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UNRESOLVED PROBLEMS IN TEXAS LEGAL MALPRACTICE LAW

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I. INTRODUCTION

This Article analyzes current unresolved issues in Texas legal malpractice law and looks at how other jurisdictions have resolved some of these issues. First, we address the various open questions raised by the "suit within the suit" requirement for causation in litigation malpractice cases in light of the recent Texas Supreme Court opinion in *Alexander v. Turtur & Associates, Inc.*[1] One important question raised by *Alexander* is whether and in what circumstances causation should be treated as a question of law for the trial judge in the malpractice case, rather than as a question for the jury. Next, we analyze the state of the law on settlement value damages and the requirement for expert testimony on the issue of causation. Finally, we consider the evolving nature of the causes of action being asserted in legal malpractice cases and potential areas for attorney liability and discipline in the wake of the recent corporate accounting scandals.

II. CAUSATION IN LITIGATION MALPRACTICE CASES

Regardless of the legal theory on which liability is claimed, causation is an essential element of a legal malpractice case.[2] How this element is submitted to the jury is still in many instances an open question. How this element is proven at trial when the underlying claim arises out of a litigation matter was the subject of a recent Texas Supreme Court opinion, *Alexander v. Turtur & Associates, Inc.* The *Alexander* opinion suggests that both the jury submission issues and the evidentiary requirements are in flux.[3]

A. *Submitting Causation in Legal Malpractice Cases*

A legal malpractice action in Texas is traditionally based on professional negligence.[4] The elements of a legal malpractice claim

1. 146 S.W.3d 113 (Tex. 2004).
2. *See infra* Part IV.A.
3. Alexander v. Turtur & Assocs., 146 S.W.3d 113, 118, 119-20 (Tex. 2004).
4. *See* Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996) (identifying that "a legal malpractice action sounds in tort and is governed by negligence principles").

are as follows: (1) there is a duty owed by the attorney to the client; (2) that duty was breached; (3) the breach proximately caused the client's injury; and (4) damages resulted.[5] Proximate cause requires proof of cause-in-fact,[6] which requires the client to prove that the client would have prevailed in the underlying case but for the negligent conduct of the attorney.

When the underlying case arises out of a litigation matter, the causation element requires "the client . . . to prove that he or she would have been successful in prosecuting or defending the underlying action, if not for the attorney's negligence or other improper conduct."[7] Thus, a successful legal malpractice action requires that the plaintiff show she would have prevailed in the underlying suit but for the counsel's negligence.[8] This requirement means the plaintiff must conduct a trial within a trial in which both the malpractice claim and the underlying claims are tried to the same jury.[9]

1. Starting Point: *Cosgrove v. Grimes*

In the leading case of *Cosgrove v. Grimes*,[10] the Texas Supreme Court first recognized (a) the necessity of submitting and proving the "case within the case" in order to meet the cause-in-fact element of proximate and producing cause, and (b) the necessity for the jury to find a causal link between the attorney's negligence in handling the underlying case and the plaintiff/client's loss.[11]

The underlying case in *Cosgrove* was a personal injury claim arising out of an automobile collision.[12] Attorney Grimes filed suit against the passenger rather than the driver of the car that hit Cos-

5. Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989).

6. *Alexander*, 146 S.W.3d at 117.

7. Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial — A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 MARQ. L. REV. 40, 41 (1989).

8. Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied).

9. *Id.*; *see also* Gibson v. Johnson, 414 S.W.2d 235, 238-39 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.) (stating the defendants were entitled to stand just where the defendant in the underlying suit would have stood and to have before the jury every fact that might tend to mitigate damages).

10. 774 S.W.2d 662 (Tex. 1989).

11. *See Cosgrove*, 774 S.W.2d at 664-66 (outlining the analysis used in an attorney malpractice action).

12. *Id.*

grove.[13] By the time the mistake was discovered, limitations had run.[14]

At trial in the legal malpractice case, the jury in *Cosgrove* answered questions covering the negligence and proximate cause elements of the underlying negligence case against the driver.[15] The jury also answered Special Issue No. 7, which covered the damages element of the underlying case, submitted as follows:

> Find from a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Frank Cosgrove for his loss, if any, resulting from the occurrence in question?
>
> . . . .
>
> You are instructed that you shall award the sum, if any, that Frank Cosgrove *would have in reasonable probability* recovered *as a result of the . . . collision.*[16]

The jury also answered a negligence question concerning the attorney/defendant's "prosecution of the lawsuit arising from the . . . collision."[17] The causation element linking the attorney's negligence and the outcome of the underlying case was submitted to the jury as part of the damages question for the legal malpractice claim: "Find from a preponderance of the evidence the amount of damages you found in Special Issue No. 7 [relating to the underlying negligence claim] that Frank Cosgrove *would have in reasonable probability collected from [the driver] as a result of the collision.*"[18] The Texas Supreme Court in *Cosgrove* stated that both of these proximate cause/damages questions should have been modified to inquire "as to the amount of damages recoverable and collectible from [the driver] *if the suit had been properly prosecuted.*"[19] Not being prescient, however, the attorney/defendant did not object at trial to this particular omission, so the court held it was waived.[20]

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13. *Id.*
14. *Id.*
15. *Id.*
16. Cosgrove v. Grimes, 774 S.W.2d 662, 665 n.3 (Tex. 1989) (emphasis added).
17. *Id.*
18. *Id.* (emphasis added).
19. *Id.* at 666.
20. *Id.*

2. The Texas Pattern Jury Charge Follows *Cosgrove*

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

a. Negligence/Proximate Cause

"Did the negligence, if any, of [Attorney/Defendant] proximately cause the . . . [*occurrence or injury*] in question?"[21]

> "Negligence," when used with respect to the conduct of [the Attorney/Defendant], means failure to use ordinary care, that is, failing to do that which an [attorney] of ordinary prudence would have done under the same or similar circumstances or doing that which an [attorney] of ordinary prudence would not have done under the same or similar circumstances.
> "Ordinary care," when used with respect to the conduct of [the Attorney/Defendant] means that degree of care that *an* [attorney] *of ordinary prudence could*[22] use under the same or similar circumstances.
> "Proximate cause," when used with respect to the conduct of [the Attorney/Defendant], means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that an [attorney] using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.[23]

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21. 3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 61.4 (2d ed. 2003); *see also* 3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 61.1 (2d ed. 2003) (discussing when to use "occurrence" or "injury," which is another thorny question in a legal malpractice case arising out of an underlying litigation matter, as discussed *infra*).

22. In legal malpractice cases, the PJC provides that the word "could" should be substituted for the word "would" in this instruction, based on language in *Cosgrove.* 3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 60.1 cmt. B (2d ed. 2003).

23. 3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 60.1 (2d ed. 2003); *see also* 3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 60.1 cmt. (2d ed. 2003) (discussing considerations specific to legal malpractice cases).

b. Damages

The PJC includes the specific language suggested by the supreme court in *Cosgrove* in a suggested instruction to the damages question, for a legal malpractice case involving a "failure to file or prosecute a suit in which a damages question would have been proper":[24]

> What sum of money, if paid now in cash, would fairly and reasonably compensate [plaintiff/client] for *his* loss, if any, resulting from the occurrence in question?[25]
>
> You shall award the sum, if any, that [plaintiff/client] would have recovered and collected if [plaintiff's] original suit against [the underlying defendant] had been properly prosecuted.[26]

c. Elements of Underlying Case

The PJC commentary to the negligence/proximate cause question confirms that the cause-in-fact element requires the plaintiff to prove that the attorney/defendant's negligence caused the loss, which means that the plaintiff "is required to try two suits in one—a 'suit within a suit.'"[27] The comment further clarifies that the plaintiff must prove in the legal malpractice case the elements of the underlying cause of action that the plaintiff claims to have lost due to the attorney's negligence.[28] One way to accomplish this result is for the jury charge in the legal malpractice case to include questions on the elements of the plaintiff's causes of action (or defenses) in the underlying case, in addition to questions on the elements of the legal malpractice claim(s). As discussed above, the jury charge in *Cosgrove* took this form.

Thus, the form of the jury charge in a legal malpractice case like *Cosgrove*—one in which the client was the plaintiff in an underlying case and suffered an adverse result in that case due to the negligence of the attorney in prosecuting that suit—is fairly well-defined by the Texas Pattern Jury Charge, which incorporates the

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24. 3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 84.2 cmt. (2d ed. 2003).

25. *Id.*

26. *Id.*

27. 3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 61.4 cmt. (2d ed. 2003).

28. *Id.*

guidance provided in the *Cosgrove* opinion. In other situations, however, the PJC does not provide clear guidance as to the form of the charge.

3. Submitting the "Case Within the Case" Element to the Jury in Non-*Cosgrove* Cases

One threshold question is whether causation in the legal malpractice case is a question of fact for the jury or a question of law for the judge. *Cosgrove* did not address this question, because causation turned on a comparison of the jury findings on the elements of a negligence cause of action—an inquiry traditionally assigned to a jury. The key question is whether causation turns on the outcome of the jury verdict in the underlying case. If so, then causation in the legal malpractice case is a proper subject for the jury to determine. In such instances, the *Cosgrove*/PJC model can be modified to fit cases where the client was the defendant in the underlying case[29] or cases where both sides assert affirmative claims for relief, as in *Alexander*.

If, however, causation turns on the outcome of a legal decision by the judge in the underlying case or if the factfinder in the underlying case was a judge and not a jury, then the question may not be one properly assigned to a jury. Instead, causation may be a question of law for the trial judge in the legal malpractice case.[30] For example, if the underlying case was determined by a judgment adverse to the client and the entry of judgment required legal determinations by the trial judge, then whether the attorney's negligence caused the adverse outcome requires a determination of what the judge's legal determination would have been but for the attorney's negligence. Arguably, this is not a proper subject for the jury. At a minimum, *Alexander v. Turtur* tells us that the jury cannot decide this question without the guidance of expert testimony.

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29. *But see* Rhodes v. Batilla, 848 S.W.2d 833, 841 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (refusing to find error in the trial court's charge, which did not follow *Cosgrove*, on the basis that the attorney has failed to properly defend, rather than prosecute, the underlying administrative proceeding).

30. *See* Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc., 48 S.W.3d 865, 875 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (stating that "proximate cause is usually a question of fact in a legal malpractice action, [however] it may be determined as a matter of law if . . . reasonable minds could not arrive at a different conclusion").

a. *Alexander v. Turtur*: Underlying Case Was a Bench Trial

In *Alexander*, the legal malpractice claim arose out of an adverse outcome in a bench trial.[31] The underlying case in *Alexander* was a business contract dispute in which both sides had claims.[32] The case was tried as an adversary proceeding to a federal bankruptcy judge, who limited the time available to thirty hours for each side.[33] The bankruptcy judge entered a judgment unfavorable to the Turturs, denying them relief on their affirmative claims and granting the other party relief on its claims against the Turturs.[34] After this judgment, the underlying case was settled for less than the full amount of the judgment.[35]

The Turturs then sued their attorneys.[36] Their central allegation was that they hired Alexander, an experienced trial lawyer, who negligently turned the case over to an inexperienced associate who ended up trying the case when she was unprepared to do so.[37] Thus, the causation question in the legal malpractice case required the *jury* to find whether a *bankruptcy judge* would have entered a "more favorable" judgment but for the attorney's negligence.[38] The supreme court opinion describes the jury question on causation as follows: "the jury was asked to decide *a complicated and very subjective causation issue*: whether, in reasonable probability, a bankruptcy judge would have decided the underlying adversary proceeding differently if Alexander had personally tried the case or if he or [his associate] had introduced other evidence."[39] Apparently, this single, global question was intended to cover the "case within the case," rather than separate questions on each of the elements of the underlying causes of action, perhaps because the underlying fact-finder was a judge and not a jury. The jury in the malpractice case answered "yes" to this question, without any ex-

31. Alexander v. Turtur & Assocs., 146 S.W.3d 113, 116 (Tex. 2004).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Alexander*, 146 S.W.3d at 116.
37. *Id.* at 116-17.
38. *Id.* at 118.
39. *Id.* at 118 (emphasis added).

pert testimony regarding causation.[40] The trial judge in the malpractice case rendered judgment notwithstanding the verdict on the basis that there was no evidence of causation.[41]

On appeal, Alexander's attorneys asserted the lack of expert testimony as the primary basis for upholding the trial court's judgment notwithstanding the verdict.[42] Neither party asserted any defect in the jury charge. Without separate jury questions and instructions on the elements of the underlying causes of action, however, it seems the jury would be speculating, even based on expert testimony, about whether the evidence that was not presented would have changed the outcome in the underlying case.[43]

b. When Is Causation a Question of Law?

The Texas Supreme Court held in *Millhouse v. Wiesenthal*[44] that causation in an appellate malpractice case, which turns on the outcome of an appeal in the underlying case, is a question of law for the trial judge.[45] Other jurisdictions have likewise determined that if causation requires a determination of the outcome of an appeal in the underlying case, but for the attorney's negligence, the question is one of law for the trial court in the legal malpractice case and should not be submitted to the jury.[46]

Similarly, in *Smith v. Heard*,[47] the court rejected the plaintiffs' contention that the attorney had negligently failed to challenge the trial court's calculation of damages, as the trial court's calculation was valid and would not have been error even if the attorney had

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40. *Id.* at 117.

41. Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004).

42. *Id.* at 118.

43. *See id.* at 122 (Hecht, J., concurring) (expressing "doubt whether a jury could ever be fairly expected to determine, even *with* expert testimony, what a judge would have decided in such hypothetical circumstances").

44. 775 S.W.2d 626 (Tex. 1989).

45. Millhouse v. Wiesenthal, 775 S.W.2d 626, 628 (Tex. 1989).

46. *See id.* at 627-28 (citing cases from many other jurisdictions); *see also* Steeves v. Bernstein, Shur, Sawyer & Nelson, P.C., 718 A.2d 186, 190-91 n.10 (Me. 1998) (citing cases from various states); Bloustine v. Fagin, 928 P.2d 964, 965 (Okla. Ct. App. 1996) (holding that trial court's determination of whether the plaintiff/client's appeal in the underlying case would have been successful must be made prior to submitting the issues of negligence and damages to the jury in the legal malpractice case).

47. 980 S.W.2d 693 (Tex. App.—San Antonio 1998, pet. denied).

properly appealed.[48] Additionally, the *Smith* court relied on the underlying appellate court's statement that the certification of the defendant's expert witness was "patently immaterial."[49] Thus, the court concluded that any failure of the attorney to pursue this avenue of appeal could not have damaged the plaintiff, thereby barring a malpractice claim on this issue.[50]

The court in *Millhouse* based its decision on the following reasoning:

> The question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules. . . . A judge is clearly in a better position [than a jury] to make this determination. Resolving legal issues on appeal is an area exclusively within the province of judges; a court is qualified in a way a jury is not to determine the merits and probable outcome of an appeal.[51]

Following the logic of *Millhouse*, causation may also be a question of law if the causation issue turns on the outcome of a legal decision made by the trial judge in the underlying case.[52] The same holds true if the underlying matter was an administrative proceeding determined by an administrative decisionmaker, who often has specialized knowledge applicable to making the specific administrative decision involved.[53]

Another instance where causation may be a question of law is when causation in the legal malpractice case turns on the same issues determined by the judgment in the underlying case—in essence the plaintiff/client is attempting through the legal

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48. *See* Smith v. Heard, 980 S.W.2d 693, 696 (Tex. App.—San Antonio 1998, pet. denied) (noting that the court's calculations conformed to established precedent).

49. *Id.*

50. *Id.*

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

52. At least one commentator has suggested that in any case where the outcome in the underlying case involved a judicial or administrative decision, the attorney/defendant is entitled to a bench trial on the malpractice claim. Phillip E. Seltzer, *Attorney's Right to a Bench Trial in Malpractice Suits*, 76 MICH. B.J. 1096, 1096 (1997).

53. *See* Marrs v. Kelly, 95 S.W.3d 856, 864-65 (Ky. 2003) (Cooper, J., concurring in part and dissenting in part) (citing the language from *Harline* quoted below and dissenting from the majority's remand of the causation question for trial by jury on the basis that the issue is one for the trial judge when the underlying decisionmaker was an administrative law judge). *But see* Rhodes v. Batilla, 848 S.W.2d 833, 840-41 (Tex. App.—Houston [14th Dist] 1993, writ denied) (rejecting the attorney's argument that negligence and causation were questions of law where the underlying matter was an administrative proceeding before the IRS).

malpractice case to avoid the binding effect of the underlying judgment. In such cases, the plaintiff/client's legal malpractice claim may be barred by the collateral estoppel effect of the underlying judgment. This issue is properly one of law for the trial judge in the legal malpractice case.

For example, in a well-reasoned opinion, the Supreme Court of Utah held in *Harline v. Barker*[54] that when the decisionmaker in the underlying case was, by statute or other rule of law, a judge, causation in the legal malpractice case is a matter of law for the judge and should not be submitted to the jury.[55] Other state courts have held that causation is a proper question for the jury in the legal malpractice case under an objective standard, regardless of whether the factfinder in the underlying case was a judge or a jury.[56] The Utah Supreme Court characterized the analysis in these cases as "superficial," rejecting its application when the underlying decision was the province of a judge and not a jury:

> We see no reason why a malpractice plaintiff should be able to bootstrap his way into having a lay jury decide the merits of the underlying "suit within a suit" when, by statute or other rule of law, only an expert judge could have made the underlying decision. It is illogical, in effect, to make a change in the law's allocation of responsibility between judge and jury in the underlying action when that action is revisited in legal malpractice action and thereby distort the "suit within a suit" analytic model. . . . To so proceed ignores and, in some cases, contradicts the public policy goals which prompted the initial assignment of decision-making authority respectively to judges and to juries on specific issues. There is no basis for abrogating those public policy goals simply because the matter arises in a legal malpractice context.[57]

Thus, the court in *Harline* established the rule "that if the underlying case could only have been tried by a judge, then this aspect of

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54. 912 P.2d 433 (Utah 1996).

55. *See* Harline v. Barker, 912 P.2d 433, 440 (Utah 1996) (overruling the plaintiff's contentions).

56. *See, e.g.*, Phillips v. Clancy, 733 P.2d 300, 306 (Ariz. Ct. App. 1986) (concluding that a jury should decide disputed factual issues); Chocktoot v. Smith, 571 P.2d 1255, 1259 (Or. 1977) (concluding that the issue was one of fact, and thus should be left to the jury); Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118, 134 (Wis. 1985) (holding that the focus is whether the remaining issue is one of fact or of law).

57. *Harline*, 912 P.2d at 440 (citation omitted).

the malpractice claim—the suit within the suit—must likewise be tried by a judge."[58]

In addition, the court held in *Harline* that, under the doctrine of collateral estoppel or issue preclusion, the plaintiff/client did not have the right to have the jury in the legal malpractice case reconsider the same factual issue decided by the bankruptcy court in the underlying case.[59] The key to this holding is that the determination of the issue in the underlying case—whether the client acted with fraudulent intent or innocently relied on incompetent attorneys—was determined by the bankruptcy court in the client's discharge hearing. Thus, the bankruptcy court determined whether the client acted solely in reliance on his attorney's advice in deciding to deny the client's discharge.[60] This issue was the same as the causation issue on the legal malpractice claim and could not be retried in the legal malpractice case. By contrast, the plaintiff/client's malpractice claim against a subsequent attorney was not precluded by the underlying bankruptcy court's decision, because the attorney's negligent conduct was not raised in the bankruptcy proceeding.[61] Thus, the central inquiry in determining if collateral estoppel determines the causation issue in the legal malpractice case is whether the factual inquiry on which causation turns is the same as an issue determined by the trial court in the underlying case. As to this claim, however, the summary judgment evidence submitted by the plaintiff/client demonstrated that the client instructed the attorneys not to take the specific action that the client now complained about.[62] On this basis, the court in *Harline* held there was no causation as a matter of law, based on the following policy grounds: "'We do not believe it would be wise judicial policy to allow one party to create legal liability in another by a voluntary exercise of the complaining party's own personal business judgment not to seek to protect his rights in the legal forums provided him.'"[63]

58. *Id.*
59. *Id.* at 442-44.
60. *Id.* at 443.
61. *Id.* at 444.
62. *Harline*, 912 P.2d at 446.
63. *Id.* at 446 (quoting Horn v. Moberg, 844 P.2d 452, 456 (Wash. Ct. App. 1993)).

B. *Proving Causation in Legal Malpractice Cases*

In *Haynes & Boone v. Bowser Bouldin, Ltd.*,[64] the Texas Supreme Court addressed causation as an evidentiary requirement in a legal malpractice case, holding that "to recover damages, a plaintiff must produce evidence from which the jury may reasonably infer that the damages sued for have resulted from the conduct of the defendant."[65] The *Bowser Bouldin* court further concluded that the causation "requirement is met when a jury is presented with pleading and proof that establish a *direct causal link* between the damages awarded, the actions of the defendant and the injury suffered."[66] While expert testimony on proximate cause may be required to prove some legal malpractice claims, it is not required in cases where lay people will ordinarily be competent to make the decision on causation.[67]

1. Is Cause-in-Fact an Objective or Subjective Inquiry?

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

> Often, "should" and "would" are used interchangeably. There is a difference because the objective of a trial-within-a-trial is to determine what the result *should have* been (an objective standard) not what the result *would have* been by a particular judge or jury (a subjective standard). The phrase "would have" been, however, does have the same meaning as "should have," if the inquiry is what a *reasonable* judge or jury "would have" decided. . . . In any event, what "could have" or "might have" been decided is speculative and is not the standard.[68]

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64. 896 S.W.2d 179 (Tex. 1995).

65. *See* Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 181 (Tex. 1995) (concluding that damages will be viewed in light of a causal nexus test).

66. *Id.* (emphasis added).

67. Streber v. Hunter, 221 F.3d 701, 726-27 (5th Cir. 2000).

68. 5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.8, at 70 (5th ed. 2000) (citations omitted); *see also* Harline v. Barker, 912 P.2d 433, 439-40 (Utah 1996) (citing Mallen & Smith for the proposition that causation in a legal malpractice case should be determined by an objective standard of what should have occurred, rather than a subjective standard of what the particular judge or jury in the underlying case would have done but for the attorney's negligence).

Several Texas cases use the ambiguous "would have been" language.[69] However, no reported Texas case has directly confronted the distinction between an objective standard (what should have occurred or what a reasonable judge or jury would have done) and a subjective standard (what the particular judge or jury in the underlying case would have done).

In *Alexander*, it appears that the jury question on causation was whether the Turturs would have received a more favorable judgment in the adversary proceeding, but for the conduct of the attorneys found negligent.[70] Though the objective/subjective distinction is not discussed explicitly, the question seems to embrace the subjective standard: What would the actual bankruptcy judge have decided if different evidence had been presented and/or a more experienced trial attorney had tried the case? As Justice Hecht points out, the best evidence on this issue is testimony from the trial judge himself.[71] As discussed below, it is unclear whether such evidence is admissible. Other alternatives are expert testimony from lawyers or former judges (who could only give testimony based on an objective standard: What a hypothetical judge would have done, based on the expert's experience) or assigning the determination to the trial judge in the legal malpractice case.[72] The Texas Supreme Court has not yet decided these questions.

One recent Texas court of appeals opinion, however, suggests an objective standard. In *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*,[73] the court held that a malpractice defendant is not limited to the defenses actually raised in the underlying suit, but rather may assert all defenses that should have been raised in the underlying suit in order to disprove causation.[74]

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69. *See, e.g.*, Cosgrove v. Grimes, 774 S.W.2d 662, 665-66 (Tex. 1989) (explaining that the plaintiff must show what she "would have recovered and collected . . . *if the suit had been properly prosecuted*"); Mackie v. McKenzie, 900 S.W.2d 445, 448 (Tex. App.—Texarkana 1995, writ denied) (showing that the client must prove he "would have been successful"); MND Drilling Corp. v. Lloyd, 866 S.W.2d 29, 31 (Tex. App.—Houston [14th Dist.] 1987, no writ) (stating that the client must prove he "would have been successful but for the negligence of his attorney").

70. Alexander v. Turtur & Assocs., 146 S.W.3d 113, 118-19 (Tex. 2004).

71. *Id.* at 122 (Hecht, J., concurring).

72. *Id.*

73. 48 S.W.3d 865 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

74. Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc., 48 S.W.3d 865, 876 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). *But see* Hall v. White, Getgey,

2. How to Prove Causation when the Underlying Case Was a Bench Trial: *Alexander* Raises Questions but Provides Few Answers

The *Alexander v. Turtur* case presents interesting proof issues when the underlying case was tried to a judge. First, the judge in the underlying case, a federal bankruptcy judge, limited trial time to two days. Trial time limits are a common occurrence in both state and federal courts. The supreme court opinion points out that limited trial time requires the attorneys to exercise professional judgment as to what evidence to present and omit and that these "tactical choices" are generally "beyond the ken of most jurors."[75] The court of appeals opinion indicates that the jury in the malpractice case heard a substantial amount of additional evidence not presented in the underlying case, but the opinion does not discuss whether this additional evidence could have been presented in the underlying case, given the time constraints imposed by the trial judge.[76] Is it fair to allow the plaintiff more time for evidence in the legal malpractice case than was available to the attorney in the underlying bench trial? This is an example of when the distinction between a subjective and objective standard of proof makes a difference. If the plaintiff must prove what the outcome would have been under the circumstances of the underlying case, then it seems reasonable that the evidence on the underlying causes of action at trial in the legal malpractice case should be limited to the same amount of time that was available in the underlying case.

Second, the court made clear that negligence and causation are separate evidentiary requirements. Though the Turturs presented ample evidence of negligent conduct, the lack of any evidence establishing causation was a fatal omission. The court's reasoning is instructive: Breach of the standard of care and causation are separate inquiries and an abundance of evidence as to one cannot sub-

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Meyer & Co., 347 F.3d 576, 585-86 (5th Cir. 2003) (distinguishing *Swinehart* on the basis that the underlying defendant in *Hall* waived the defense in question by failing to plead it, a benefit that the plaintiff/client would have realized in the underlying case if the attorney had not been negligent in failing to supplement discovery responses).

75. *Alexander*, 146 S.W.3d at 119.

76. Alexander's petition to the Supreme Court notes that the underlying trial was limited to two days, while the legal malpractice trial lasted 5 weeks. Petitioners' Brief on the Merits at xvi, Alexander v. Turtur, 146 S.W.3d 113 (Tex. 2004) (No. 02-1009).

stitute for a deficiency of evidence as to the other. "Thus, even when negligence is admitted, causation is not presumed."[77]

Third, the court held that expert testimony is required to prove the causal link when the factfinder in the underlying case was a judge and not a jury.[78] The supreme court held in *Alexander* that the jury was left to speculate as to causation without the guidance of any expert testimony and that causation, when the underlying outcome was determined by a judge, is not within the common knowledge of jurors.[79] Justice Hecht's concurrence points out the many questions raised by this holding. For example, who is qualified to testify as to how a hypothetical or the actual bankruptcy judge would have decided the case on a different record? May the trial judge in the underlying case testify as to how that judge would have decided the case but for the attorney's negligence or testify that the attorney's alleged negligence played no role in the judge's decision in the underlying case?[80] In *Alexander,* Justice Hecht expressed reluctance to decide these questions without full briefing of authorities on the issues, but made clear that, in his view, the court was not deciding that the issue of causation was "properly one for the jury."[81]

C. *Proving Causation and Damages Based on Settlement Value*

The general rule in Texas is that when a plaintiff alleges that an attorney was negligent in handling his/her lawsuit, the plaintiff must show that but for the attorney's negligence, he/she would have been entitled to judgment in the underlying case, and to show the amount of that judgment.[82] Clients who were defendants in the

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77. *Alexander*, 146 S.W.3d at 119 (citing Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 181-82 (Tex. 1995)).

78. *Id.* at 119.

79. *Id.* at 120.

80. *Id.* at 122 (Hecht, J., concurring).

81. *Id.* at 123 (Hecht, J., concurring).

82. *See, e.g.*, Greathouse v. McConnell, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding that the plaintiff must prove that he would have prevailed to be entitled to judgment); Hall v. Rutherford, 911 S.W.2d 422, 424 (Tex. App.—San Antonio 1995, writ denied) (holding that the "plaintiff has the burden to prove that but for the attorney's negligence, he or she would be entitled to judgment, and to show what amount would have been recovered in the judgment"); MND Drilling Corp. v. Lloyd, 866 S.W.2d 29, 31 (Tex. App.—Houston [14th Dist.] 1987, no writ) (holding that the burden is on the client to prove that his suit would have been successful). This burden also includes a requirement that the plaintiff show the amount of the judgment that could have

underlying suit must prove that they had a meritorious defense in the case, i.e., one that, if proved, would cause a different result upon retrial of the case.[83] This burden is often referred to as the "suit within a suit" requirement and it contemplates that damages be measured based on the difference between the actual outcome and the outcome that would have resulted had there been no professional negligence.[84] However, several Texas cases have indicated a willingness to at least consider malpractice damages based on "settlement value" when the plaintiff can prove that the settlement amount was altered to the plaintiff's detriment as a result of the attorney's negligence.[85]

This concept of "settlement value" damages raises a number of unresolved issues and potential problems. If such a measure is based on the difference between a reasonable versus actual settlement amount, is that figure not inherently speculative? In the context of plaintiffs, can a showing of decreased settlement value wholly replace the requirement that a plaintiff prove that he/she was entitled to judgment in the underlying suit? On the other hand, does a strict application of the "suit within a suit" rule deny the reality that in many cases a plaintiff is unlikely to win the un-

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actually been collected from the defendant in the underlying litigation. Williams v. Briscoe, 137 S.W.3d 120, 124 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

83. Rice v. Forestier, 415 S.W.2d 711, 713 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).

84. *Greathouse*, 982 S.W.2d at 173 (referring to the plaintiff's burden as the "suit within a suit" requirement).

85. In *Heath v. Herron*, for example, the Fourteenth Court of Appeals upheld a theory of recovery that was based on the altered "settlement value" of the plaintiff's case, rather than the amount of the likely judgment. Heath v. Herron, 732 S.W.2d 748, 753 (Tex. App.—Houston [14th Dist.] 1987, writ denied). Several other recent cases have followed suit. *See* Underkofler v. Vanasek, 53 S.W.3d 343, 346 (Tex. 2001) (finding that a settlement which did not include all defendants did not support a summary judgment on the grounds that the plaintiff had received full satisfaction by setting the original case); Ballesteros v. Jones, 985 S.W.2d 485, 499 (Tex. App.—San Antonio 1999, pet. denied) (stating that a jury instruction on malpractice damages based on a difference in settlement value still must account for collectibility); Stonewall Surplus Lines Ins. Co. v. Drabek, 835 S.W.2d 708, 712 (Tex. App.—Corpus Christi 1992, writ denied) (concluding that a fact issue existed regarding whether the settlement value of the case was affected by the attorney's negligence and resulting sanction). *But see* Hartford Accident & Indemnity Co. v. Texas Hosp. Ins. Exch., No. 03-97-00562, 1998 WL 598125, at *8 (Tex. App.—Austin Sept. 11, 1998, pet. denied) (holding that, when an attorney advises a client to settle following his malpractice, the client's decision to settle the case does not bar recovery of malpractice damages; but when the client refuses to appeal against the attorney's advice, the decision to settle does bar malpractice damages).

derlying suit but the case may still have some settlement value? The Texas cases that have alluded to the possibility of settlement value damages have yet to wrestle with these issues. It therefore remains unclear whether settlement value damages are generally available, whether they are available absent a showing of likely success in the underlying trial, and how they may ever be measured without being too speculative.

Although it may seem that the "settlement value" theory of damages is inconsistent with the "suit within a suit" requirement, the two concepts are not necessarily mutually exclusive, at least with respect to causation. *Heath v. Herron*,[86] which is one of the first Texas cases to recognize settlement value as a possible measure of damages, holds *not only* that damages may be based on "the difference between the value of the settlement handled properly and improperly," *but also* that the malpractice plaintiff must prove that he/she had a meritorious defense in the underlying lawsuit.[87] Thus, the *Heath* holding does not mean that the "suit within a suit" requirement may be replaced by a simple showing of diminished settlement value. Rather, the plaintiff must prove both that he/she had a meritorious defense in the underlying case and the amount of the harm caused by the attorney's negligence, which in *Heath* is based on the altered settlement value rather than the value of the case following trial.[88] *Heath* allows a plaintiff to recover settlement value damages but does not relieve the plaintiff of the burden to prove causation, which is linked to the outcome of the underlying case at trial.[89]

In addition, in *Keck, Mahin & Cate v. National Union Fire Insurance Co.*,[90] the Texas Supreme Court addressed the proper measure of damages in a malpractice case based on allegations of an excessive settlement (i.e., a settlement amount that increased due to a defense attorney's negligence).[91] The court held that damages

86. 732 S.W.2d 748 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

87. Heath v. Herron, 732 S.W.2d 748, 753 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

88. *Id.*

89. *See id.* (requiring proof of a meritorious defense, but allowing recovery based on the settlement value).

90. 20 S.W.3d 692 (Tex. 2000).

91. *See* Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 703 (Tex. 2000) (noting that all parties agreed that the settlement was excessive, though they disagreed as to fault).

in that context are calculated based on the difference between the value of the case after the negligence inflated its worth and the case's true value, less any amount saved by settlement.[92] In *Keck*, the underlying defendant's excess insurance carrier (National) sued the defendant's attorney for negligence in handling the lawsuit.[93] National argued that the attorney's malpractice had caused it to settle for $7 million, which was greater than the actual worth of the case.[94] The supreme court held that, in order to recover, National had to prove that "a judgment for [the underlying plaintiff] in excess of the case's *true value* would have resulted from [the] malpractice."[95] The court explained that "true value" means the recovery that the plaintiff would have obtained following trial in which the underlying defendant had a reasonably competent, malpractice-free defense.[96] If National could prove that the malpractice inflated the value of the case, the court explained, it could recover as damages "the difference between the true and inflated value less any amount saved by the settlement."[97] The court did not explain, and it remains unclear, whether the court intended for this true versus inflated value measure to supersede the theory of settlement value damages (i.e., damages based on a reasonable settlement amount compared to the actual settlement amount) in all cases. Certainly, an argument can be made that cases have different values at different stages in the litigation process, and that it is unrealistic to require damages to be based only on a "true" value following trial on the merits. The settlement value concept, however, is inherently more subjective than the question of what a case would be worth following trial before a reasonable judge and jury.[98] With that in mind, the supreme court may well have in-

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92. *Id.*

93. *Id.* at 695-96. The excess carrier was able to sue the attorney for malpractice under a theory of equitable subrogation. *Id.* at 700 (citing Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480 (Tex. 1992)).

94. *See id.* at 703 (claiming that the attorneys' "inept trial preparation put it . . . at grave financial risk").

95. *Id.* at 703 (emphasis added).

96. *Keck*, 20 S.W.3d at 703 n.5.

97. *Id.* at 703.

98. For that matter, any expert witness's testimony regarding the "value" of a case, whether it be for settlement or following trial on the merits, is somewhat speculative and might be subject to challenge under a *Daubert/Robinson* motion.

tended for its "true value" measure to be the only appropriate way of calculating damages following an unfavorable settlement.

The "suit within a suit" approach to causation and damages is the general rule in the vast majority of other states, primarily because of the inherent difficulties with accurately measuring a plaintiff's loss using any other method.[99] As explained by a California court of appeals:

> Nonetheless, while some arguments of the critics have merit, the trial-within-a-trial burden persists. This is so probably because it is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance. Certainly to date, no other approach has been accepted by the courts.[100]

In addition, Mallen and Smith's treatise explains that to enable a plaintiff merely to value a case without the use of the "suit within a suit" approach renders professionals liable as guarantors, as almost all cases have some value.[101]

A few jurisdictions have allowed settlement value damages, but these cases typically involve unique fact patterns that make measuring a reasonable settlement value less speculative. For example,

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99. *See, e.g.*, Garretson v. Miller, 99 Cal. App. 4th 563, 568-69 (Cal. Ct. App. 2002) ("explaining that California follows the majority rule that a malpractice plaintiff must prove not only negligence on the part of his or her attorney, but that careful management of the case within a case would have resulted in a favorable judgment '*and collection of same* . . . .'" (quoting Campbell v. Magana, 184 Cal. App. 2d 751, 754 (Cal. Ct. App. 1960))); Mattco Forge, Inc. v. Arthur Young & Co., 52 Cal. App. 4th 820, 834, 843-44 (Cal. Ct. App. 1997) (citing to the "trial within a trial" method as the general rule and concluding that allowing a plaintiff to value the case without reference to the outcome of the underlying trial would result in speculative damages); Fuschetti v. Bierman, 319 A.2d 781, 784 (N.J. Super. Ct. Law Div. 1974) (excluding expert testimony on reasonable settlement value "[b]ecause no expert can suppose with any degree of reasonable certainty the private blends of hopes and fears that might have come together to produce a settlement before or during trial"). *But see* Duncan v. Lord, 409 F. Supp. 687, 692-93 (E.D. Penn. 1976) (determining the amount of damages, the court stated that "we start with the legal proposition that the measure of damages in this legal malpractice action is that amount which plaintiff would have received from a jury or through settlement of her state court action").

100. *Mattco Forge*, 52 Cal. App. 4th at 834. For an analysis and criticism of the strengths and weaknesses of the "suit within a suit" method, see John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127 (1988).

101. 4 RONALD E. MALLEN & JEFFREY M. SMITH , LEGAL MALPRACTICE § 32.8, at 170 (4th ed. 1996).

in *Rizzo v. Haines*,[102] the Supreme Court of Pennsylvania allowed recovery of settlement value damages when there was testimony from both sides of the underlying lawsuit that they would have settled the case within a certain range, had the attorney communicated all settlement offers.[103] Similarly, in *Moores v. Greenberg*,[104] the First Circuit held that a plaintiff could recover the amount of a settlement offer that an attorney never communicated to the client, irrespective of the case's actual value following trial.[105]

Although the "suit within a suit" method does have its difficulties, it remains the most reliable method of proving causation and damages in a legal malpractice case. Texas cases that have flirted with the possibility of allowing settlement value damages have not yet analyzed when these damages may be allowed without resulting in a speculative recovery. The best approach may be to allow damages to be measured based on settlement value only in those rare situations where there is reliable evidence, other than pure opinion testimony, of what the case would have settled for absent the malpractice. Causation, however, must still be shown by proving the "case with in case." This is the only reasonable approach because opening the door further would essentially make attorneys liable as guarantors regardless of the true merit of the client's case.

III. Expert Testimony in Legal Malpractice Cases

A. *Is the Locality Rule Still Viable?*

In order for an attorney to be qualified to testify as an expert regarding the standard of care in a legal malpractice case, Texas law requires the attorney to establish expertise within the particular locality in which the alleged malpractice occurred.[106] Thus, at-

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102. 555 A.2d 58 (Pa. 1989).

103. *See* Rizzo v. Haines, 555 A.2d 58, 68 (Pa. 1989) (upholding the trial court's damages in light of evidence of a firm settlement and the attorneys' authority to settle for the amount offered).

104. 834 F.2d 1105 (1st Cir. 1987).

105. Moores v. Greenberg, 834 F.2d 1105, 1110 (1st Cir. 1987) ("On this record, it was 'reasonably foreseeable' that, by failing to communicate the offer, Greenberg would effectively deprive his client of the net benefit of the tendered bargain. . . .").

106. *See* Ballesteros v. Jones, 985 S.W.2d 485, 494-95 (Tex. App.—San Antonio 1998, pet. denied) (stating that experts must demonstrate the competency to testify regarding the standard of care for Webb County); *see also* Tijerina v. Wennermark, 700 S.W.2d 342, 347 (Tex. App.—San Antonio 1985, no writ) (holding that an attorney who practiced law in San Antonio for several years was qualified to establish the standard of care for legal

torneys who do not practice within a particular municipality or county may not be qualified to testify regarding the standard of care within that area. In fact, the Austin Court of Appeals recently held in *Ramsey v. Reagan, Burrus, Dierksen, Lamon & Bluntzer*[107] that an attorney who was not licensed to practice in Texas was not qualified to testify regarding the standard of care applicable to Texas attorneys.[108]

One of the primary justifications for this "locality" requirement is the variation among local procedures, trial practice, jury pools, and trial judges in different counties and cities in Texas.[109] It is less clear, however, why this requirement would apply to transactional matters such as drafting real estate deeds, representing corporations in connection with securities offerings or mergers, or even setting up wills or trusts. Nevertheless, in *Ramsey*, the Austin Court of Appeals applied and relied on the locality rule in the context of allegations regarding negligent drafting of closing documents for a real estate transaction.[110]

The locality requirement for expert witnesses is in contrast to recent Texas case law in the medical malpractice area. Experts regarding the standard of care in medical malpractice cases do not necessarily have to practice within a particular locality, so long as they can demonstrate expertise with the procedure performed, electronic and mechanical appliances used, or knowledge of certain common medical standards that are applicable irrespective of locality.[111] In the same way that Texas courts have realized that the

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representation within San Antonio); Cook v. Irion, 409 S.W.2d 475, 478 (Tex. Civ. App.—San Antonio 1966, no writ) (stating that an attorney from a different locality is not qualified to offer testimony regarding joinder practices in El Paso County).

107. No. 03-01-00582-CV, 2003 WL 124206 (Tex. App.—Austin Jan. 16, 2003, no pet.) (mem. opinion).

108. *See* Ramsey v. Reagan, Burrus, Dierksen, Lamon & Bluntzer, No. 03-01-00582-CV, 2003 WL 124206, at *5 (Tex. App.—Austin Jan. 16, 2003, no pet.) (mem. opinion) (upholding the trial court's decision to exclude the expert because he was not licensed to practice in Texas).

109. *See Ballesteros*, 985 S.W.2d at 494-95 (holding that, although the attorneys did not work out of Webb County, they were nevertheless qualified because they had worked on Webb County cases in the past, had consulted with Webb County attorneys regarding local court personnel and customs, and had practiced before Webb County judges, including the trial judge from the malpractice case in question).

110. *Ramsey*, 2003 WL 124206, at *4-5.

111. *See, e.g.*, Hall v. Huff, 957 S.W.2d 90, 101 (Tex. App.—Texarkana 1997, pet. denied) (allowing a nursing expert, who was admittedly unfamiliar with Texas practice, to

locality requirement does not make sense in most medical malpractice cases, Texas courts should consider applying a more situation-specific test for the qualifications of expert witnesses in legal malpractice suits.[112] While there may be certain legal practices that remain unique among localities, much of our law practice has become national in scope.[113] And particularly in areas that require specialization, such as securities and intellectual property, a locality requirement seems outdated.[114]

B. *Can the Trial Judge in the Underlying Case Testify in the Legal Malpractice Case?*

Under Texas Rule of Evidence 605, the judge presiding at a trial is not competent to testify in that trial as a witness.[115] It follows that judges are *competent* to testify in any other situation as a general rule.[116] Thus, assuming the legal malpractice case is before a judge different from the judge who heard the underlying case, the

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testify regarding the universally accepted standard of care for diagnosis and treatment); Harris County Hosp. Dist. v. Estrada, 872 S.W.2d 759, 762 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (holding that a nurse need not be familiar with the standard of care in a particular locality, so long as he/she is familiar with the standard in another, similar hospital); Johnson v. Hermann Hosp., 659 S.W.2d 124, 126 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) ("Doctors are no longer required to be from the same city, state, or school of practice in order to testify so long as they are equally familiar with the subject of inquiry and where the subject of inquiry relates to the manner of use of electrical and mechanical appliances which are of common use in both schools of practice.").

112. *Cf.* David J. Beck, *Legal Malpractice in Texas*, 50 BAYLOR L. REV. 547, 643-44 (1998) ("The locality rule arguably retains more relevance to the legal profession than to the medical profession. It is still important for an attorney to know the local rules, practices, and customs, as well as, in a litigation context, the attitudes and preferences of various judges sitting in a particular county. It should be emphasized, however, there are probably certain minimum accepted practices that must be met in every locality.").

113. Dwain E. Fagerlund, Note, *Legal Malpractice: The Locality Rule and Other Limitations of the Standard of Care: Should Rural and Metropolitan Lawyers Be Held to the Same Standard of Care?*, 64 N.D. L. REV. 661, 676 (1988) (distinguishing between the medical and legal professions in that the legal profession does not have a national standard of care or certification program, but noting that "[t]he idea of a national standard of care has been suggested, and many states do apply a general standard which does not take into account any geographical boundaries").

114. *See* 5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.18, at 145 (5th ed. 2000) ("Sometimes, the lawyer not need [*sic*] be licensed in the jurisdiction to qualify to testify. The lawyer, however, must be familiar with the standards in the jurisdiction.").

115. TEX. R. EVID. 605.

116. Joachim v. Chambers, 815 S.W.2d 234, 237 (Tex. 1991); *see also* Sansone v. Garvey, Schubert & Barer, 71 P.3d 124, 131 (Or. Ct. App. 2003) (holding that the Oregon

judge in the underlying case is *competent* to testify in the legal malpractice case on the issue of causation.[117]

In order to avoid the appearance of impropriety under the Code of Judicial Conduct (CJC), however, the Texas supreme court held in *Joachim v. Chambers*[118] that a sitting judge is prohibited from testifying as an expert witness on the issue of negligence in a legal malpractice case.[119] The court's holding in *Joachim* was limited to the circumstances of that case.[120]

In *Joachim*, the trial judge in the underlying case had made a docket entry that judgment was to be entered according to the parties' settlement agreement which was announced in open court and to which all parties consented.[121] Before the judgment was entered, however, the opposing parties withdrew their consent.[122] In the legal malpractice case, the client asserted that the attorney should have asked the judge to render judgment when the settlement was announced, rather than leaving the judgment to be entered.[123] Before the legal malpractice case was decided, the judge who made the docket entry died.[124] The attorney/defendant obtained an affidavit from a retired, but still sitting, judge, stating that the error complained of was a judicial error and not an attorney error.[125] The trial court denied the attorney's motion for summary judgment based on this affidavit, but denied the plaintiff/client's

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counterpart to Rule 605 does not make a trial judge in the underlying case incompetent to testify in the legal malpractice case in which another judge presides).

117. *See Joachim*, 815 S.W.2d at 237 (interpreting Rule 605 as allowing a judge to testify in any trial over which he is not presiding). *Compare* Harline v. Barker, 912 P.2d 433, 441 (Utah 1996) (holding that under an objective standard of causation, testimony from the judge in the underlying case is of marginal relevance that is substantially outweighed by the risk of prejudice created when a judge appears to side with one party in a case), *with Sansone*, 71 P.3d at 132-33, 134 (holding that the testimony of the judge in the underlying case, as to her personal observations of the witnesses, the probable jury verdict, and the reasonableness of the settlement reached before verdict, were admissible factual testimony in the legal malpractice case in which the plaintiff/client sought to recover the amount of the settlement).

118. 815 S.W.2d 234 (Tex. 1991).

119. *Joachim*, 815 S.W.2d at 230.

120. *Id.* at 240.

121. *Id.* at 235.

122. *Id.*

123. *Id.* at 236.

124. Joachim v. Chambers, 815 S.W.2d 234, 236 (Tex. 1991).

125. *Id.*

motion to prohibit the judge from testifying at trial.[126] The case came to the supreme court on a writ of mandamus.[127]

The court analyzed the case based on the premise that the judge would testify as an expert for the attorney/defendant on the issue of negligence.[128] Therefore, the supreme court has not addressed whether a judge may testify about the issue of causation in a legal malpractice case.[129] Arguably, the issue of causation—whether the alleged negligence of the attorney caused the judge's decision in the underlying case or, stated differently, whether the judge would have made a decision more favorable to the client but for the attorney's negligence—is a matter of fact coming from the trial judge in the underlying case. On judges as fact witnesses, the supreme court stated in *Joachim*:

> Although [the standards in the CJC] are invoked whenever a judge testifies, we do not hold that they prohibit judges from ever testifying in court. Certainly, a judge must, like anyone else, testify to relevant facts within his personal knowledge when summoned to do so. In some circumstances, such as when no substitute for a judicial witness is available, the testimony of a judge, even as an expert, may not trespass upon the constraints of Canon 2 [of the CJC].[130]

This reasoning suggests that the trial judge in the underlying case could testify as a fact witness, if a subjective standard of causation applies.[131]

In at least one recent Texas case, an attorney/defendant successfully presented an affidavit from the trial judge in the underlying criminal case stating that the judge's decision against the client had

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126. *Id.*

127. *Id.* at 237.

128. *Id.* at 240 n.11.

129. Alexander v. Turtur, 146 S.W.3d 113, 122 (Tex. 2004) (Hecht, J., concurring) (citing Joachim v. Chambers, 815 S.W.2d 231 (Tex. 1991)). Justice Hecht suggests in his concurrence that the judge in the underlying case probably could not testify voluntarily. *Id.*

130. *Joachim*, 815 S.W.2d at 239.

131. *Cf.* Sansone v Garvey, Schubert & Barer, 71 P.3d 124, 131-34 (Or. Ct. App. 2003) (holding that testimony from the trial judge in the underlying case, as to her personal observations during the trial and her statements to counsel that the settlement the client accepted was reasonable based on the probable outcome of the trial, was factual, not expert opinion, and was admissible under the Oregon counterpart of Texas Rule of Evidence 403).

nothing to do with the conduct of the attorney.[132] The Dallas Court of Appeals upheld the summary judgment for the attorney on the basis that the plaintiff/client failed to present any evidence to create a fact question on causation and the judge's affidavit established lack of causation as a matter of law.[133] The propriety of allowing the trial judge's affidavit as evidence in the case was not specifically addressed, though the court did cite cases for the general rule that expert testimony is necessary to prove causation in a legal malpractice case.[134]

Allowing a judge to testify as to whether an attorney's alleged negligence caused his decision in the underlying case could run afoul of the general rule prohibiting judges from testifying about their mental processes in reaching judicial decisions.[135] The United States Supreme Court established this prohibition in 1904, based on the need for finality of judgments.[136]

In addition, if causation is determined by the objective standard of what a reasonable judge would have decided in the underlying case, but for the attorney's negligence, then testimony from the judge in the underlying case is subjective and irrelevant to the issue of causation in the legal malpractice case. Several courts outside Texas have held that testimony from the judge or other decisionmaker in the underlying case is inadmissible because its marginal relevance to the objective standard of causation is outweighed by the substantial prejudice of a judge lending support to one side in the legal malpractice case.[137] Some courts characterize the dan-

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132. *See generally* Rodgers v. Weatherspoon, 141 S.W.3d 342, 345 (Tex. App.—Dallas 2004, no pet.) (stating that "[s]ummary judgment may be proper if it is shown that the attorney's act or omission was not the cause of any damages to the client").

133. *Rodgers*, 141 S.W.3d at 346.

134. *Id.* at 345.

135. *See* Alexander v. Turtur, 146 S.W.3d 113, 122 (Tex. 2004) (Hecht, J., concurring) (citing United States v. Morgan, 313 U.S. 409, 422, 61 S. Ct. 999 (1941), in which the Court applied this rule to disallow testimony from the decisionmaker in an administrative proceeding regarding the factors that determined the administrative decision).

136. Fayerweather v. Ritch, 195 U.S. 276, 307, 25 S. Ct. 58, 67-68 (1904).

137. *See* Rubens v. Mason, 387 F.3d 183, 190-91 (2d Cir. 2004) (citing Harline v. Barker, 912 P.2d 433, 441 (Utah 1996)). The court in *Rubens* applied New York law and held that the affidavit of the arbitrator in the underlying case stating that attorney's negligence did not cause the arbitrator's decision was inadmissible and could not support a summary judgment, because (1) as a subjective statement, it had limited relevance to the objective standard of causation; (2) its limited probative value was outweighed by the potential to usurp the jury's role as factfinder in the legal malpractice case; and (3) it "imper-

ger as the trial judge usurping the role of the jury as factfinder in the legal malpractice case.[138] This reasoning presumes that a jury is the appropriate decisionmaker on causation in the legal malpractice case when the outcome of the underlying case was determined by a judge and not a jury. Yet other courts take issue with this premise, holding that causation in this context must be decided as a matter of law by the trial judge in the legal malpractice case, and not by a jury.[139] In such instances, testimony from the trial judge in the underlying case would still be of marginal relevance under an objective standard of causation.

C. *When Is Expert Testimony Required in Legal Malpractice Cases?*

The general rule is that expert testimony is required to prove a breach of the standard of care in a legal malpractice case. In *Alexander*, the Texas Supreme Court held that the jury could not determine the issue of causation without the benefit of expert testimony as to how the outcome of a bankruptcy court decision would have been affected if the case had been tried according to the plaintiff's request.[140] The court rejected the Turturs' contention that causation was "obvious" so that expert testimony was not required.[141] The court acknowledged that in some cases the causal link can be supplied by the client's testimony, such as when "the clients themselves were the key decisionmakers" in the underlying matter.[142] When, as in *Alexander*, the key decisionmaker in the underlying case was a bankruptcy judge, the court held that expert testimony as to the legal effect of the omitted evidence and other attorney misconduct on the bankruptcy judge's decision was required to es-

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missibly revealed the deliberative thought processes of the decision-maker in the underlying" case. *Id.* at 191.

138. *See* Marrs v. Kelly, 95 S.W.3d 856, 860 (Ky. 2003) (considering whether a judge's role as an objective, reasonable judge is confused when he or she is allowed to testify).

139. *See generally* Phillips v. Clancy, 733 P.2d 300 (Ariz. Ct. App. 1986); Chocktoot v. Smith, 571 P.2d 1255 (Or. 1977); Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118 (Wis. 1985).

140. *See generally Alexander*, 146 S.W.3d at 113 (discussing the role of juries and their ability to determine legal questions).

141. *Id.* at 119.

142. *Id.* at 119 (citing Delp v. Douglas, 948 S.W.2d 483, 495 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 987 S.W.2d 879 (Tex. 1999), and Streber v. Hunter, 221 F.3d 701, 726 (5th Cir. 2000)).

tablish causation.[143] Without it, the jury would have to speculate as to causation.[144]

Assuming the objective standard is applied to the issue of causation, the relevant inquiry for the expert to address is what a reasonable judge in the underlying case would have decided if the attorney/defendant had acted properly—that is as the plaintiff's standard of care expert opines the attorney/defendant should have acted. To establish causation, the expert must opine as to what effect on the outcome proper conduct would have had, when compared to the actual outcome in the underlying case.

What happens if the trial judge in the malpractice case determines that the trial court in the underlying case made an erroneous decision under the actual circumstances of the underlying case? Can the attorney/defendant negate causation by asserting that the trial judge's error in the underlying case caused the adverse outcome rather than the attorney's negligent conduct? In a lengthy and complex opinion, one California court of appeals has given a negative answer to this question, holding that on the facts of that case, the underlying trial judge's erroneous decision was foreseeable to the attorney and could have been prevented had the attorney acted in accordance with the standard of care.[145] Thus, the court in that case found that the attorney's negligence caused the underlying trial court's error, under the foreseeability component of proximate cause. The court noted that if the trial court's error was not foreseeable, then the error could be a superseding cause, negating causation in the legal malpractice case.[146] Whether Texas courts would follow such reasoning is an unanswered question. Regardless, this case is a good example of how convoluted causation analysis can become in litigation malpractice cases.

143. *Id.* at 119-20.

144. *See Alexander*, 146 S.W.3d at 119-20 (surveying authorities from other states).

145. Lombardo v. Huysentruyt, 91 Cal. App. 4th 656, 668-69 (2001).

146. *Id.* at 669.

IV. Evolving Nature of the Causes of Action Available Against Attorneys

A. *Recent Cases on Fracturing Legal Malpractice Claims and Resulting Unresolved Issues*

As a general rule, Texas law does not allow the "fracturing" of legal malpractice claims into multiple causes of action. Courts have struggled with this fracturing principle over the last several years, in an effort to determine whether all claims clients bring against their attorneys should be treated only as legal malpractice claims based on negligence or can be brought as distinct causes of action in certain circumstances. The emerging principle is that claims brought against attorneys based on the quality of their representation should be brought only as traditional legal malpractice claims based on professional negligence.[147] Claims based on truly distinct allegations, however, may be brought as separate causes of action. For example, allegations of affirmative misrepresentations of material fact may give rise to separate claims under the Deceptive Trade Practices Act (DTPA). And claims premised on acts of disloyalty toward the client may be separately pleaded as breaches of fiduciary duty.

Interestingly, many of the recent fracturing opinions, while providing helpful analysis in the context of fracturing, have actually generated a number of new unresolved issues regarding the scope of the distinct claims, particularly claims against attorneys under the DTPA and for breach of fiduciary duty. This section discusses recent fracturing opinions, with a focus on these new unresolved issues.[148]

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147. *See* Barcelo v. Elliot, 923 S.W.2d 575, 580 (Tex. 1996) (citing Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989)); Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) (holding that a legal malpractice action in Texas is traditionally based on professional negligence). The plaintiff must prove: (1) there is a duty owed by the attorney to the client, (2) that duty was breached, (3) the breach proximately caused the client's injury, and (4) damages resulted. *Cosgrove*, 774 S.W.2d at 665.

148. This discussion addresses only those claims brought by clients against their attorneys, not claims brought by non-clients who lack the requisite privity of contract needed for a malpractice claim. Non-clients may, in certain circumstances, sue attorneys for fraud and negligent misrepresentation under Texas law. *See, e.g.*, McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999) (recognizing a claim for negligent misrepresentation under Section 552 of the Restatement (Second) of Torts, which allows liability to third parties who justifiably relied); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ) (holding that

1. Breach of Contract and Breach of Warranty

Clients may not sue their attorneys for breach of contract based on allegations that the legal services performed were inadequate or otherwise failed to comply with the contract for services between the attorney and client. In *Jampole v. Matthews*,[149] the First Court of Appeals held that a distinct cause of action for breach of contract is available only when a client sues his attorney for collecting excessive legal fees.[150] Courts of appeals evaluating this issue since *Jampole* have consistently enforced this limitation and have affirmed that all other breach of contract claims arising out of the attorney's representation of the client are considered to be tort actions that are subsumed into the traditional legal malpractice cause of action.[151]

Similar to breach of contract claims, claims for breach of express or implied warranty are not proper if they are based on allegations that an attorney failed to provide good or competent legal services.[152] In fact, Texas law does not even recognize an implied warranty of good and workmanlike performance of professional services, such as legal services.[153] Thus, plaintiffs may not complain

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non-clients may sue attorneys for fraud in certain circumstances). But because these types of claims are not based on the attorney's representation of a client, they are usually not subject to a fracturing analysis.

149. 857 S.W.2d 57 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

150. Jampole v. Matthews, 857 S.W.2d 57, 62 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

151. *See, e.g.*, Tolpo v. DeCordova, 146 S.W.3d 678, 685 (Tex. App.—Beaumont 2004, no pet.) (holding that a breach of contract claim was merely an improperly restated malpractice claim); Newton v. Meade, 143 S.W.3d 571, 574-75 (Tex. App.—Dallas 2004, no pet.) (holding that because the plaintiff's contract claims were not based on breach of a contractually defined fee arrangement, they did not give rise to an independent contract claim); Vacek Group, Inc. v. Clark, 95 S.W.3d 439, 448 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing to and following the limitation set forth in *Jampole*).

152. Greathouse v. McConnell, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding that breach of express or implied warranty claims based on the alleged failure to provide competent legal services were simply legal malpractice claims).

153. *See* Parkway Co. v. Woodruff, 901 S.W.2d 434, 438-39 (Tex. 1994) (holding that implied warranties for services are not generally available); Chapman v. Wilson, 826 S.W.2d 214, 217 (Tex. App.—Austin 1992, writ denied) (holding that under current supreme court authority an implied warranty for the rendition of professional services does not exist). The Texas Supreme Court has recognized an implied warranty of workmanlike performance in the repair or modification of tangible goods or property. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987). The ruling in *Melody Home* did not expand this limited warranty to cover professional services and the court's most recent opinion on point expressly rejects such a warranty. Dennis v. Allison, 698 S.W.2d 94, 96

that an attorney expressly or impliedly warranted to provide legal services of a particular quality. These types of allegations may only be brought as claims of legal malpractice.

2. Violations of the Deceptive Trade Practices Act

As with breach of contract and breach of warranty claims, claims brought under the DTPA are subject to the fracturing rule if they are based on the attorney's failure to comply with the standard of care in representing the client. If the claims are based on affirmative misrepresentations of material fact, however, they may be outside the scope of the fracturing rule.

Some early fracturing cases had suggested that all claims against attorneys arising out of their legal representation, including claims brought under the DTPA, were subject to the fracturing rule and thus, should be brought only as legal malpractice claims.[154] But in 1998 the Texas Supreme Court issued *Latham v. Castillo*,[155] which clarified that attorneys are still subject to DTPA liability, despite the fracturing rule, so long as the claims are based on affirmative misrepresentations of material fact (i.e., deceptive conduct) and not on mere allegations of inadequate legal representation or negligence.[156]

In *Latham*, the Castillos alleged and presented some evidence that their attorney, Latham, affirmatively misrepresented to them that he had filed a medical malpractice claim on their behalf when in fact he had not.[157] Latham moved for and received a directed verdict on the ground that the Castillos had offered no evidence

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(Tex. 1985); *see also* Murphy v. Campbell, 964 S.W.2d 265, 269 (Tex. 1997) (citing to *Dennis* and *Melody Home* and holding that no implied warranty for the performance of accounting services is available under Texas law); Humble Nat'l Bank v. DCV, Inc., 933 S.W.2d 224, 239 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (declining to recognize an implied warranty of reasonably proficient banking services).

154. *See, e.g.*, Greathouse v. McConnell, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding that claims of breach of contract, breach of fiduciary duty, fraud, DTPA violations, and breach of express and implied warranties were "all essentially 'means to an end' to achieve one complaint of legal malpractice" and thus could all be defeated by disproof of one element of a legal malpractice cause of action); Sledge v. Alsup, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ) (holding that all claims against attorneys regarding their representation should be treated as one cause for legal malpractice).

155. 972 S.W.2d 66 (Tex. 1998).

156. Latham v. Castillo, 972 S.W.2d 66, 69 (Tex. 1998).

157. *Id.* at 67.

that they would have prevailed in their medical malpractice suit against the hospital had Latham timely filed the suit.[158] Latham argued that the DTPA claims were really just restated malpractice claims and thus, were subject to the "case within a case" causation standard of a traditional malpractice suit, in other words, requiring proof that the client would have won the underlying suit but for the attorney's malpractice.[159] The Texas Supreme Court held that Latham's affirmative misrepresentations caused the Castillos to lose the opportunity to prosecute their claim against the hospital because the statute of limitations ran out.[160] Since this was an "unconscionable action"[161] that resulted in unfairness to the consumer, the court held that the Castillos were able to bring their suit under the DTPA.[162] Moreover, the court held that the Castillos were not required to prove, as Latham had argued, that they would have won the underlying medical malpractice action in order to prevail in their DTPA cause of action against Latham; rather, they only needed to satisfy the 'producing cause' standard under the DTPA.[163]

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

> Recasting [a] DTPA claim as merely a legal malpractice claim would subvert the Legislature's clear purpose in enacting the DTPA—to deter deceptive business practices.
>
> If the [plaintiffs] had only alleged that [their attorney] negligently failed to timely file their claim, their claim would properly be one for legal malpractice. However, the [plaintiffs] alleged and presented some evidence that [their attorney] affirmatively misrepresented to them that he had filed and was actively prosecuting their claim. It is the difference between negligent conduct and deceptive conduct. To

158. *Id.* at 67-68.

159. *Id.* at 69.

160. *Id.* at 68.

161. *Id.* (applying TEX. BUS. & COM. CODE § 17.50(a)(3) to the facts of the case). The *Latham* court stated that to be actionable as an "'unconscionable action or course of action,'" the resulting unfairness must be "'glaringly noticeable, flagrant, complete and unmitigated.'" *Id.* (quoting TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon 1987) and Chastain v. Koonce, 700 S.W.2d 579, 584 (Tex. 1985)).

162. *Latham*, 972 S.W.2d at 69-70.

163. *Id.* at 69.

> recast this claim as one for legal malpractice is to ignore this distinction.[164]

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

In addition, tort reform legislation effective September 1, 1995 blocks most professional liability under the DTPA in connection with the providing of advice, judgment, or opinion. Section 17.49(c) of the Texas Business and Commerce Code provides:

> (c) Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill. This exemption does not apply to:
>
> (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
>
> (2) a failure to disclose information in violation of Section 17.46(b)(23);
>
> (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; [or]
>
> (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion[.][165]

This new statutory limitation on the availability of DTPA claims against attorneys and other professionals, along with the Texas Supreme Court's holding in *Latham*, significantly limits the availability of DTPA claims based on the attorney's representation of a client.

In fact, the Fourteenth Court of Appeals has recently reconfirmed that an affirmative deception is required for a DTPA claim to be viable apart from a traditional malpractice claim.[166] In *Goffney v. Rabson*,[167] plaintiff Rabson sued her attorney, Goffney, for legal malpractice, breach of fiduciary duty, and violations of the DTPA, alleging that Goffney abandoned her on the day of her

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164. *Id.* at 69.

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

166. Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (applying Latham v. Castillo, 972 S.W.2d 66 (Tex. 1998)).

167. 56 S.W.3d 186 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

trial.[168] Rabson claimed that her DTPA claim was available independent of a traditional malpractice claim because the abandonment of a client on the day of trial was an "unconscionable action" under the statute.[169] The court of appeals disagreed, citing to *Latham*'s distinction between negligence and affirmative misrepresentation.[170] The court held that "we cannot say that Rabson's allegations of unconscionable conduct constitute the type of deceptive conduct which the *Latham* court distinguished from negligent conduct, to support a cause of action under the DTPA, independent of a cause of action for legal malpractice."[171] Thus, under *Goffney*, DTPA claims against attorneys must not only meet the new statutory requirements, but they must also still satisfy the common law requirements set forth in *Latham*.

In addition, one of the most recent cases on attorney liability under the DTPA, *Mazuca v. Schumann*,[172] has confirmed that, in order to be liable under the DTPA, the attorney must have made an affirmative misrepresentation rather than merely an omission.[173] This case also holds that the alleged misrepresentation must have related to a material fact and must have been made directly to the plaintiff rather than a third party in order to be actionable.[174] In *Mazuca*, the attorney had failed to file suit on his client's personal injury claim within the statute of limitations.[175] The attorney had initially filed suit in Texas, but nonsuited the claim without prejudice in order to facilitate negotiations with the insurer.[176] In the notice of nonsuit, the attorney stated that "Plaintiff does not desire to prosecute this matter further."[177] Negotiations failed and then, because the Texas statute of limitations had lapsed, the attorney attempted to file suit in Arizona.[178] This effort failed, as

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

169. *Id.* at 192.

170. *Id.*

171. *Id.* at 193.

172. 82 S.W.3d 90 (Tex. App.—San Antonio 2002, pet. denied).

173. James V. Mazuca & Assocs. v. Schumann, 82 S.W.3d 90, 95-96 (Tex. App.—San Antonio 2002, pet. denied).

174. *Id.* at 95.

175. *See id.* at 92-93 (detailing the factual and legal background).

176. *Id.* at 92.

177. *Id.*

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

well.[179] The client ultimately sued the attorney for negligence, breach of warranty, and violations of the DTPA.[180] The attorney appealed after losing at trial and the appellate court reversed the damages award for the DTPA claim.[181] In evaluating the DTPA claim, the court cited to *Latham* in distinguishing between silence and affirmative misrepresentations and held that "[the attorney] made no misrepresentations, only bad judgments. . . . [S]ilence amounts to nothing more than potentially negligent omissions, but falls short of the affirmative deception required by the DTPA."[182] In addition, although the client cited to the attorney's alleged misrepresentations to the court in the notice of nonsuit, the court dismissed this assertion because the nonsuit language did not contain any misrepresentations of material fact and was made to the court, not to the plaintiff himself.[183]

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

179. *Id.*
180. *Id.*
181. *Id.* at 96.
182. *Id.*
183. *Mazuca*, 82 S.W.3d at 96.

3. Professional Negligence Versus Breach of Fiduciary Duty

One of the more difficult fracturing issues has been the question of where to draw the line between traditional legal malpractice (professional negligence) claims and breach of fiduciary duty claims. Attorneys owe a fiduciary duty of loyalty to their clients as a matter of law on the basis that "the attorney-client relationship is one of 'most abundant good faith,' requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception."[184] A violation of this duty of loyalty gives rise to a cause of action for breach of fiduciary duty and, if the breach is sufficiently clear and serious, to a cause of action for forfeiture of the attorney's fee.[185] A traditional legal malpractice claim is based on a breach of the attorney's duty to exercise ordinary care, i.e., to act as would a reasonably prudent attorney in the same or similar circumstances, in representing a client.[186]

Recent opinions on point have begun to draw a workable distinction between malpractice and breach of fiduciary duty claims and to recognize that separate breach of fiduciary duty claims may be brought against attorneys despite the fracturing rule if the allegations fit within the proper parameters. In *Kimleco Petroleum, Inc. v. Morrison & Shelton*,[187] for example, the Fort Worth Court of Appeals explained the distinction as follows:

> A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interests to his own, retaining the client's funds, using the client's confidences improperly, taking advantage of

184. Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *see also* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.1, at 530 (5th ed. 2000) (stating that "[t]he attorney is under a duty to represent the client with undivided loyalty, to preserve the client's confidences and to disclose any material matters infringing upon these obligations"). "The basic fiduciary obligations are twofold: undivided loyalty and confidentiality." 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.1, at 530 (5th ed. 2000).

185. *See* Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied) (describing fiduciary duty claims as based on a breach of the attorney's "integrity and fidelity"); *see also* Burrow v. Arce, 997 S.W.2d 229, 241 (Tex. 1999) (recognizing a new claim of fee forfeiture for certain breaches of fiduciary duty).

186. *Kimleco*, 91 S.W.3d at 923 (holding that malpractice claims, as distinguished from fiduciary duty claims, are based on "an attorney's alleged failure to exercise ordinary care").

187. 91 S.W.3d 921 (Tex. App.—Fort Worth 2002, pet. denied).

> the client's trust, engaging in self-dealing, or making misrepresentations.
> . . . . A cause of action for legal malpractice arises from an attorney giving a client bad legal advice or otherwise improperly representing the client.[188]

Similarly, the San Antonio Court of Appeals recently explained in *Aiken v. Hancock*[189] that "the focus of such a breach [of fiduciary duty claim] 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."[190] In *Aiken*, the plaintiff attempted to argue that the attorney had breached his fiduciary duty by misrepresenting that he was ready to go forward with the client's lawsuit and by failing to reveal to the client that he was unprepared to go forward. The court of appeals rejected the plaintiff's attempt to characterize these allegations, which in essence complained about the quality of representation, as breaches of fiduciary duty, explaining that "allegations [that] do not amount to self-dealing, deception, or express misrepresentations . . . do not support a separate cause of action for breach of fiduciary duty."[191] Thus, the emerging distinction appears to be that allegations that an attorney deceptively obtained an improper benefit at the expense of the client give rise to a breach of fiduciary duty claim, whereas most other allegations regarding the attorney's representation of the client give rise to malpractice claims.[192]

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188. *Id.* at 923 (citations omitted).

189. 115 S.W.3d 26 (Tex. App.—San Antonio 2003, pet. denied).

190. Aiken v. Hancock, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, pet. denied).

191. *Id.* at 29.

192. *See, e.g.*, Gibson v. Ellis, 126 S.W.3d 324, 330 (Tex. App.—Dallas 2004, no pet.) (stating that "[t]he essence of a claim for breach of [fiduciary] duty involves the 'integrity and fidelity' of an attorney and focuses on whether an attorney obtained an improper benefit from representing the client"); Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 190 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that allegations of failure to disclose and counsel the client regarding alleged conflicts of interest could be appropriately classified as breaches of fiduciary duty independent of the client's negligence claim); *Goffney*, 56 S.W.3d at 193 (listing examples of breach of fiduciary duty as acts involving "failure to disclose conflicts of interest, failure to deliver funds belonging to the client, placing personal interests over the client's interests, improper use of client confidences, taking advantage of the client's trust, engaging in self-dealing, and making misrepresentations" to the client); Vinson & Elkins v. Moran, 946 S.W.2d 381, 400-06 (Tex. App.—Houston [14th Dist.] 1997, pet. dism'd by agr.) (upholding the trial court's finding that the law

Despite this emerging distinction, some courts have still had difficulty distinguishing between claims of breach of fiduciary duty and legal malpractice. For example, in *Cuyler v. Minns*,[193] the Fourteenth Court of Appeals held, without any analysis of the nature of the claims alleged, that a breach of fiduciary duty claim based on the "same set of facts and circumstances" as a legal malpractice claim was impermissibly fractured and subject to dismissal.[194] In addition, another recent court of appeals opinion blurs the line between malpractice and fiduciary duty claims significantly in the context of conflicts of interest. In *Two Thirty Nine Joint Venture v. Joe*,[195] the Dallas Court of Appeals held that:

> [A]n attorney's *duty of care* includes [that] duty to avoid conflicts of interest that may impair the attorney's ability to exercise independent professional judgment on behalf of the client. . . . And the duty to avoid conflicts of interest is a key aspect of the fiduciary duty that an attorney owes to his client generally.[196]

This opinion suggests, therefore, that the failure to avoid conflicts of interest is a breach of both a fiduciary duty of loyalty and a duty of care, thus giving rise to both a malpractice and a breach of fiduciary duty claim. Such a holding would be in conflict with other courts of appeals' decisions that hold the failure to avoid conflicts of interest gives rise only to a breach of fiduciary duty claim, not a malpractice claim.[197] Even more problematic, the court in *Joe* held that "avoiding conflicts of interest and thereby observing the fiduciary duty of loyalty is an action that a *reasonably prudent lawyer would observe*" and then relied on expert testimony that nondisclosure of the conflict was a breach of the standard of care

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firm had breached its fiduciary duty because there was some evidence that the firm failed to disclose its conflicts of interest with the clients and then acted in the firm's own interest rather than in the best interest of the estate).

193. 60 S.W.3d 209 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

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

195. 60 S.W.3d 896 (Tex. App.—Dallas 2001), *rev'd on other grounds*, 145 S.W.3d 150 (Tex. 2004).

196. Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 905 (Tex. App.—Dallas 2001), *rev'd on other grounds*, 145 S.W.3d 150 (Tex. 2004) (emphasis added).

197. *See, e.g.*, *Gibson*, 126 S.W.3d at 330 (listing the failure to disclose conflicts of interest as an example of a breach of fiduciary duty); *Deutsch*, 97 S.W.3d at 190 (holding that conflict of interest allegations are appropriately classified as breach of fiduciary duty claims, not malpractice claims).

as evidence in support of the breach of fiduciary duty claim.[198] The *Joe* opinion blurs the distinction between the nature of the two duties owed, to act as a reasonable attorney would have acted under the duty of care and to exercise abundant good faith and perfect candor as a fiduciary. The Texas Supreme Court has since reversed the Dallas Court of Appeals's decision in *Joe*, but in doing so did not criticize or discuss the lower court's melding of the fiduciary duty and ordinary care standards.[199]

In addition, as the courts clarify how a fiduciary duty claim differs from a malpractice claim, it becomes less certain whether the legal standards applicable to professional negligence cases really should apply to fiduciary duty claims. For example, the Fort Worth Court of Appeals held in *Kimleco Petroleum* that "the essence of a breach of fiduciary duty involves the 'integrity and fidelity' of an attorney."[200] And other opinions have described the nature of this duty of loyalty as one that requires "absolute and perfect candor" in representation.[201] If this is the case, what must a plaintiff show in order to demonstrate a breach of the standard? In traditional legal malpractice cases, the plaintiff typically must present expert testimony regarding the standard of care and what a reasonably prudent attorney would have done in the same or similar circumstances. It is well-established that this standard of care is an objective one; thus, good faith is not a defense to a professional negligence claim.[202] It seems wrong, however, to impose a purely objective standard on a fiduciary duty claim and to preclude good faith as a defense, when what is at issue is the "integrity and fidelity" of the attorney. But the Dallas Court of Appeals in *Joe* seems

198. *Joe*, 60 S.W.3d at 905 (emphasis added).

199. Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 154 (Tex. 2004). The supreme court reversed because it found that the attorney (who was sued in part based on his acts as a city council member) was protected by legislative immunity and because the attorney's duty to inform the client of matters did not extend to actions of the city council, which were beyond the scope of the law firm's representation. *Id.* at 158, 159-60.

200. *Kimleco*, 91 S.W.3d at 923.

201. Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

202. *See* Streber v. Hunter, 221 F.3d 701, 722 (5th Cir. 2000) (noting that expert testimony is generally required to establish the standard of care and holding that the duty of care standard "is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith") (quoting Cosgrove v. Grimes, 774 S.W.2d 662, 664-65 (Tex. 1989)).

to indicate that the traditional ordinary care standard is nevertheless applicable.[203]

Similarly, if the proper focus of a fiduciary duty claim is, as several opinions have held, "whether an attorney obtained an improper benefit from representing a client,"[204] what type of showing is required to demonstrate such an improper benefit? Does the attorney have to have gained financially as a result of the breach? Does the collection of attorneys' fees qualify as an improper benefit, irrespective of whether the receipt of those fees was directly connected to the improper behavior? Are certain types of behavior sufficiently egregious to justify a finding of breach even if the attorney did not actually benefit from the improper behavior, but rather only hoped to benefit? Presumably, harm to the client cannot be a component of the "improper benefit" requirement because the Texas Supreme Court recognized in *Burrow v. Arce*[205] that fee forfeiture was available as a remedy for "clear and serious" violations of fiduciary duty even if the client cannot prove actual damages.[206]

In sum, many unresolved issues remain regarding the proper scope of, and legal standards applicable to, a cause of action for breach of fiduciary duty.

B. *Proper Scope of Fee Forfeiture Claims*

In 1999, the Texas Supreme Court decided *Burrow v. Arce*, in which it recognized for the first time the equitable remedy of fee forfeiture for an attorney's breach of fiduciary duty. This remedy is significant because it does not require a showing of causation or damages in order for a client to recover all or part of the attorney's fee. Rather, fee forfeiture is available when the trial court determines that the breach was sufficiently "clear and serious" to justify forfeiture in furtherance of the public interest in preserving the integrity of the attorney client relationship.[207] Because the forfeiture remedy under *Arce* is a relatively new cause of action, unresolved

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203. *Joe*, 60 S.W.3d at 904.

204. Aiken v. Hancock, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, no pet.); Kimleco Petroleum, Inc. v. Morrison & Shelton, P.C., 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied).

205. 997 S.W.2d 229 (Tex. 1999).

206. Burrow v. Arce, 997 S.W.2d 229, 241 (Tex. 1999).

207. *Id.* at 243.

issues regarding both its substantive and procedural parameters remain.

1. What Type of Breach Is Sufficiently "Clear and Serious" to Justify Fee Forfeiture?

Arce's limitation of the remedy of fee forfeiture to "clear and serious" breaches of fiduciary duty is likely to generate significant litigation in the future because the exact meaning of "clear and serious" remains somewhat unclear. The Texas Supreme Court did provide guidance on this point in *Arce* when it cited to a number of factors from section 49 of the proposed Restatement (Third) of the Law Governing Lawyers.[208] These factors include "the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies."[209] In addition, the Texas Supreme Court added another factor that was to be given great weight: "the public interest in protecting the integrity of the attorney-client relationship."[210]

Unfortunately, neither *Arce* nor subsequent cases interpreting *Arce* have provided much practical information regarding the types of behavior that qualify as sufficiently clear and serious to justify forfeiture. Perhaps practical guidance is impossible in an area that requires equitable determinations based on the specific circumstances of the case. Regardless, following is a discussion of recent cases that address the issue. Most of these cases involve accusations regarding the propriety of an attorney's fee.

A dispute over a fee arrangement led to a partial fee forfeiture in *Jackson Law Office, P.C. v. Chappell*.[211] In *Chappell*, the law-

208. *Id.*; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996). Section 49 states in part: "A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter." *Id.* A comment to section 49 also explains: "A violation is clear if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful." *Id.* cmt. d. This indicates that the question of whether a violation was "clear and serious" should be evaluated using an objective standard.

209. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996).

210. *Burrow*, 997 S.W.2d at 245.

211. 37 S.W.3d 15, 20-21 (Tex. App.—Tyler 2000, pet. denied).

yers and client failed to reduce their fee agreement to writing.[212] The lawyers also failed to keep billing records, record services rendered, or provide billing statements to their client.[213] Instead, they charged the plaintiff what the court characterized as an inflated fee, and eventually sued the client for non-payment.[214] The court found that "[t]he evidence supports the jury's finding of breach of fiduciary duty in that there is evidence of failure to disclose, misrepresentation, conflict of interest, and self-dealing" and therefore upheld the trial court's order of a partial fee forfeiture.[215] The lesson of *Chappell* is that attorneys should always keep their fee agreements and billing records in writing and provide as much detail as possible.

In *Spera v. Fleming, Hovenkamp & Grayson, P.C.*,[216] the Houston Court of Appeals dismissed the defendant attorneys' motion for summary judgment on a fee forfeiture claim, holding that a question of fact existed regarding whether the attorneys had committed a clear and serious breach of fiduciary duty in connection with their contingency fee.[217] The plaintiffs alleged that the attorneys did not notify them of a hearing on the reasonableness of the fee, which was sought by the attorneys as part of the settlement of a class action, in time for the clients to obtain other counsel with respect to the fee issue.[218] Because of the potential conflict of interest between the attorneys and their clients regarding the fee, the court concluded that a fact question existed regarding the fee forfeiture claim.[219]

In *Miller v. Kennedy & Minshew, P.C.*,[220] the Fort Worth Court of Appeals upheld a trial court's refusal to award fee forfeiture despite a jury's finding that the attorney's collection of his fee

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

213. *Id.*

214. *Id.*

215. *Id.* at 23.

216. 25 S.W.3d 863 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

217. Spera v. Fleming, Hovenkamp & Grayson, P.C., 25 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

218. *Id.*

219. *Id.*

220. 142 S.W.3d 325 (Tex. App.—Fort Worth 2003, pet. denied).

should be barred by his breach of fiduciary duty.[221] The jury found that the attorney (Minshew) had breached his fiduciary duty to the client (Miller), made negligent misrepresentations to him, and committed deceptive acts and practices in connection with his representation of Miller and their contingency fee agreement.[222] However, the jury also found that the attorney's misconduct had not been willful, unconscionable, knowing, or intentional, and that the misconduct had not caused any damages to Miller.[223] On the basis of these findings, the trial court held that fee forfeiture was not appropriate because the timing of the misconduct caused Miller no harm and did not affect the quality of the work performed for him, the violations were not clear and serious, and the misconduct had no impact on the public's interest in protecting the attorney-client relationship.[224] On appeal, Miller contended that because the jury had found that some of Minshew's counterclaims for attorneys fees were barred by his breach of fiduciary duty, such a finding showed that fee forfeiture should be awarded and was in the public interest.[225] The appellate court confirmed that the question of whether all or part of a fee should be forfeited is a matter for the court, not the jury, and it held that the jury's findings on point were thus immaterial.[226] The court also found that the trial court's refusal to award fee forfeiture was not an abuse of discretion.[227] This opinion indicates that, although a client does not have to prove causation and damages in order to recover fee forfeiture, the question of whether or not the attorney's conduct caused any harm is nevertheless a proper consideration in determining whether forfeiture is appropriate.[228]

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221. Miller v. Kennedy & Minshew, P.C., 142 S.W.3d 325, 340-41 (Tex. App.—Fort Worth 2003, pet. denied).

222. *Id.* at 339.

223. *Id.*

224. *Id.* at 340.

225. *Id.*

226. *Miller*, 142 S.W.3d at 340.

227. *Id.*

228. For that matter, *Arce* also indicates that harm to the client is an important consideration. *See Arce*, 997 S.W.2d at 241 (establishing "[f]orfeiture of fees, however, is not justified in each instance in which a lawyer violates a legal duty. . . . Some violations are inadvertent or do not significantly harm the client") (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. b (Proposed Final Draft No. 1, 1996)).

Finally, a fee forfeiture was denied under an unusual set of facts in *Haase v. Herberger*.[229] The attorneys represented a couple in a lawsuit arising out of construction defects on their home.[230] Subsequently, the wife filed for divorce.[231] A settlement offer was made by the defendants in the construction litigation, and the wife, through her divorce attorney, filed a motion in family court to obtain the exclusive right to settle the litigation.[232] The motion was granted.[233] The attorneys then filed a plea in intervention in family court requesting a disbursement of their fees.[234] The husband objected and counterclaimed for fee forfeiture and legal malpractice, alleging a conflict of interest between the husband and the wife due to the couple's difference of opinion as to whether to accept the settlement offer.[235] The court of appeals affirmed summary judgment for the attorneys, holding the trial court's ruling was not erroneous in refusing to order a forfeiture of attorneys' fees because this would constitute forfeiture of a fee that the attorneys had ultimately earned by following a court order.[236] Under this line of reasoning, an attorney's good faith is an important consideration and can be sufficient to defeat a claim of fee forfeiture.

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

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229. 44 S.W.3d 267, 268 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

230. Haase v. Herberger, 44 S.W.3d 267, 269 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Haase*, 44 S.W.3d at 269.

236. *Id.* at 270.

2. When, If Ever, Is Summary Judgment or a Directed Verdict Available on a Fee Forfeiture Claim?

In *Arce*, the Texas Supreme Court set forth a specific procedure by which claims of fee forfeiture must be litigated. The trial court must first determine "whether factual disputes exist that must be decided by a jury before the court can determine whether a clear and serious violation of [the] duty has occurred."[237] The court must then determine whether forfeiture is appropriate, and if so, whether all or a portion of the attorney's fee should be forfeited.[238] Thus, the jury decides the factual issues regarding the breach of a fiduciary duty, and then the court determines the amount, if any, of the fee that should be forfeited to the client.[239]

A recent opinion highlights one of the most significant ambiguities created by *Arce*'s unique procedure. In *Deutsch v. Hoover, Bax & Slovacek*,[240] a law firm brought suit against its client to recover unpaid legal fees. The client counterclaimed, alleging a number of theories of liability, including negligence, traditional breach of fiduciary duty, and fee forfeiture for breach of fiduciary duty.[241] At the close of evidence at trial, the law firm moved for a directed verdict, which the trial court granted as to both the traditional breach of fiduciary duty and the fee forfeiture claim.[242] The appellate court held that the trial court did not err by granting a directed verdict on the traditional breach of fiduciary duty claim because "there was no conflicting evidence of probative value as to whether Deutsch suffered damages caused by the Law Firm's alleged breaches of fiduciary duty."[243] With respect to the fee forfeiture claim, however, the court found that the trial judge did err in granting a directed verdict because of remaining fact questions regarding the alleged breach, noting that under *Arce*, "the jury must determine the factual issues *before* the trial court can determine

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237. *Arce*, 997 S.W.2d at 246.

238. *Id.*

239. *Id.*

240. 97 S.W.3d 179 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

241. Deutsch v. Hoover, Bax & Slovacek, 97 S.W.3d 179, 184 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

242. *Id.*

243. *Id.* at 191.

whether the breach . . . was a clear and serious breach that merits fee forfeiture."[244]

The majority opinion further interpreted *Arce* to mean that the trial judge does not have discretion to resolve any conflicting evidentiary issues regarding breach of fiduciary duty, no matter how small, and that these questions must always be decided by the jury for purposes of a fee forfeiture claim.[245] The majority opinion did express some skepticism about this approach, stating that "[t]hough our dissenting colleague would have us take an arguably more efficient path . . . we must follow the Texas Supreme Court's expressions of the law and leave changes . . . to that higher authority."[246]

In his dissent, Chief Judge Scott Brister (now on the Texas Supreme Court) pointed out that the majority's interpretation of *Arce*'s procedural requirements requires:

> [A] jury trial every time fee forfeiture is alleged and there is any factual dispute, no matter how slight. . . . Surely it is possible that a trial judge may decide, after hearing the claimant's case, that fee forfeiture is not appropriate *even if a jury found all factual disputes in the claimant's favor.*[247]

This opinion leaves in question whether a directed verdict, summary judgment, or other dispositive remedy can ever be available on the basis that a breach of fiduciary duty is not sufficiently clear and serious as a matter of law.

V. Potential Areas for Liability and Discipline in the Wake of Corporate Accounting Scandals

The recent corporate accounting scandals have prompted new federal legislation, Securities and Exchange Commission rules, case law, and American Bar Association rules, all of which significantly affect the nature of corporate counsel's ethical responsibilities and potential for liability in connection with corporate accounting and disclosures to investors. This section highlights a few of the more significant developments in this area.

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244. *Id.* at 193.
245. *Id.* at 195.
246. *Deutsch*, 97 S.W.3d at 195.
247. *Id.* at 201 (Brister, C.J., dissenting).

A. *Increased Potential for Civil Liability Under Section 10(b) of the Securities and Exchange Act of 1934*

Section 10(b) of the Securities and Exchange Act of 1934 makes it illegal to "use or employ . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[248] Although the Act does not explicitly prescribe a cause of action for violating this provision, courts have developed a common law claim for securities fraud, which holds a company liable for misrepresenting its financial position to investors, failing to disclose the factual importance about stock price, or being over-optimistic about future expectations.[249] The elements of a claim for securities fraud arising out of Section 10(b) are: (1) a misstatement or omission; (2) of a material fact; (3) made with scienter; (4) on which the plaintiff relied; and (5) which proximately caused his injury.[250] Scienter has been defined as "intent to deceive, manipulate, or defraud."[251] The Fifth Circuit has held that scienter may be established by showing severe recklessness that involves "an extreme departure from the standard[ ] of ordinary care, and that present[s] a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it."[252]

The United States Supreme Court held in *Central Bank of Denver v. First Interstate Bank of Denver*[253] that a private plaintiff may not bring an aiding and abetting claim under section 10(b) and that

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248. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2000). Note that attorneys may also be liable under other securities laws, including the 1933 Securities Act, the Investment Advisers Act of 1940, and the Texas Securities Act. In addition, the Securities and Exchange Commission (SEC) may regulate lawyers who appear before it under its disciplinary Rule 2(e), which allows the SEC to suspend or deny to the lawyer the privilege of appearing or practicing before it if the lawyer willfully aided or abetted in violating the federal securities laws. The 1990 revisions to the Act also vest the SEC with power to bring administrative proceedings against, and to impose cease and desist orders against, any person who causes another to violate the securities laws.

249. *See* Tanya Patterson, Note, *Heightened Securities Liability for Lawyers Who Invest in Their Clients: Worth the Risk?*, 80 TEX. L. REV. 639, 647 (2002) (discussing typical securities-fraud cases under Section 10(b) of the Securities Exchange Act of 1934).

250. *In re* Enron Corp. Sec., 235 F. Supp. 2d 549, 571 (S.D. Tex. 2002).

251. Abrams v. Baker Hughes, Inc., 292 F.3d 424, 430 (5th Cir. 2002).

252. Nathenson v. Zonagen, Inc., 267 F.3d 400, 408 (5th Cir. 2001).

253. 511 U.S. 164 (1994).

liability under that section is limited only to "primary violators."[254] *Central Bank* did not, however, make clear when "secondary actors" such as lawyers, accountants, and banks might be held liable as primary violators along with their clients. Federal courts have split on this issue.[255] The Second, Tenth, and Eleventh Circuits have advocated a "bright line" test that imposes liability only on secondary actors who: (a) make a misstatement, (b) that they know or should know will be communicated to investors, and (c) the misstatement is attributed directly to the actor.[256] The Ninth Circuit, by contrast, has imposed liability more broadly on secondary actors who substantially participate in creating a misrepresentation, even if the investing public may not be able to directly attribute the misstatement to that secondary actor.[257]

One of the most significant recent cases addressing this issue came from the United States District Court for the Southern District of Texas in one of the lawsuits resulting from the Enron scandal itself. *In re Enron Corp. Securities, Derivative & ERISA Litigation*[258] involved a number of secondary actors, including law firms, banks, and accounting firms that had represented Enron. These entities moved for dismissal from the class action securities lawsuit that had been brought against them based on their alleged complicity in the accounting scandal. The secondary actors argued that they could not be liable as aiders and abetters under Section

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254. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 192 (1994).

255. *See* David J. Beck, *The Legal Profession at the Crossroads: Who Will Write the Future Rules Governing the Conduct of Lawyers Representing Public Corporations*, 34 ST. MARY'S L.J. 873, 891 (2003) (stating that "*Central Bank* and its progeny have raised the question of what conduct, if any, by an attorney is sufficient to create primary liability"); Peter M. Saparoff & Breton Leone-Quick, *The Future of Secondary Actor Liability Under Section 10(b)*, SJ084 ALI-ABA 723, 726-27 (2004) (noting that *Central Bank* "did no provide any guidance on the issue").

256. *See, e.g.*, Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1205 (11th Cir. 2001) (following the Second Circuit in using the "bright line" test); Wright v. Ernst & Young, L.L.P., 152 F.3d 169, 175 (2d Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999) (using the "bright line" test); Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1226 (10th Cir. 1996) (expanding on the elements of the "bright line" test).

257. *See, e.g.*, *In re* Software Toolworks, 50 F.3d 615, 626 (9th Cir. 1994), *cert. denied*, Montgomery Sec. v. Dannenberg, 516 U.S. 907 (1995) (advocating broader liability); *In re* ZZZZ Best Sec. Litig., 864 F. Supp. 960, 970 (C.D. Cal. 1994) (agreeing to impose liability more broadly like the Ninth Circuit).

258. 235 F. Supp. 2d 549 (S.D. Tex. 2002).

10(b) and that they were not primary violators.[259] The district court, in a lengthy and detailed opinion, considered conflicting case law on the appropriate standard for holding a secondary actor liable as a primary violator under 10(b) and chose to adopt the standard advocated by the SEC.[260]

This standard imposes primary liability when:

> [A] person, acting alone or with others, *creates* a misrepresentation [on which the investor-plaintiffs relied] . . . [and] he acts with the requisite scienter. . . . Moreover it would not be necessary for a person to be the initiator of a misrepresentation in order to be a primary violator. Provided that a plaintiff can plead and prove scienter, a person can be a primary violator if he or she writes misrepresentations for inclusion in a document to be given to investors, even if the idea for those misrepresentations came from someone else.[261]

With respect to lawyers specifically, the court found that a critical component of a finding of primary liability would be whether or not the lawyers created an affirmative misrepresentation versus merely staying silent.[262] The court noted that this distinction was crucial because a lawyer ordinarily does not owe any duty to non-clients unless the lawyer makes material misrepresentations on which third parties rely.[263] On this basis, the court denied the motion to dismiss as to the law firm that had allegedly made statements to the public in SEC filings and press statements, in which it had allegedly misrepresented the nature of Enron's business and financial situation.[264] By contrast, because the other firm was not accused of making any representations to the public or to investors, the court found that it could not be primarily liable for a securities violation under Section 10(b).[265]

The *Enron* opinion reflects a significantly broader approach to liability than the "bright line" test, although it is not quite as broad as the "substantial participation" standard. It also reflects a general trend toward broadening securities fraud liability as a result of

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259. *In re* Enron Corp. Sec., 235 F. Supp. 2d 549, 687 (S.D. Tex. 2002).

260. *Id.* at 590.

261. *Id.* at 588 (quoting from the amicus brief filed by the SEC) (citations omitted) (emphasis added).

262. *Id.* at 705.

263. *Id.* at 707.

264. *In re Enron*, 235 F. Supp. 2d at 705.

265. *Id.* at 706.

the recent scandals. Lawyers who represent public corporations should monitor this area of the law closely for future developments in securities liability.

B. *Altered Professional Responsibility Standards Following the Sarbanes-Oxley Act of 2002*

1. SEC Rules Implementing Sarbanes-Oxley Standards for Attorney Conduct

In response to the corporate accounting scandals, Congress enacted the Sarbanes-Oxley Act of 2002 in order to protect investors by improving the accuracy and reliability of corporate accounting and disclosures.[266] This Act takes a number of significant steps toward more careful policing of corporate accounting, including setting up a Public Company Accounting Oversight Board and establishing new rules for public accounting firms and public corporations.[267] Section 307 of the Act also directs the SEC to issue rules that set forth minimum standards of professional conduct for attorneys representing clients before the SEC.[268] The Act specifically requires that these rules obligate attorneys:

> [T]o report evidence of a material violation of securities law or breach of fiduciary duty . . . to the chief legal counsel or the chief executive officer of the company . . . and . . . if the counsel or officer does not appropriately respond . . . requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.[269]

The SEC responded to this mandate by issuing a set of proposed rules that would obligate attorneys to report material violations "up-the-ladder" to the board of directors or other committees and to make a "noisy withdrawal" from representing the company by disaffirming any submission to the SEC that the lawyer believes to

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266. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. § 7245).

267. *Id.*; *see also* N. Henry Simpson et al., *The Sarbanes-Oxley Act of 2002*, 66 TEX. B.J. 226, 227 (Mar. 2003) (noting that the Act sets forth rules for the establishment and guidance of the Public Company Accounting Oversight Board).

268. Sarbanes-Oxley Act § 307.

269. *Id.*

be false or misleading.[270] These rules also purported to state that such a withdrawal would not violate the attorney-client privilege.[271]

The SEC's "noisy withdrawal" proposal resulted in an explosion of criticism from the legal community, primarily out of fear that it might denigrate the attorney-client privilege, attorneys' ethical duties of confidentiality, and already established means of attorney discipline.[272] The SEC therefore altered the proposed rules in light of these criticisms and has held back issuing a final rule that obligates attorneys to make a noisy withdrawal.[273]

The Final Rules that have been issued thus far, however, do significantly affect the nature of attorneys' ethical obligations in representing clients before the SEC. In particular, they impose on all attorneys appearing and practicing before the Commission the duty to report evidence of any "material violation" up the ladder to the highest authority within the corporation.[274] The Final Rules define a "material violation" as "a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law."[275] In other words, "material violation" is so broadly defined as to possibly mean any potential violation of any federal or state law. The Rules list a specific group of individuals or committees to

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270. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8185 (Feb. 6, 2003), 68 Fed. Reg. 6296, 6296.

271. *Id.* at 6302.

272. *See, e.g.*, Roger C. Crampton, et. al, *Up the Ladder and Beyond: The New Professional Standards for Lawyers Under the Sarbanes-Oxley Act*, 49 VILL. L. REV. 725, 731-33 (2004) (discussing criticism of the noisy withdrawal provisions); Monica Perin, *SEC Pressured to Re-Examine Sarbanes-Oxley*, HOUS. BUS. J., Jan. 3, 2003, *available at* http://www.houston.bizjournals.com/houston/stories/2003/01/06/story2.html (discussing provisions of the noisy withdrawal provisions).

273. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8185 (Feb. 6, 2003), 68 Fed. Reg. 6296, 6296 (acknowledging that the proposed rule generated "significant comment and extensive debate" and explaining that the final rule was therefore significantly modified and that the SEC would extend the comment period on the noisy withdrawal aspects); *see also* Arthur S. Berner & Debra G. Hatter, *Sarbanes-Oxley Act's Provisions to Alter Attorney-Client Relationship*, HOUS. BUS. J., Feb. 7, 2003, *available at* http://www.houston.bizjournals.com/houston/stories/2003/02/10/focus4.html (citing to the SEC's receipt of numerous critical comments of the proposed rules). As of the date of this Article, the SEC has not approved a final rule either adopting the "noisy withdrawal" provisions or some other approach.

274. 17 C.F.R. § 205.3(b) (2003).

275. *Id.* § 205.2(i).

whom the attorney should report in a particular order, including the chief legal officer or chief executive officer, a "qualified legal compliance committee," the audit committee of the board of directors, or the board itself.[276] The Rules further provide that:

> An attorney appearing and practicing before the Commission . . . may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary . . . to prevent the issuer [client] from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer . . . to prevent the issuer . . . from committing perjury . . . or to rectify the consequences of a material violation. . . .[277]

If the attorney fails to comply with his/her obligations under the Rules, the attorney may be subject to discipline by the Commission, "regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices."[278] Interestingly, the Rules attempt to supersede any conflicting ethical standards/disciplinary rules applicable in the various states by stating that "an attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction."[279] The Rules also specifically state that violations do not create a private right of action.[280]

2. Revised American Bar Association Model Rules of Professional Conduct

Another significant change in ethical standards came from the American Bar Association (ABA) in August 2003, when it voted to amend Rules 1.6 and 1.13 of the Model Rules of Professional Conduct as recommended by the ABA Task Force on Corporate Responsibility.[281] The amended Model Rule 1.6, which governs

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276. *Id.* § 205.3(b)(2).
277. *Id.* § 205.3(d)(2).
278. *Id.* § 205.6(b).
279. 17 C.F.R. § 205.6(c) (2003).
280. *Id.* § 205.7(a).
281. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.13 (2003) (providing the most recent version of the rules); ABA TASK FORCE ON CORP. RESPONSIBILITY, REP. OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY, *available at*

attorneys' confidentiality obligations, allows lawyers to reveal confidential information in order "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services" or "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."[282] The Texas equivalent of Model Rule 1.6, Texas Disciplinary Rule of Professional Conduct 1.06, allows lawyers to reveal confidential client information when "the lawyer has reason to believe it is necessary . . . to prevent the client from committing a criminal or fraudulent act" and *requires* that lawyers reveal confidential information when the information clearly establishes that "a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, ..."[283]

Amended Model Rule 1.13, governing representation of entities, shows the influence of the SEC's "up-the-ladder" reporting requirements. Specifically, the amended Rule requires lawyers to follow the following procedure for reporting known legal violations:

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a

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http://www.abanet.org/cpr/ethics2k.html (recognizing the formation of the Ethics 2000 Commission and subsequent amendments to the rules).

282. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2), (3). Interestingly, at its 2001 Annual Meeting, the ABA had voted not to broaden this exception. ABA COMM. ON EVALUATION OF THE RULES OF PROF'L CONDUCT, REP. OF THE COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT R. 1.6(b)(2), (Ethics 2000 Commission), *available at* http://www.abanet.org/cpr/e2k-rule16.html; *see also* Roger C. Crampton et al., *Up the Ladder and Beyond: The New Professional Standards for Lawyers Under the Sarbanes-Oxley Act*, 49 VILL. L. REV. 725, 731-33 (2004) (stating "[t]he ABA's change of position was influenced by a growing feeling within the organization that its leadership in the legal ethics field was threatened by the degree to which its confidentiality provisions departed from the actions taken by the high courts of most of the states. Also important was the ABA's desire to keep the SEC and the rest of the federal government at bay.").

283. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(c)(7), (e), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998).

violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.[284]

This Rule essentially requires that a lawyer report violations to the highest authority in the organization, unless the attorney believes that is not in the best interest of the organization. Texas Disciplinary Rule 1.12 authorizes attorneys to report violations to "higher authority" in the organization, but does not require such disclosure or specify that disclosure to the "highest" authority may be warranted.[285]

3. Effect of Sarbanes-Oxley on Attorney Audit Response Letters

Section 303 of the Sarbanes-Oxley Act makes it expressly unlawful for attorneys to "take any action to fraudulently influence, coerce, manipulate, or mislead . . . [an auditor] . . . for the purpose of rendering [the company's] financial statements materially misleading."[286] The SEC has enacted rules to implement section 303 and

284. MODEL RULE OF PROF'L CONDUCT R. 1.13(b), (c).

285. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12(c)(3), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998).

286. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 303, 116 Stat. 745, 778 (codified at 15 U.S.C. § 7245).

has explained that it intends for those rules to apply to attorneys and other advisers.[287] In addition, the SEC's discussion of the rules explains that an example of "improper influence" prohibited by the rules would be "providing an auditor with an inaccurate or misleading legal analysis."[288] Attorneys providing audit letters to their clients should therefore take care that the information they include is not only accurate but that they not offer opinions on the potential outcome of matters unless they are confident about the likely result.[289]

VI. CONCLUSION

Legal malpractice jurisprudence is a dynamic and still evolving, area of Texas law. As practitioners in this area know, many questions posed by legal malpractice cases remain unanswered under current case law. We have attempted to address some of those questions and shed light on how Texas law may answer them as well as learn from the opinions of our sister states and federal courts.

287. Improper Influence on Conduct of Audits, Securities Act Release No. 34-4-7890 (May 28, 2003), 68 Fed. Reg. 31820, 31821-22 (codified at 17 C.F.R. pt. 240).

288. Improper Influence on Conduct of Audits, Securities Act Release No. 34-4-7890 (May 28, 2003), 68 Fed. Reg. 31820, 31823 (codified at 17 C.F.R. pt. 240).

289. *See generally* Dean F. Hanley, *Responding to Audit Inquiry Letters After the Sarbanes-Oxley Act*, 6 GPSOLO 40 (Sept. 2004) (arguing for a more detailed discussion regarding considerations in responding to audit inquiry letters).