beneficiary card of the IRA in order to effectuate the terms of the will.[121] The daughter was deposed, and admitted that she had not hired the lawyer to do anything for her personal benefit other than to draft a power of attorney so that she could pay the decedent's bills.[122] The lawyer moved for summary judgment on grounds that the plaintiff was not a consumer, and the motion was granted.[123] On appeal, the court explained that the proof showed that the testator, and not the daughter, had hired the lawyer to draft his will.[124] Thus, as the daughter's "relationship to the will was primarily one of beneficiary and executrix," the legal services she acquired from the attorney, if any, were "gratuitous and incidental to the terms of the will or the durable power of attorney, and not because [the testator] intended to purchase legal services for [the daughter's] benefit."[125] Therefore, the daughter "was not a consumer under the DTPA,"

116. *Id.*
117. 956 S.W.2d 43 (Tex. App.—Houston [14th Dist.] 1996, no writ).
118. Wright v. Gunderson, 956 S.W.2d 43, 45 (Tex. App.—Houston [14th Dist.] 1996, no writ).
119. *Id.*
120. *Id.*
121. *Id.* at 46.
122. *Id.* at 48.
123. *Wright*, 956 S.W.2d at 45.
124. *Id.* at 48.
125. *Id.*

and the summary judgment was affirmed.[126] A number of cases have followed this same rationale.[127]

It is important to note that actual consideration need not change hands for consumer status to arise.[128] Under that established rationale, even if the attorney-client contract involves a contingency fee, the fact that no fee is ever paid does not exempt the transaction from the DTPA.[129]

B. *Deceptive Practices by Attorneys in the Representation of Their Clients*

1. Pre-1995 Liability for Professional Services

Prior to 1995, a number of cases had been brought against professionals for deceptive or otherwise unconscionable conduct.[130] The first DTPA case against a lawyer was *DeBakey v. Staggs.*[131] In *Debakey*, the plaintiff brought suit against her lawyer under the

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126. *Id.*

127. *See, e.g.*, Guest v. Cochran, 993 S.W.2d 397, 408 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (stating that any benefit derived by beneficiaries of a will from estate work provided by an attorney was purely incidental); Smithart v. Sweeney, No. 05-97-01901-CV, 2001 WL 804492, at *2 (Tex. App.—Dallas July 18, 2001, pet. denied) (not designated for publication) (stressing that summary judgment evidence established that services were not purchased for the plaintiff's benefit; rather, the client acquired the lawyers' services solely for his own benefit); Hager v. Amiri, No. 05-97-02046-CV, 2001 WL 533806, at *2 (Tex. App.—Dallas May 21, 2001, pet. denied) (not designated for publication) (noting that the plaintiff cannot qualify as a consumer because she did not acquire attorney's services, and there was no evidence that legal services were purchased for her).

128. Roberts v. Burkett, 802 S.W.2d 42, 47 (Tex. App.—Corpus Christi 1990, no writ). Of course, if a purchase has not actually occurred, the plaintiff will still have to show that he "intended" to seek or acquire the services by purchase. *Id.*

129. *See, e.g.*, Cuyler v. Minns, 60 S.W.3d 209, 217 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (discussing a situation in which lawyers attempted to decline a fee for representation, then argue that no consideration was "paid" and therefore there was no consumer status). The court in this case held that the attorneys had a right to payment, but declined to exercise that right, and such "unilateral act should not be able to defeat the applicability of the DTPA." *Id.*

130. *See, e.g.*, Rhodes v. Sorokolit, 846 S.W.2d 618, 620-21 (Tex. App.—Fort Worth 1993) (holding that a patient has a DTPA claim against the physician for misrepresentation and breach of an express warranty), *aff'd*, 889 S.W.2d 239 (Tex. 1994); White Budd Van Ness P'ship v. Major-Gladys Drive Joint Venture, 798 S.W.2d 805, 807 (Tex. App.—Beaumont 1990, writ dism'd) (affirming that the DTPA is applicable to architecture malpractice).

131. 605 S.W.2d 631 (Tex. Civ. App.—Houston [1st Dist.] 1980), *aff'd*, 612 S.W.2d 924 (Tex. 1981) (per curiam).

DTPA for failing to timely accomplish a name change.[132] The lawyer unsuccessfully argued that the DTPA did not apply to legal services, and that the plaintiff was not a consumer under the Act.[133] First, the court of appeals found that the attorney's various failures and errors relating to the name change were sufficient to support the trial court's conclusion that the attorney had taken advantage of the client's lack of experience, knowledge, and capacity to an unfair degree.[134] Second, the court noted that the DTPA was to be liberally construed to effectuate its broad purposes, and that legal "services" fell within the definition of the Act.[135] Likewise, as the attorney "sells" legal services and the client "buys" them, the client is a consumer. Finally, the court remarked that physicians and other professionals had been found responsible under the Act, except where the claim was based on negligence.[136] As the legislature had previously refused to exempt all professional services from coverage under the Act, the court concluded it was "reasonable to [believe] that the legislature intended legal services to be covered by the Act."[137]

Later, in the landmark decision of *Willis v. Maverick*,[138] the primary issue was whether the discovery rule was applicable in legal malpractice actions, but the Supreme Court tangentially, and arguably in dicta, addressed the "great unknown" regarding DTPA claims against attorneys.[139] In focusing on the issue of limitations under the DTPA, the court found that the plaintiff had not properly submitted an issue to the trial court, and therefore "it [became] unnecessary to address [the attorney's] contention that the

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132. DeBakey v. Staggs, 605 S.W.2d 631, 631 (Tex. Civ. App.—Houston [1st Dist.] 1980), *aff'd*, 612 S.W.2d 924 (Tex. 1981) (per curiam).

133. *Id.* at 633.

134. *Id.*

135. *Id.*

136. *Id.*

137. *DeBakey*, 605 S.W.2d at 633. Upon further appeal, the Texas Supreme Court refused to overturn the case, addressing only the issue of whether or not the client was a consumer, but specifically reserving the question of "the standard of care by which a legal malpractice claim is to be determined." DeBakey v. Staggs, 612 S.W.2d 924, 925 (Tex. 1981) (per curiam). This determination was not to come for another eight years. *See* Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex.1989) (holding that the standard of care for attorneys in Texas is an objective standard meaning that degree of care which would be exercised by a reasonably prudent attorney).

138. 760 S.W.2d 642 (Tex. 1988).

139. Willis v. Maverick, 760 S.W.2d 642, 644-45 (Tex. 1988).

DTPA [was] not applicable to this cause of action."[140] However, the court "recognize[d] that [it had] previously held a lawyer's unconscionable conduct to be actionable under the DTPA."[141] It also concluded that implied warranties, "which are likewise actionable under the DTPA," would not be extended to include professional conduct.[142] Therefore, the court stated that its "determination of whether a lawyer's professional conduct is actionable under the DTPA must await another day."[143]

Similarly, *Johnson v. DeLay*[144] also involved a DTPA claim against an attorney.[145] In *Johnson*, the attorney had been retained by the buyer and seller to document the sale of a business.[146] After the sale, numerous problems occurred, and the attorney allegedly told the seller that he "would handle her problems."[147] Although the attorney supposedly told the seller that he could not represent either party, he later represented the buyer's representative when the seller sued.[148] The seller eventually obtained a judgment against the buyer, then sued the lawyer for negligence and violation of the DTPA.[149] The trial court granted a directed verdict for the lawyer, and the client appealed.[150] The court of appeals first found that while unconscionable conduct by an attorney had been found to be actionable, "[t]he extent to which professional services are subject to the DTPA appears to be an open question."[151] Here, even though the plaintiff had only paid for one-half of the legal fees, she was a consumer because the lawyer had performed legal services for which he was paid directly by the plaintiff.[152] The court thereafter found a distinction between "the quality of advice" given to the plaintiff and the "representation of material facts con-

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140. *Id.* at 647.

141. *Id.* (citing *DeBakey*, 612 S.W.2d 924 (Tex. 1981) (per curiam)).

142. *Id.* at 647-48 (citing Dennis v. Allison, 698 S.W.2d 94, 94-95 (Tex.1985)).

143. *Id.*

144. 809 S.W.2d 552 (Tex. App.—Corpus Christi 1991, writ denied).

145. Johnson v. Delay, 809 S.W.2d 552, 553 (Tex. App.—Corpus Christi 1991, writ denied).

146. *Id.*

147. *Id.* at 554.

148. *Id.*

149. *Id.*

150. *Johnson*, 809 S.W.2d at 554.

151. *Id.*

152. *Id.*

cerning the specifics of the transaction."[153] As there was evidence, albeit solely from the plaintiff, that the lawyer had misrepresented facts to "induce [the plaintiff] to finalize the sale," which did not concern the rendition of legal services, there was potential liability under the DTPA.[154]

It certainly appears that the court in *Johnson* was concentrating on the wrong transaction. Even under the previous version of the DTPA, the "improper" inducement which should result in liability to the lawyer is not the underlying transaction, but the transaction in retaining the lawyer. Likewise, a representation regarding the nature of, or the benefits and drawbacks of a legal document must necessarily question the quality of the advice, and therefore the *Johnson* case is of dubious precedential value.

In *Sample v. Freeman*,[155] the attorney failed to timely file suit on behalf of his client in an admiralty matter.[156] The trial judge delivered charges for negligence and DTPA violations, and the jury returned a verdict in favor of the plaintiff on both issues.[157] On appeal, the attorney argued that it was error for the court to have submitted the DTPA claim to the jury.[158] The court of appeals disagreed, holding that "[i]t is settled law that attorney malpractice is actionable under the DTPA."[159] The court indicated that the jury's verdict could be upheld on the theory of breach of an express warranty, and thus it did not need to reach the issue of implied warranty.[160]

The *Sample* court appears to have misread *DeBakey*, in that *DeBakey* held that the attorney's errors equated to unconscionability, which was undoubtedly covered by the DTPA.[161] Furthermore, the *Sample* court failed to note the Texas Supreme Court's comment in *Willis* that the issue of whether an attorney's professional

153. *Id.* at 555.

154. *Id.*

155. 873 S.W.2d 470, 473 (Tex. App.—Beaumont 1994, writ denied).

156. Sample v. Freeman, 873 S.W.2d 470, 473 (Tex. App.—Beaumont 1994, writ denied).

157. *Id.* at 473.

158. *Id.* at 475.

159. *Id.* (citing DeBakey v. Staggs, 612 S.W.2d 924, 925 (Tex. 1981) (per curiam)).

160. *Id.*

161. DeBakey v. Staggs, 605 S.W.2d 631, 632 (Tex. Civ. App.—Houston [1st Dist.] 1980), *aff'd*, 612 S.W.2d 924 (Tex. 1981) (per curiam).

services were covered by the Act had not yet been decided.[162] Therefore, the *Sample* court's conclusion that "attorney malpractice is actionable under the DTPA" appears to be a vastly different holding than could have been discerned from the law it cited for the conclusion.[163]

After the *Cosgrove* decision, legal malpractice plaintiffs began to try to get several bites at the same apple by asserting multiple claims arising out of the same factual scenario. In addition to DTPA claims, the typical claims that are made include: breach of fiduciary duty, breach of contract, breach of warranty, and even more esoteric claims such as breach of the duty of good faith and fair dealing.[164] Several courts decided that if the case sounded in malpractice, it would be treated as a malpractice case, no matter what name the plaintiff put on it.[165] As noted by one court:

> Nothing is to be gained by fracturing a cause of action arising out of bad legal advice or improper representation into claims for negligence, breach of contract, fraud or some other name. If a lawyer's error or mistake is actionable, it should give rise to a cause of action for legal malpractice with one set of issues which inquire if the conduct or omission occurred, if that conduct or omission was malpractice and if so, subsequent issues on causation and damages. Nothing is to be gained in fracturing that cause of action into three or four different claims and sets of special issues.[166]

Numerous cases adopted this general idea and rejected attempts to "split" the cause of action, finding that they were simply "a means to an end" to assert legal malpractice.[167] This also led to the

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162. Willis v. Maverick, 760 S.W.2d 642, 648 (Tex. 1988) (stating that whether an attorney's services were actionable under the DTPA was to be determined at a later date).

163. Sample v. Freeman, 873 S.W.2d 470, 475 (Tex. App.—Beaumont 1994, writ denied).

164. *See* Smith v. Heard, 980 S.W.2d 693, 696 (Tex. App.—San Antonio 1998, pet. denied) (rejecting a duty of good faith and fair dealing claim); Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (denying breach of warranty and breach of fiduciary duty claims).

165. *See, e.g., Judwin*, 911 S.W.2d at 498 (stating that the client's contract, warranty, and fiduciary claims were restatements of the claim for malpractice).

166. *See* Sledge v. Alsup, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ) (affirming that a two-year statute of limitations barred the plaintiff's claims).

167. *Judwin*, 911 S.W.2d at 506; *see also* Kahlig v. Boyd, 980 S.W.2d 685, 688 (Tex. App.—San Antonio 1998, pet. denied) (stating that malpractice is not the sole cause of action against an attorney); Am. Med. Elecs. v. Korn, 819 S.W.2d 573, 576 (Tex. App.—Dallas 1991, writ denied) (denying a breach of warranty claim).

denial of DTPA claims that were determined to have been disguised legal malpractice claims.[168] This trend eventually led to the Texas Supreme Court's decision in *Latham v. Castillo*,[169] which settled the application of pre-1995 DTPA law to claims against lawyers, and also provided a framework for claims under the amended statute.[170]

2. *Latham v. Castillo*

In *Latham v. Castillo,* Mrs. Castillo prematurely gave birth to twin daughters, who were both born with substantial birth defects.[171] One died almost immediately, and a medical malpractice claim on her behalf was settled.[172] The other daughter lingered for a long period of time, then finally passed away as well.[173] The Castillos hired Latham to file a legal malpractice claim against the lawyer who had handled the medical malpractice claim for the first child and to pursue a medical malpractice claim for the second child's death.[174] While Latham settled the legal malpractice claim, the statute of limitations ran on the Castillos' medical malpractice claim for the second daughter's death without suit being filed.[175] The Castillos then sued Latham for legal malpractice for the failure to file the medical malpractice action for the second child within

168. There has never been a bright line test for when a claim is strictly a malpractice case and when it is something more, but where there is only one general factual allegation in a petition, followed by a number of general allegations of the existence of various causes of action, the courts will be more inclined to find that the "additional" claims are subsumed within the malpractice claim. *See Judwin*, 911 S.W.2d at 506-07 (addressing the client's claims against the attorney for breach of contract, warranty, and fiduciary duty). On the other hand, where there are some facts that show active deception or other conflicts of interest which do not strictly involve malpractice concepts, the additional claims might be valid. For example, while a breach of contract claim is not a proper claim to bring against a lawyer for the lawyer's failure to properly handle a case, it is the proper method to challenge billing practices by an attorney. *See* Jampole v. Matthews, 857 S.W.2d 57, 61-62 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (recognizing a cause of action for breach of contract independent of a legal malpractice claim, but limited to actions against attorneys for excessive legal fees).

169. 972 S.W.2d 66 (Tex. 1988).

170. Latham v. Castillo, 972 S.W.2d 66, 68-70 (Tex. 1998).

171. *Id.* at 67.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Latham*, 972 S.W.2d at 67.

the two-year statute of limitations period.[176] Latham was also sued for "unconscionable actions under the DTPA because Latham allegedly affirmatively represented to them that he had filed and was actively prosecuting the medical malpractice claim."[177] The Castillos further alleged that Latham "wrongfully misrepresented himself, breached the contract of employment, and was negligent."[178]

The trial court granted a directed verdict for Latham that the Castillos take nothing.[179] The court of appeals reversed and remanded, holding that some evidence was presented which would prevent a directed verdict as to the Castillos' DTPA claim.[180] The court of appeals affirmed the directed verdict as to the negligence claim because "the Castillos did not present evidence that but for Latham's negligence, the medical malpractice suit would have been successful."[181]

Latham appealed to the Texas Supreme Court, which affirmed the court of appeals' ruling with regard to the DTPA issues.[182] Although the case had been filed prior to the 1995 revisions to the DTPA, the court noted that under the amendments effective Sep-

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Latham*, 972 S.W.2d. at 67-68.

181. *Id.* This is the "case-within-a-case" requirement which mandates that in order for a plaintiff to show proximate causation of damages, they must show not only that they would have won the underlying case, but also that any judgment was collectible from the underlying defendant. *See* Rodriguez v. Sciano, 18 S.W.3d 725, 727 (Tex. App.—San Antonio 2000, no pet.) (outlining plaintiff's burden in order to win a legal malpractice claim). Thus, to recover for legal malpractice, a plaintiff must prove that: (1) the attorney had a duty to the plaintiff; (2) the duty was breached; (3) the breach was the proximate cause of the plaintiff's injuries; and (4) there were damages. *See* Van Polen v. Wisch, 23 S.W.3d 510, 515 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (naming the elements necessary to recover legal malpractice damages). When a legal malpractice claim stems from prior litigation, the plaintiff also has a burden to show that "but for" the attorney's mistakes, he or she would have won the underlying claim and would also have been able to collect on the judgment. *See* Greathouse v. McConnell, 982 S.W.2d 165, 172-73 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (identifying the plaintiff's burden of proof before recovering damages). "This aspect of the plaintiff's burden is commonly referred to as the 'suit within a suit' requirement." *Id.* at 173 (citing Schlager v. Clements, 939 S.W.2d 183, 186-87 (Tex. App.—Houston [14th Dist.] 1996, writ denied)). The rationale for this line of cases is essentially that, if the plaintiff was not going to be able to recover anyway, nothing the lawyer did or did not do could have caused actual damages to the client.

182. *Latham*, 972 S.W.2d at 67 (affirming the lower court's remand of the DTPA claim).

tember 1, 1995, lawyers may not be sued under the DTPA unless they engage in one of the following acts:

> (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion; (2) a failure to disclose; (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.[183]

Because the Castillos had alleged that Latham's conduct constituted an "unconscionable action or course of action" that violated the DTPA, they had effectively stated a claim under both the pre- and post-1995 version of the DTPA.

In turning to the Castillos' claims, the court pointed out that an

> "unconscionable action or course of action" means "an act or practice which, to a person's detriment: (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration."[184]

As the claim was evidently a contingency fee case, the Castillos relied only on (A), which meant that they had to show that the resulting unfairness was "glaringly noticeable, flagrant, complete and unmitigated."[185] Concluding that it had to apply the DTPA liberally, the court noted that "[a]ttorneys can be found to have engaged in unconscionable conduct by the way they represent their clients."[186] Given that the plaintiff had testified that the attorney had stated he was prosecuting their medical malpractice case when he was not, the court found that there was some evidence that "Latham took advantage of the trust the Castillos placed in him as an attorney."[187] Therefore, the Castillos "presented some evidence that they were taken advantage of to a grossly unfair degree."[188]

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183. *Id.* at 68 n.2 (citing TEX. BUS. & COM. CODE § 17.49(c)).

184. *Id.* at 68 (citing TEX. BUS. & COM. CODE § 17.45(5)).

185. *Id.* (citing Chastain v. Koonce, 700 S.W.2d 579, 584 (Tex. 1985)).

186. *Id.* (citing DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Civ. App.—Houston [1st Dist] 1980), *aff'd*, 612 S.W.2d 924 (Tex. 1981) (per curiam)).

187. *Latham*, 972 S.W.2d at 68-69.

188. *Id.*

The attorney argued that the plaintiffs' claims were actually disguised malpractice claims in that the actual basis of the case was the failure to properly file suit in a timely fashion.[189] The court, however, remarked that the DTPA was designed to provide a remedy where the common law failed, and that to subsume the claim within a negligence framework would "subvert the Legislature's clear purpose in enacting the DTPA—to deter deceptive business practices."[190]

As noted by the court:

> If the Castillos had only alleged that Latham negligently failed to timely file their claim, their claim would properly be one for legal malpractice. However, the Castillos alleged and presented some evidence that Latham 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. The Legislature enacted the DTPA to curtail this type of deceptive conduct. Thus, the DTPA does not require and the Castillos need not prove the "suit within a suit" element when suing an attorney under the DTPA.[191]

Therefore, the argument that the Castillos were required to prove that they would have won the medical malpractice case in order to recover fell on deaf ears. The court thereafter found that because the Castillos supplied some evidence of mental anguish damages, their DTPA claims should have been allowed to go to the jury.

Justice Owen, joined by three other justices, wrote a very strong dissent, making the case a close one. Justice Owen asserted that the majority had expanded the definition of unconscionability, as an attorney could not "take advantage of . . . , 'to a grossly unfair degree,'" a contingency fee client who had a meritless suit, even if a misrepresentation was committed.[192] The fact that an "unfair advantage" is taken is not enough, as "[t]he resulting unfairness must be 'grossly unfair,'" which the court had previously defined as

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189. *Id.* Even today, this seemed to be a powerful argument under nearly all of the previous case law regarding improper "splitting" of the causes of action.

190. *Id.* at 69.

191. *Id.*

192. *Latham*, 972 S.W.2d. at 71 (Owen, J., dissenting).

"glaringly noticeable, flagrant, complete and unmitigated."[193] Justice Owen urged that the majority was coming dangerously close to equating "unconscionability" with "deception."[194] As stated, the attorney gained no "advantage" by his conduct, and it was not "grossly unfair" to the Castillos, as they were in no way disadvantaged in the absence of a meritorious claim.[195]

At first glance, the decision in *Latham* might be considered of little importance given that it was specifically decided under a previous version of the DTPA, which likely would produce no further claims.[196] Despite the gaping holes in the logic of the majority opinion as pointed out by the dissent, *Latham* remains the law as to claims of unconscionability, and has survived the 1995 changes to the DTPA, which otherwise inured to the benefit of professionals.

3. The 1995 Changes to the Texas Deceptive Trade Practices Act

In 1995, the legislature enacted a number of changes to the DTPA, which affected all litigation filed on or after September 1, 1995.[197] The Act also applied to "all causes of action that accrued before the effective date of [the] Act and upon which suit is filed on or after September 1, 1996."[198]

The key changes with respect to potential liability of lawyers[199] to their clients came in Section 17.49, entitled "Exemptions."[200]

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193. *Id.* at 72 (quoting Chastain v. Koonce, 700 S.W.2d 579, 582 (Tex. 1985)).

194. *Id.*

195. *Id.*

196. *See* TEX. BUS. & COM. CODE ANN. § 17.49 historical note (Vernon 2002) (noting that the 1995 amendments to the DTPA apply to all claims filed after September 1, 1996). Given the two-year statute of limitations on DTPA claims against lawyers, a timely claim under the pre-1995 changes is difficult to imagine. *See* Underkofler v. Vanasek, 53 S.W.3d 343, 346 (Tex. 2001) (refusing to recognize a "litigation exception" to the two-year discovery rule statute of limitations for DTPA claims against lawyers).

197. TEX. BUS. & COM. CODE ANN. § 17.49 historical note (Vernon 2002).

198. *Id.*

199. Under subsection (d) of Section 17.49, the exemptions under subsection (c) apply "to a cause of action brought against the person who provided the professional service and a cause of action brought against any entity that could be found to be vicariously liable for the person's conduct." *Id.* Thus, to the extent that a claim invokes the liability of an individual lawyer, the same analysis exists under the DTPA for the firm or entity with which the attorney practices.

200. The 1995 changes added subsections (c) through (g) to Section 17.49. *See id.* historical note (listing amendments affected by the 1995 Acts implemented by the 74th Legislature).

Under subparagraph (c), the legislature provided that:

> 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)(24);[201]
> (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;
> (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or
> (5) a violation of Section 17.46(b)(26).[202]

From a review of the above provisions, it is clear that the legislature intended to exclude claims for damages under the DTPA based on the rendering of a professional service, such as the providing of advice, judgment, opinion, or similar professional skills. At the same time, however, if the attorney "expressly misrepresents a material fact," breaches an express warranty, or acts unconscionably, the exclusion contained in the general provision of Section 17.46 (c) does not apply. The difficulty, of course, is in deciding what actions by a lawyer constitute nonactionable "advice, judgment or opinion," and what are actionable misrepresenta-

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201. *Id.* Section 17.46(b)(24) states that a violation would include "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed." TEX. BUS. & COM. CODE ANN. § 17.46(b)(24) (Vernon Supp. 2004). It is important to note that this is the only "laundry list" violation of the DTPA that currently appears applicable to lawyers acting in their capacity as legal counsel (as opposed to sellers of annuities).

202. Section 17.46(b)(26) provides that a violation would include the:

> selling, offering to sell, or illegally promoting an annuity contract under Chapter 22, Acts of the 57th Legislature, 3d Called Session, 1962 (Article 6228a-5, Vernon's Texas Civil Statutes), with the intent that the annuity contract will be the subject of a salary reduction agreement, as defined by that Act, if the annuity contract is not an eligible qualified investment under that Act. . . .

TEX. BUS. & COM. CODE ANN. § 17.46(b)(26) (Vernon Supp. 2004). There were additional changes to Section 17.46 in 2003, but they were limited to changing the references to "17.46(b)(24)" for "17.46(b)(23)" due to the modification and renumbering of that section. Act Effective Sept. 1, 2003, 78th Leg., R.S., ch. 1276, § 4.001(b)(27)(c)(2), sec. 17.46, 2003 Tex. Gen. Laws 4170.

tions, warranties, or unconscionable conduct. Unfortunately, the cases decided after 1995 do not assist in developing a bright line test for attorney conduct.

4. Post-1995 Cases

In cases decided since *Latham*, the courts have had to struggle with the distinction between what is simply negligent conduct and what is actionable conduct under the DTPA. There is, of course, no bright line rule, and some courts have labored through a tortured analysis in coming to conclusions about the distinction between such claims.

For example, in *Bellows v. San Miguel*,[203] the court was faced with claims against an attorney who had referred a client to a second lawyer for the handling of a multiple death products liability case.[204] The referring attorney continued to be involved in the case, providing various services to either the client or the handling attorney.[205] During mediation—outside the presence of the referring attorney—the trial lawyer allegedly coerced the client into accepting a lesser portion of the settlement based upon a claim that the client's surviving children had signed an affidavit claiming that she was not a good mother, and that the underlying defendant would use that against the client at trial.[206] The client later signed documents and videotaped a statement declaring that she understood the nature of the settlement and had not been coerced into settling her claims.[207] Despite this, the client thereafter brought a

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203. No. 14-00-0071-CV, 2002 WL 835667 (Tex. App.—Houston [14th Dist.] May 2, 2002, pet. denied) (not designated for publication).

204. Bellows v. San Miguel, No. 14-00-0071-CV, 2002 WL 835667, at *1-2 (Tex. App.—Houston [14th Dist.] May 2, 2002, pet. denied) (not designated for publication).

205. *See id.* at *4 (explaining the referring attorney's role in the underlying lawsuit). The defendant attorney's involvement in the handling of the underlying case was limited to forwarding the attorney-client contract between the trial lawyer and the client, contacting the client to inform her that the underlying defendant was interested in settling the case, informing her of the time and place of the mediation, advancing out-of-pocket expenses, attendance at court hearings, and allowing depositions to be taken at his office, even though he was not present. *Id.*

206. *Id.* at *2.

207. *Id.* In fact, the client had signed a settlement closing statement acknowledging "(1) the distribution of the recovery, (2) her review of attorney fees and costs paid by Carbajal, (3) the distribution of attorneys fees, and (4) her consent to, and waiver of, actual or potential conflicts of interest." *Id.* She also signed a settlement agreement with the underlying defendant in which she stated that she had "no criticism of her attorneys" and

negligence and DTPA claim against both lawyers.[208] The trial lawyer settled prior to trial, and the referring lawyer proceeded to trial claiming that, as a referring attorney, he had no attorney-client duty to the plaintiff, and that the DTPA did not apply to the plaintiff's claims under Section 17.46(c).[209] The jury, however, found negligence, breach of fiduciary duty, and violations of the DTPA, and awarded over $500,000 in damages under the DTPA, a judgment that the referring lawyer appealed.[210]

The court of appeals agreed that the duty of a "referring" attorney is "to refer the client to a competent attorney to handle the matter, but once the referral has been made, the referring attorney no longer has an obligation or responsibility for the handling of that particular matter."[211] The court, however, reasoned that the attorney's involvement in the underlying case "went beyond that of merely a referring attorney," such that there was sufficient evidence to support a finding that he was actually representing the client in the underlying suit.[212] Turning to the DTPA issues, the court rejected the attorney's claim that Section 17.46(c) protected his conduct, noting that both *Latham* and *DeBakey* support a finding that an attorney's unconscionable conduct is actionable.[213] The court thereafter listed a number of facts favorable to the client, supposedly supporting the jury verdict, then simply concluded that Section 17.46(c) did not apply.[214] Turning to the issues of unconscionability and misrepresentation, the court examined the plaintiff's allegations and found that there was sufficient evidence to support the jury's verdict.[215]

Upon review of the result in *Bellows*, it could be argued that the court erred in its analysis for a number of reasons. The crux of the

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agreed to accept the settlement reached at the mediation. *Id.* Finally, she gave a videotaped statement, acknowledging that she understood the nature of the settlement offer at the mediation, was not coerced into settlement, was satisfied with the amounts she was to receive, and that she was not to be responsible for any attorney fees and expenses. *Id.*

208. *Id.* at *3.

209. *Bellows*, 2002 WL 835667, at *3.

210. *Id.*

211. *Id.* at *5.

212. *Id.*

213. *Id.* at *8 (citing Latham v. Castillo, 972 S.W.2d 66, 68 (Tex. 1998) and DeBakey v. Staggs, 612 S.W.2d 924, 925 (Tex. 1981) (per curiam)).

214. *Bellows*, 2002 WL 835667, at *8.

215. *Id.* at *10.

Bellows' DTPA claims (as well as those for negligence and breach of fiduciary duty) consisted of three arguments. The first argument was that the referring attorney, at the very beginning of the representation, had told her she was "entitled to one-half of any recovery."[216] It is difficult to comprehend how such a statement could have been anything other than "advice, opinion or judgment," as it was necessarily based on the skill of the lawyer in analyzing the law and the facts and applying them to the client's situation.[217] Second, the client urged that she had been told "that her children had signed an affidavit stating she was not a good mother, when [the lawyers] knew the affidavit did not exist," and third, that "the settlement offer at the September mediation was for $2 million, when the offer was actually for $3 million."[218] While the court correctly concluded that these statements were factual rather than opinions and therefore actionable, the opinion makes very clear that the defendant attorney was not present when the trial attorney allegedly made the statements to the client.[219] Without some finding that the referring lawyer had ratified or otherwise adopted those statements, the *Bellows* court appears to have endorsed some unknown species of vicarious liability whereby a referring attorney can be held liable under the DTPA for statements made outside his presence by another lawyer representing the client.

Even more troubling is the court's analysis of the unconscionability and misrepresentation issues. The court paid lip service to the general standard that, in order to prove that an act is unconscionable, a litigant must show "the defendant took advantage of her lack of knowledge and 'that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.'"[220] The

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216. *Id.* at *8.

217. The result certainly appears to fly in the face of a number of decisions relating to general statements by attorneys regarding the merits of a case. *Compare id.* at *10 (establishing that the plaintiff was "entitled to one-half"), *with* Kahlig v. Boyd, 980 S.W.2d 685, 688 (Tex. App.—San Antonio 1998, pet. denied) (concluding there was no DTPA liability for saying the case was a "slam dunk" and that there was "no problem" in winning), *and* Francisco v. Foret, No. 05-01-00783-CV, 2002 WL 535455, at *5 (Tex. App.—Dallas Apr. 11, 2002, pet. denied) (not designated for publication) (holding an attorney's representation that client had a "90% chance of winning," too general to support liability under the DTPA).

218. *Bellows*, 2002 WL 835667, at *9.

219. *Id.* at *2.

220. *See id.* at *8 (citing Bradford v. Vento, 48 S.W.3d 749, 760 (Tex. 2001)).

court then, however, resorted to what appears to be guesswork as to how the referring attorney had "taken advantage of" the client to achieve a settlement.[221] The problem with the court's logic is that there was nothing in the record to show that the ultimate settlement was actually "unfair," much less grossly unfair, to the plaintiff. This gap in logic necessarily follows from the ruling in *Latham*,[222] as the plaintiff was not required to show that the settlement she actually received was somehow less than that to which she was entitled.[223]

While *Bellows* is, in many ways, a "worst case scenario" for a lawyer, other courts have been more judicious in the application of the DTPA to claims against lawyers. For example, in *Greathouse v. McConnell*,[224] the attorney had unsuccessfully represented a litigant in an underlying lawsuit involving a $250,000 loan, which had been guaranteed by the client.[225] After a judgment was rendered in the underlying suit, the then-deceased client's estate brought suit against the attorney for negligence, DTPA violations, breach of contract, and fraud arising from the representation.[226] The plaintiff's DTPA claim alleged that the lawyer had:

> (1) falsely represented that his legal services were of a competent quality, when they were not, (2) represented that the attorney-client relationship between them conferred certain rights, remedies or obligations that it did not have, (3) engaged in an unconscionable course of conduct that took advantage of [the client's] lack of knowledge

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221. As noted by the court,

> to achieve a settlement, [the client] might have been persuaded to accept less than a fifty-fifty split with [the co-plaintiff]. Accordingly, the record contains evidence from which a reasonable fact-finder could infer that [the client's] attorneys had a motive to tell her that her children had signed an affidavit stating she was not a good mother, when such an affidavit did not exist, and that the settlement offer at the September mediation was for $2 million, when it was actually for $3 million.

Id. at *9.

The plaintiff testified that she would not have agreed to settle for only $425,000 of the $3 million settlement offer had it not been for those misrepresentations. *Id.*

222. *See* Latham v. Castillo, 972 S.W.2d 66, 69 (Tex. 1998) (stating that the "[plaintiffs] have satisfied their burden on the damages element of a DTPA cause of action if they have presented some evidence of mental anguish").

223. *Bellows*, 2002 WL 835667, at *9-11.

224. 982 S.W.2d 165 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

225. Greathouse v. McConnell, 982 S.W.2d 165, 166 (Tex. App.—Houston [1st Dist] 1998, pet. denied).

226. *Id.*

> and experience such that there existed a gross disparity between the value of legal services received and the consideration paid to [the attorney] for those services, because [the attorney's] legal services were of no value.[227]

The plaintiff also claimed that the attorney had made express and implied warranties that he would provide "good and competent legal services," and that such warranties had been breached by his failure to properly handle the lawsuit.[228]

In addressing the plaintiff's claims, the *Greathouse* court noted that while the plaintiff had "allege[d] multiple causes of action, they were all [a] . . . 'means to an end' to achieve one complaint of legal malpractice."[229] The crux of each claim was that the attorney did not provide adequate legal representation, and as such, were not truly DTPA claims.[230] The *Greathouse* decision, therefore, supports the general principle that if a client's allegation is that an attorney represented that his legal services were of competent quality when they were not, or represented that the attorney-client relationship conferred certain rights, remedies, or obligations that it did not have, such are merely allegations of legal malpractice.[231]

The *Greathouse* decision was later followed in *Goffney v. Rabson*,[232] which, as in *Bellows,* involved two counsel representing the same party in a lawsuit.[233] In *Goffney,* two lawyers were working together on litigation arising out of a disputed estate.[234] On the Friday before trial, co-counsel informed the defendant attorney that he would not be able to appear at trial due to a heart condition.[235] As the co-counsel was supposed to be handling much of the trial preparation and trial duties, the defendant attorney found

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227. *Id.* at 172.

228. *Id.*

229. *See id.* at 172 (citing Klein v. Reynolds, Cunningham, Peterson & Cordell, 923 S.W.2d 45, 49 (Tex. App.—Houston [1st Dist.] 1995, no writ)); *see also* Sullivan v. Bickel & Brewer, 943 S.W.2d 477, 481 (Tex. App.—Dallas 1995, writ denied) (asserting that a legal malpractice cause of action may arise from improper representation).

230. *Greathouse,* 982 S.W.2d at 172.

231. *Id.*

232. 56 S.W.3d 186 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

233. Goffney v. Rabson, 56 S.W.3d 186, 188 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

234. *Id.* The underlying plaintiff was actually on her third lawyer, after having discharged an hourly fee lawyer, and subsequently retaining a second lawyer under a contingency fee, who thereafter requested that Goffney assist with the litigation. *Id.*

235. *Id.*

another attorney who agreed to appear in court on the trial date to obtain a continuance and to take over as lead counsel if the continuance was granted.[236] On the morning of trial, the trial court, after initially refusing to grant the continuance, indicated that a one-week continuance would be granted so long as new counsel could be retained.[237] A series of attorneys at the courthouse unsuccessfully attempted to obtain a longer continuance from the court.[238] Subsequently, the defendant lawyer filed a motion to withdraw, hoping it would force a longer continuance.[239] The court refused the motion to withdraw, and the client was eventually forced to hire additional counsel, who agreed to prepare for and try the case with Goffney's assistance a week later.[240]

At the trial of the underlying case, the jury awarded $750,000 in damages against the client for her actions related to the estate dispute.[241] After an appeal of the underlying matter, the court of appeals reversed and remanded the case for a new trial.[242] Before the new trial was conducted, the client sued the defendant lawyer claiming negligence, breach of fiduciary duty, breach of contract, and violations of the DTPA.[243] As a part of her DTPA cause of action, the plaintiff claimed that her attorney had

> violated section 17. 46 of the DTPA by: (1) representing to [the client] that the services she was providing were of a particular grade or quality when they were of another; (2) representing that the agreement to represent [the client] conferred or involved rights, remedies or obligations which it did not have or involve; and (3) failing to disclose information concerning her representation of [the client], which was known to [the lawyer] at the time she entered into the contract with [the client], and the failure to disclose such information was intended to induce [the client] to enter into a contract which she would not have entered into had that information been disclosed.[244]

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236. *Id.*

237. *Id.* at 189.

238. *Goffney*, 56 S.W.3d at 189.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Goffney*, 56 S.W.3d at 189. After filing the claim against her former lawyer, the plaintiff settled the underlying estate dispute prior to the retrial of her claims against the lawyer. *Id.*

244. *Id.* at 192.

The client also alleged that the lawyer had engaged in unconscionable acts, since he had abandoned the client at trial, misled the plaintiff into believing the case was adequately prepared, and had misrepresented their preparedness and ability to handle the case.[245] The jury found in favor of the client on her DTPA claims against her lawyer, and awarded over $100,000 in mental anguish damages under the DTPA, as well as the fees expended in the underlying litigation.[246]

On appeal, the client argued that her DTPA claim was based on the attorney's "abandonment" on the day of trial and therefore was not related to the quality of representation such that it would be considered as a restated malpractice claim.[247] The court of appeals, however, disagreed, finding it was only a malpractice claim, no matter how it was termed by the plaintiff.[248] The court, citing *Greathouse*, similarly rejected each of the other misrepresentation allegations, effectively finding that whether the attorney was properly prepared was a negligence issue, as would be any representation relating to her readiness.[249] Noting the plaintiff's argument under *Latham*, the court indicated that it could not conclude that the "allegations of unconscionable conduct constitute the type of deceptive conduct, which the *Latham* court distinguished from neg-

245. *Id.*

246. *Id.* at 189-90.

247. *Id.* at 192 (contending that the bases of her DTPA action were her attorney's failure to fulfill obligations under the contract and attempted withdrawal).

248. *Goffney*, 56 S.W.3d at 192 (holding plaintiff's claim for breach of contract, which was based on attorney's failure to appear at hearing on motion to adjudicate, was in the nature of a tort, i.e., attorney's breach of duty to represent the client (citing Van Polen v. Wisch, 23 S.W.3d 510, 515 (Tex. App.—Houston [1st Dist.] 2000, pet. denied))); *see also* Black v. Wills, 758 S.W.2d 809, 814 (Tex. App.—Dallas 1988, no writ) (holding that plaintiff's cause of action for breach of contract, which was based on the attorney's failure to appear at trial, was in the nature of a tort, no matter how the plaintiff labeled the claim); Citizens State Bank v. Shapiro, 575 S.W.2d 375, 387 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (finding the plaintiff's cause as sounding in tort despite the fact that the plaintiff couched it as a contract claim).

249. *See Goffney*, 56 S.W.3d at 192 (concluding that the plaintiff's other allegations were also restated legal malpractice claims).

ligent conduct."[250] A similar result subsequently occurred in a recent case with comparable facts and claims.[251]

Ballesteros v. Jones[252] also dealt with post-*Latham* unconscionability issues.[253] In *Ballesteros*, a purported common law wife retained a lawyer under a contingency fee contract to represent her in a divorce action.[254] Prior to discovery, the parties reached an agreement whereby the plaintiff would receive almost $400,000, which entitled the lawyer to a fee of approximately $90,000.[255] The client eventually brought a negligence and DTPA claim against the lawyer, alleging that the fee charged was unconscionable in relation to the work performed.[256] The jury awarded nearly one million dollars in damages on both the negligence and DTPA claims at trial,[257] but the trial court granted judgment notwithstanding the verdict in favor of the lawyer.[258] The court of appeals reversed the decision of the trial judge on the negligence issue against the law-

250. *See id.* at 193 (citing Kahlig v. Boyd, 980 S.W.2d 685, 689 (Tex. App.—San Antonio 1998, pet. denied)). *But see* Francisco v. Foret, No. 05-01-00783-CV, 2002 WL 535455, at *4 (Tex. App.—Dallas Apr. 11, 2002, pet. denied) (not designated for publication) (holding that the plaintiff put on sufficient evidence of misrepresentation to avoid summary judgment by showing that the attorneys entered into a settlement agreement without the consent of one client, the attorneys had a personal interest in settling the claims, failed to disclose they had already agreed to settle the case or their potential conflict of interest, and that the attorneys' failure to disclose was intended to induce the clients into ratifying the settlement agreement).

251. Aiken v. Hancock, 115 S.W.3d 26, 29 (Tex. App.—San Antonio 2003, pet. denied). In *Aiken*, the plaintiff claimed that the attorney had "falsely represented he was prepared to go forward and try" the plaintiff's case when he was not, and falsely represented that an expert witness was ready to testify when he was not. *Id.* The court found that such allegations were effectively malpractice claims. *Id.* While noting the result in *Latham v. Castillo*, the court found that "[t]hese statements, . . . do not constitute deceptive conduct, but rather, conceivably negligent conduct, a distinction recognized by the Texas Supreme Court in *Latham v. Castillo*." *Id.*

252. 985 S.W.2d 485 (Tex. App.—San Antonio 1998, pet. denied).

253. Ballesteros v. Jones, 985 S.W.2d 485, 489 (Tex. App.—San Antonio 1998, pet. denied).

254. *Id.*

255. *See id.* at 492-93 (suggesting that the quick settlement was problematic for the client in that the purported common law husband evidently had substantial assets unknown to the client, which could have been identified with even limited discovery).

256. *See id.* at 489 (reciting the jury's findings of negligence and unconscionability). The allegation of unconscionability related to the existence of the contingency fee in a divorce matter and the amount of that fee. *Id.* at 497.

257. *Id.* at 494 (granting $560,000 in actual damages, plus $1,000,000 in DTPA damages, $200,000 in exemplary damages, and attorney's fees).

258. *Ballesteros*, 985 S.W.2d at 489.

yer and remanded for a new trial, but affirmed the dismissal of the DTPA claims.[259] Despite testimony of two experts stating that the fee was unconscionable,[260] the court found that under the facts, the contingency fee agreement was enforceable and not excessive.[261] As such, it simply could not conclude that there was a "glaring and flagrant disparity between the fee paid by [the client] and the value of the services received."[262] The court held that there was no evidence that the attorney's arguably negligent conduct was deceptive.[263]

Likewise, in *Kahlig v. Boyd*,[264] despite some fairly egregious facts relating to the attorney's conduct, the court found that there was no viable claim under the DTPA for either misrepresentations or unconscionable conduct.[265] The plaintiff urged that early in the representation, the attorney had told him he would "handle the case to the 'best of [his] ability' and he would 'be the best that [he]

259. *Id.* at 500. The court noted a number of things that the attorney failed to do, which could have better protected the client's rights, thus finding sufficient evidence to support the negligence verdict. *Id.* at 495.

260. *Id.* at 497. The attorney's own records showed that under the contingency fee arrangement, he made over $750 per hour on the case, when expert testimony established that $125 per hour would have been a reasonable fee. *Id.*

261. *Id.* Contingency fees are seldom justified in divorce actions, but they may be appropriate in a situation where a common law marriage is disputed. This is because if the marriage is not proved, the plaintiff may recover nothing, which distinguishes it from a ceremonial marriage wherein each party will obtain some type of recovery. *Id.* Likewise, the court found that a one-third contingent fee contract is not excessive. *Id.* (citing Kuhn, Collins & Rash v. Reynolds, 614 S.W.2d 854, 857 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e.)).

262. *Id.* (noting a disparity between the value of services and fees paid). *But see* Coatney, Sprague & Wachsmuth v. Klepak, No. 04-95-00495-CV, 1996 WL 628570, at *10 (Tex. App.—San Antonio Oct. 31, 1996, no writ) (not designated for publication) (finding unconscionable conduct partially based on the firm's charging of legal fees in an amount almost equal to the estimated value of the case after five weeks of work and before any documents had been finalized and filed).

263. *See Ballesteros*, 985 S.W.2d at 500 (finding no evidence of deception).

264. 980 S.W.2d 685 (Tex. App.—San Antonio 1998, pet. denied).

265. Kahlig v. Boyd, 980 S.W.2d 685, 687 (Tex. App.—San Antonio 1998, pet. denied). As stated by the court in its preface in *Kahlig*, "[t]he facts of this case sadly unfold like a classic 'bad lawyer joke' and confirm what we as attorneys fear the most: that perceived truths about our profession often expressed in hyperbole can find support in reality." *Id.* In essence, while representing the husband in a child custody matter from a previous marriage, the attorney had an affair with his client's wife, which was not disclosed for over two years. *Id.* At the trial of the underlying custody case, the client's request for custody was denied, and attorney's fees were awarded against him. *Id.*

could be.'"[266] The attorney also allegedly made representations to his client regarding the strength of his case, specifically, that "there was absolutely no problem getting custody, the case would be a 'slam dunk,' and just a formality."[267] At trial, the client urged that: (1) "the concealment of the affair [was] a false, misleading, or deceptive act that was designed to induce [him] to continue in their attorney-client relationship"; and (2) the attorney's acts were unconscionable by "stating that the case was a 'slam dunk,' encouraging him to proceed to trial, not disclosing the uncertainty of the outcome, or the possibility that he could be ordered to pay his ex-wife's attorney's fees, and in failing to disclose the affair."[268] The court, however, found that the first complaint was effectively a claim that the affair had affected the quality of representation, which was only a legal malpractice claim.[269] Finally, the court concluded that given the facts of the custody dispute, the attorney's "conduct did not result in unfairness that was glaringly noticeable, flagrant, complete, and unmitigated."[270] Thus, despite condemning the attorney's conduct, the court found no viable cause of action under the DTPA.[271]

The *Kahlig* court's decision on the nature of the attorney's "puffing" regarding the merits of the case presaged the court's later decision in *Douglas v. Delp*,[272] where the court held that an attorney's statement indicating that an agreement "protected the client's interests" was not specific enough to be actionable under the

266. *Id.* at 687.

267. *Id.*

268. *Id.* at 690.

269. *Id.*

270. *Kahlig*, 980 S.W.2d at 690 (citing Chastain v. Koonce, 700 S.W.2d 579, 584 (Tex. 1985)). As the case was the client's third attempt to modify the custody arrangements, the court concluded that the client could not have been "totally unaware of the inherent uncertainties in such litigation," despite the attorney's assurances of success. *Id.* at 691.

271. *Id.* at 691.

272. 987 S.W.2d 879 (Tex. 1999).

DTPA.[273] Instead, the court concluded that such a statement was nothing more than a nonactionable opinion.[274]

One of the most difficult cases to square with the post-*Latham* reasoning is *Mazuca v. Schumann,*[275] an en banc decision of the Fourth District Court of Appeals.[276] In *Mazuca*, the underlying plaintiff had been involved in an auto accident in Arizona.[277] The plaintiff hired the lawyer, who originally filed suit in Webb County against both the defendant driver and the plaintiff's uninsured/underinsured motorist carrier.[278] No service was ever accomplished on the defendant driver, and to avoid a threat of removal to federal court made by the plaintiff's uninsured/underinsured carrier, the attorney agreed to transfer the case to Bexar County.[279] Approximately three months before the statute of limitations was to run, the lawyer filed a notice of nonsuit without prejudice in Webb County as to the defendant driver, using boilerplate language that the plaintiff does not desire to prosecute this matter further.[280] Settlement negotiations were fruitless, and the statute of limitations ran against the defendant driver without suit having been refiled in Texas.[281]

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273. Douglas v. Delp, 987 S.W.2d 879, 886 (Tex. 1999) (noting that general claims regarding the sufficiency of insurance coverage are not usually actionable under the DTPA (citing State Farm County Mut. Ins. Co. v. Moran, 809 S.W.2d 613, 621 (Tex. App.—Corpus Christi 1991, writ denied))); Employers Cas. Co. v. Fambro, 694 S.W.2d 449, 452 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (holding the insurer not responsible for misrepresentation based on the statement that the policy was "adequate" or "sufficient"); *see also* Humble Nat'l Bank v. DCV, Inc., 933 S.W.2d 224, 229-30 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (providing elements to be taken into account in deciding whether a statement is mere "puffing" or opinion and therefore not actionable).

274. *Douglas*, 987 S.W.2d at 886; *see also* Pennington v. Singleton, 606 S.W.2d 682, 687 (Tex. 1980) (stating that mere "puffing" or opinion is not actionable); *Humble Nat'l Bank*, 933 S.W.2d at 230 (noting a "vague representation constitutes a mere opinion"); Francisco v. Foret, No. 05-01-00783-CV, 2002 WL 535455, at *5 (Tex. App.—Dallas Apr. 11, 2002, pet. denied) (not designated for publication) (concluding that certain statements such as having "a lot of experience" and having a "90% chance of winning" are too general for liability to attach).

275. 82 S.W.3d 90 (Tex. App.—San Antonio 2002, pet. denied).

276. Mazuca v. Schumann, 82 S.W.3d 90, 92 (Tex. App.—San Antonio 2002, pet. denied).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Mazuca*, 82 S.W.3d at 93. Arizona has a "savings provision" that will permit filing of a suit beyond the two-year statute of limitations. *Id.* Arizona counsel later

Three years after the accident, the attorney also filed a motion to nonsuit Schumann's claim against the uninsured/underinsured carrier.[282] Eleven months later, after the plaintiff had hired other counsel, the defendant lawyer wrote to the plaintiff to inform him that the statute of limitations was about to run, and that he had only limited time to refile his claim against the carrier.[283] The plaintiff, however, did not refile against the carrier.[284] Instead, the client brought suit against the attorney for DTPA violations, breach of warranty, negligence, and gross negligence arising from the failure to timely file suit in Texas against the defendant driver.[285] The jury ultimately found for the client on all claims, including a $90,000 judgment under the DTPA, plus attorney's fees, and the attorney appealed.[286]

The court of appeals had no trouble concluding that the attorney had committed malpractice by failing to file suit in a timely fashion.[287] The court noted, however, that while that mistake was the proximate cause of the plaintiff's damages and met the elements of negligence, "there is no evidence of the deceptive conduct required under *Latham*."[288] The client argued that there had been a misrepresentation to the trial court as a part of the nonsuit, as he had never even known about the nonsuit, and had never wanted to cease prosecuting his claim—the court of appeals agreed that the statement to the court was untrue, but concluded that it was not a misrepresentation of material fact as it "had no legal effect."[289]

Specifically, as the nonsuit was taken without prejudice, the words did not prevent the attorney from refiling the suit in the ap-

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brought suit against the defendant driver, but the suit was ultimately dismissed under Arizona law due to the voluntary nonsuit that had been filed in Webb County. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Mazuca*, 82 S.W.3d at 93.

287. *Id.* at 94. The court stated that "[the lawyer] was clearly negligent. Whether he acted unconscionably is less certain." *Id.*

288. *Id.* at 95 (citing Latham v. Castillo, 972 S.W.2d 66, 69 (Tex. App.—San Antonio 1998, pet. denied)); *see also* Ballesteros v. Jones, 985 S.W.2d 485, 498 (Tex. App.—San Antonio 1998, pet. denied) (explaining that the conduct in this case did not exceed negligence).

289. *Mazuca,* 82 S.W.3d at 95 (finding that under the DTPA, misrepresentation must be one of material fact (citing Church & Dwight Co. v. Huey, 961 S.W.2d 560, 567 (Tex. App.—San Antonio 1997, pet. denied))).

propriate venue.[290] Moreover, there was no misrepresentation to the plaintiff, as he was completely unaware that it had been made and did not act or fail to act because of it.[291] The court concluded that "[m]aking an affirmative representation regarding the status of a lawsuit is deception," but the attorney "made no misrepresentations, only bad judgments."[292] As the attorney's silence amounted to "nothing more than potentially negligent omissions," there was no affirmative deception as required by the DTPA.[293]

While the ultimate decision in *Mazuca* appears correct, it is difficult to harmonize the rationale used with that in *Latham*.[294] Specifically, the court in *Latham* found that it was unconscionable and a violation of the DTPA to tell the client something about the status of litigation that was not true.[295] The *Mazuca* court found that the *failure* to tell a client something about the status of litigation is not a violation of the DTPA or unconscionable conduct.[296] Given the duty of an attorney to keep the client informed about important changes in the status of a case, it is difficult to see the distinction between "affirmative deception" and what is arguably "deception by omission." While the attorney in *Mazuca* did nothing wrong in filing the nonsuit,[297] his decision was no different conceptually than that of the attorney in *Latham* in failing to file the

290. *See id.* (stating that "[t]he suit could have been filed again the next day").

291. *See id.* (explaining that the plaintiff did not change his position as a result of the statement).

292. *Id.* at 96.

293. *Id.* The court also found that the attorney's conduct had not been unconscionable, as the filing of a nonsuit with sufficient time remaining under the statute of limitations to refile the case in a more appropriate venue does not equate to an unconscionable act. *Id.* at 94. Unconscionability requires a showing that the "resulting unfairness was 'glaringly noticeable, flagrant, complete, and unmitigated,'" and while he ultimately made a mistake in failing to refile the suit, this did not meet the requirements of *Chastain*. *Id.* (citing Chastain v. Koonce, 700 S.W.2d 579, 584 (Tex. 1985)).

294. *Compare Mazuca*, 82 S.W.3d at 96 (holding that the attorney's silence does not fall within the affirmative deception required by the DTPA), *with* Latham v. Castillo, 972 S.W.2d 66, 68 (Tex. 1998) (suggesting that an affirmative representation by the attorney is a violation of the DTPA).

295. *Latham*, 972 S.W.2d at 68 (finding that "[a]ttorneys can be found to have engaged in unconscionable conduct by the way they represent their clients").

296. *Mazuca*, 82 S.W.3d at 96 (identifying that silence is not an affirmative deception).

297. *Id.* at 94 (determining that the attorney's actions did not fit the definition of unconscionability).

suit in the first place,[298] and both led to the identical result for the client (no suit being filed).[299] Under the reasoning of *Mazuca,* the attorney is presumably advised to keep his mouth firmly shut in order to avoid DTPA liability, which is inapposite to the underlying duties of an attorney to his client.[300]

C. *Producing Cause of Actual Damages to the Client in an Attorney-Client Relationship*

As noted above, the third element of a DTPA claim against an attorney is that the attorney's act was the "producing cause" of actual damages to the client.[301] Under the current version of Section 17.50 of the DTPA, one who qualifies as a consumer can recover "economic damage" or "damages for mental anguish" caused by deceptive or unconscionable actions by an attorney.[302] Section 17.50(b)(1) provides that the consumer is potentially entitled to recover (1) economic damages; (2) mental anguish damages of up to three times the economic damages, if the DTPA violation is found to have been committed "knowingly"; and (3) three times the amount of economic and mental anguish damages if the DTPA violation is found to have been committed "intentionally."[303]

The "producing cause" of economic or mental anguish damages for purposes of a DTPA claim against an attorney is an "efficient, exciting, or contributing cause, which in natural sequence, produced injuries or damages."[304] Neither reliance nor foreseeability

298. *Latham*, 972 S.W.2d at 68 (confirming that the attorney never filed suit and the limitations period expired).

299. *See id.* (pointing out that the clients lost the opportunity to pursue their claim); *see also Mazuca*, 82 S.W.3d at 95 (announcing that the attorney's mistake cost the client the ability to file suit).

300. *Mazuca*, 82 S.W.3d at 96. One might even conclude that in remaining silent in order to avoid DTPA liability, the attorney would necessarily breach his fiduciary duty to the client, and be liable for the "enhanced" damages available in a breach of fiduciary duty suit for what would otherwise be simple negligent conduct, thus leaving the attorney potentially ruined no matter what he does.

301. Hall v. Stephenson, 919 S.W.2d 454, 468 (Tex. App.—Fort Worth 1996, writ denied).

302. TEX. BUS. & COM. CODE ANN. § 17.50 (a) (Vernon 2002).

303. *See id.* § 17.50(b)(1) (listing that the consumer can possibly recover economic damages as well as mental anguish damages); *see also id.* § 17.50(d) (expressing that a successful consumer would also be able to recover "costs and reasonable and necessary attorneys' fees").

304. *Hall*, 919 S.W.2d at 468.

is required, but some causal connection must be shown between the deceptive act and the actual damages suffered.[305] "Producing cause is not established if the defendant's conduct does no more than provide conditions that make the plaintiff's injury possible."[306]

One case that appears to show the distinction between legal causation and foreseeability in the lawyer-client context is *Roberts v. Healey*.[307] There, the client had retained the lawyer to file a divorce petition and obtain a restraining order against her estranged husband.[308] The attorney filed the petition and requested the restraining order, but never sought a hearing and did not obtain a judge's signature on the restraining order despite numerous requests from the client.[309] The client reported her husband's increasingly erratic behavior and drug use, including bringing the attorney evidence of his harassing and stalking activities and a suicide attempt, but the attorney still took no action to obtain the protective order.[310] The husband thereafter kidnapped the client, shot and killed their two children, then committed suicide.[311] The client and her mother[312] brought suit against the attorney for negligence and violation of the DTPA for failing to obtain the restraining order.[313] The trial court granted summary judgment to the attorney, and the client appealed.[314] In affirming the judgment, the court of appeals examined the general rules regarding proximate cause and found that, even viewing the evidence favorably to the client, the failure to obtain the protective order did "no more than create the condition (absence of a protective order) that ena-

305. *Id.; see also* Van Polen v. Wisch, 23 S.W.3d 510, 515 n.3 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (asserting that common to both malpractice and DTPA tests of causation against attorneys "is the element of 'cause in fact,'" which "means that the defendant's conduct was a substantial factor in bringing about the injury which would not otherwise have occurred").

306. *Hall*, 919 S.W.2d at 468.

307. 991 S.W.2d 873 (Tex. App.—Houston [14th] Dist. 1999, pet. denied).

308. Roberts v. Healey, 991 S.W.2d 873, 876 (Tex. App.—Houston [14th] Dist. 1999, pet. denied).

309. *Id.*

310. *Id.* at 877.

311. *Id.*

312. The client's mother had been the source of money for the lawyer's initial retainer, and was also wounded in the husband's final rampage. *Id.*

313. *Roberts*, 991 S.W.2d at 877.

314. *Id.*

bled [the husband] to kill [the client's] children and wound her mother."[315] The court recognized that the attorney might reasonably have foreseen the attack because of the numerous threats, but such foreseeability was immaterial in the absence of legal causation, and the attorney's failure to obtain the protective order was simply "too attenuated" from the criminal acts for it to be a legal cause of the client's injuries under either negligence or the DTPA.[316] Thus, where a client was unable to show that her divorce settlement should have turned out more favorably than it actually did, both her negligence and DTPA claims failed as a matter of law.[317]

Similarly, the client in *Mackie v. McKenzie*[318] was found to have suffered no damages as a result of the failure of her will contest, as she was found to have ultimately collected more under a settlement agreement than she would have received had she succeeded in the will contest.[319] In *Haynes & Boone v. Bowser Bouldin, Ltd.*,[320] a firm was also found not to have been the proximate cause of its client's alleged damages when the client could not show that the foreclosure of the client's interest was causally related to the law firm's unsuccessful defense of certain litigation.[321] Of course,

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315. *Id.* at 879 (citing Holder v. Mellon Mortgage Co., 954 S.W.2d 786, 801 (Tex. App.—Houston [14th Dist.] 1997), *rev'd on other grounds*, 5 S.W.3d 654 (Tex. 1999)).

316. *Id.* at 879-80.

317. *See* Hall v. Stephenson, 919 S.W.2d 454, 466 (Tex. App.—Fort Worth 1996, writ denied) (noting that the plaintiff demonstrated no evidence that the attorneys' alleged failure to aggressively pursue disclosure of assets harmed her); *see also* Anderson v. Snider, 809 S.W.2d 505, 508 (Tex. App.—Amarillo 1990), *rev'd on other grounds*, 808 S.W.2d 54 (Tex. 1991) (stating that a client could not maintain a DTPA action against an attorney based on his representation leading to the entry of a divorce decree as the evidence did not indicate that a ruling or order by the trial judge would have been meaningfully different but for the actions or inactions of the attorney).

318. 900 S.W.2d 445, 451 (Tex. App.—Texarkana 1995, writ denied).

319. *See* Mackie v. McKenzie, 900 S.W.2d 445, 451 (Tex. App.—Texarkana 1995, writ denied) (arguing that "[i]f McKenzie [and] Baer had successfully pursued Mackie's will contest and had the 1984 will been set aside and the 1980 will probated, Mackie's inheritance would have been reduced to $50,000 plus some personal items"); *see also* Peeler v. Hughes & Luce, 868 S.W.2d 823, 831-32 (Tex. App.—Dallas 1993) (holding that a convicted criminal defendant cannot maintain a DTPA action against the former attorney unless he obtains post-conviction relief and establishes his innocence; otherwise, the attorney's malfeasance cannot be a "producing cause" of the defendant's conviction within the meaning of the DTPA), *aff'd*, 909 S.W.2d 494 (Tex. 1994).

320. 896 S.W.2d 179 (Tex. 1995).

321. *See* Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 182 (Tex. 1995) (noting that there was no evidence that the bank had foreclosed on the client developer's

the courts have had no problem concluding that proximate cause exists when the plaintiff is able to show that damages are a direct consequence of the attorney's actions or inactions.[322]

IV. CONCLUSION

Clients can bring claims against their attorneys through several different causes of action, including negligence, breach of contract, breach of fiduciary duty, and violations of the DTPA. Although Texas law does not permit a plaintiff to divide or fracture legal malpractice claims into additional causes of action, Texas courts have had some difficulty in distinguishing between acts that are simply negligence, and those which involve something "more." Some of the recent cases are attempting to provide a better "bright line" test as to when an attorney was simply negligent, versus when the attorney breached a fiduciary duty or acted unconscionably, but the line is still not at all clear. Texas practitioners should be aware of this shifting line, as well as the most recent cases, so that *if* their conduct somehow falls short of the negligence standard of care, they do not stray into the much more dangerous ground set up by cases such as *Burrow* and *Latham.* In this day of lawyer-bashing, the last thing the practicing lawyer needs is to increase his own potential liability to a point that may far exceed even the client's wildest expectations regarding the underlying litigation.

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interests because of the law firm's unsuccessful defense of a claim against the anchor tenant of the developer's property). The evidence showed that the loss of the anchor tenant was "not the same thing as the loss of the suit," and the client's problems with refinancing were not caused by the firm's handling of the litigation, or its ultimate loss. *Id.*; *see also* Lowe v. De La Garza, No. 01-01-01153-CV, 2003 WL 1945379, at *4 (Tex. App.—Houston [1st Dist.] Apr. 24, 2003, no pet.) (not designated for publication) (recognizing that the plaintiff could show no damages against the attorney under DTPA because she had expressly agreed to settle her divorce proceeding against the attorney's advice).

322. *See, e.g.*, Streber v. Hunter, 221 F.3d 701, 734-35 (5th Cir. 2000) (stating that a client who brought a successful DTPA action against her former tax attorneys could recover the difference between the interest earned by the client on the amounts subject to the tax dispute as interest differential damages were required to make the client whole under Texas law); DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Civ. App.—Houston [1st Dist.] 1980) (explaining that the plaintiff showed entitlement to damages, including a "knowing" violation of the DTPA, for attorney's failure to effectuate a name change), *aff'd*, 612 S.W.2d 924 (Tex. 1981) (per curiam).