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Recent Developments in Texas Legal Malpractice Law The Sixth Annual Symposium on Legal Malpractice and Professional Responsibility.

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RECENT DEVELOPMENTS IN TEXAS LEGAL MALPRACTICE LAW

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Legal malpractice cases are near and dear to every lawyer's heart, even those who do not sue or defend lawyers as part of their

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practice. All attorneys need to stay abreast of recent developments within this area. Legal malpractice law continues to evolve, and in the last few years there have been important developments affecting who can bring claims, when those claims can be brought, where those claims can be brought, what claims can be asserted, and how a plaintiff can prove that alleged malpractice actually caused a compensable injury.

This Article will discuss recent Texas legal malpractice cases, and how those cases will affect the day-to-day practice of law.

I. Who Can Sue You?

A. *The Privity Rule*

One of the most crucial questions any lawyer should consider is: "Who can sue me?" It is important to understand the universe of potential malpractice plaintiffs. For the most part, that question is governed by what is known as the "privity rule."

The Texas Supreme Court has held that "[a]t common law, an attorney owes a duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligent representation of the client."[1] In other words, "a non client has no cause of action against an attorney for negligent performance of legal work."[2] The effect of this principle, which is sometimes referred to as the "privity barrier,"[3] is that a plaintiff will be unable to establish the duty element of a legal malpractice claim unless he can show he was in privity of contract with the attorney he is seeking to sue.

Determining the existence of a legal duty is typically a question of law for the court.[4] Therefore, if a defendant attorney can establish that the person or persons bringing a malpractice claim were not clients or were not otherwise in privity with the attorney, that may provide the basis for an early summary judgment. In most cases, a well-crafted engagement letter, setting forth with specificity who is and is not the client, will go a long way in establishing who has standing to sue. However, several recent cases have ex-

1. Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996).

2. Parker v. Carnahan, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied).

3. *Barcelo*, 923 S.W.2d at 577.

4. Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994).

amined different circumstances in which plaintiffs have attempted to expand the scope of the privity rule in order to maintain suits as non-clients.

B. *New Law Regarding Estate Planning*

The question of privity, or "who's the client," often arises in connection with estate planning representations. Courts have wrestled with the competing public policy concerns that come into play when alleged malpractice is not discovered until after the estate planning client has passed away and the estate plan is examined, litigated, or both.[5] Often, the only potential plaintiffs available to pursue a malpractice claim are the deceased's beneficiaries, who might have interests that conflict with one another and with that of the deceased client. The privity rule is designed to protect the interests of the testator over the interests of any potential beneficiaries in controlling her relationship with her attorney as to the disposition of her assets over the interests of any potential beneficiaries.[6] Accordingly, the Texas Supreme Court held in *Barcelo v. Elliot*[7] that "an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust."[8] The court held that barring claims by beneficiaries helps ensure that estate planners "zealously represent their clients."[9] Many have argued, however, that if taken too far, this rule would unfairly insulate estate planning attorneys from malpractice claims, regardless of the quality of their work.

In *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*,[10] an opinion released on May 5, 2006, the Texas Supreme Court considered for the first time whether personal representatives of the deceased client's estate have standing to bring legal malpractice claims on

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5. *See Barcelo*, 923 S.W.2d at 577-78 (citing the decisions of different courts concerning disputes with the privity barrier and estate planning).

6. *See id.* at 578 (noting that "potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries").

7. 923 S.W.2d 575 (Tex. 1996).

8. Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996).

9. *Id.* at 578-79.

10. 192 S.W.3d 780 (Tex. 2006).

behalf of the estate.[11] The Texas Supreme Court held that personal representatives do have standing, reversing two court of appeals opinions that had held to the contrary.[12] The court held that a legal malpractice claim survives the client's death because "the estate has a justiciable interest in the controversy sufficient to confer standing," and that "the estate's personal representative has the capacity to bring" that claim on the estate's behalf.[13] The *Belt* opinion stated that "because the estate 'stands in the shoes' of the decedent, it is in privity with the decedent's estate-planning attorney . . . ."[14] The court reconciled this holding with *Barcelo* by noting that: "while the interests of the decedent and a potential beneficiary may conflict, a decedent's interests should mirror those of his estate."[15] In allowing a claim by the estate's representative, the court hoped to "strike[ ] the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship."[16]

C. *Assignment of Malpractice Claims*

Another twist on the general rule of privity is that, in certain circumstances, legal malpractice claims can be assigned to and brought by persons who were not in privity with the attorney. In most circumstances, causes of action are assignable under Texas law.[17] However, that principle "does not necessarily apply to legal malpractice claims."[18] When faced with a question about an assigned malpractice claim, Texas courts examine the particular assignment at issue to see if it violates public policy.[19] For example, assignments of legal malpractice claims "necessitating a 'duplici-

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11. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 783 (Tex. 2006) (granting petition to determine whether representatives could bring a malpractice action alleging that the deceased's attorneys were negligent in the drafting of a will).

12. *See id.* at 785 (finding that legal malpractice claims that allege pure economic loss are in essence a recovery for property damages which survive the death of the injured party); O'Donnell v. Smith, 197 S.W.3d 394, 394 (Tex. 2006) (vacating a judgment and remanding for reconsideration in light of the court's decision in *Belt*).

13. *Belt*, 192 S.W.3d at 786.

14. *Id.* at 787.

15. *Id.*

16. *Id.* at 789.

17. Wright v. Sydow, 173 S.W.3d 534, 551 (Tex. App—Houston [14th Dist.] 2004, pet. denied).

18. *Id.* at 551.

19. *Id.*

tous change in the positions taken by the parties in antecedent litigation' and those involving commercial marketing of legal malpractice claims are disfavored under Texas law."[20]

When examining an agreement with public policy concerns in mind, the court "determines whether the agreement has a tendency to 'injure the public good.'"[21] The court added that "[n]o standard definition or test applies to all cases, but courts generally find that a contract injures the public good if it is illegal, or is inconsistent with or contrary to, the best interests of the public."[22]

The Fourteenth Court of Appeals found that the assignment at issue in *Wright v. Sydow*[23] was violative of public policy.[24] In *Wright*, the clients sued their lawyers for malpractice and then, shortly before signing a settlement agreement with the lawyers, assigned their malpractice claims to a third party.[25] Accordingly, although the clients purported to release all of their claims against the attorneys, the claims were later brought by the third-party assignees.[26] The court found that to allow such an assignment would defeat the strong public policy of resolving disputes through settlement and would injure the public good.[27] The court wrote:

> Upholding these assignments would undermine the strong public policy favoring voluntary settlement agreements. It would encourage parties to negotiate and execute settlement agreements in bad faith. It would incite litigation rather than settling it. It would produce disharmony and ill will rather than peace. In short, our State's public policy would be undone.[28]

The court therefore declared the assignments void.[29]

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20. *Id.* (quoting Mallios v. Baker, 11 S.W.3d 157, 164 (Tex. 2000) (Hecht, J., concurring)).

21. *Wright*, 173 S.W.3d at 551 (quoting Ranger Ins. Co. v. Ward, 107 S.W.3d 820, 827 (Tex. App.—Texarkana 2003, pet. denied)).

22. *Id.*

23. 173 S.W.3d 534, 551 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

24. Wright v. Sydow, 173 S.W.3d 534, 553 (Tex. App.—Houston [14th Dist] 2004, pet. denied) (holding that assignments of such actions would violate Texas policy favoring voluntary settlement agreements).

25. *Id.* at 539.

26. *Id.* at 543.

27. *See id.* at 553 (arguing that although the legal system generally condones assignment of claims, "[i]f we condoned these assignments, no agreement could ever be considered 'settled'").

28. *Id.*

29. *Wright*, 173 S.W.3d at 553.

D. *Transfer During Sale of Assets*

Another recent case examined the circumstances in which an attorney-client relationship might be transferred through the sale of assets. In *Greene's Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P.*,[30] a company called Pipetronix purchased a company called Coulter and the rights to the "Coulter Process."[31] Pipetronix retained Fulbright & Jaworski to issue an opinion letter that the Coulter Process did not infringe on a certain patent.[32] The rights to the Coulter Process were later sold to Greene.[33] Greene began using the Coulter Process, and a third party called BJS asserted that such use violated the aforementioned patent.[34] BJS sued Greene and was represented by none other than Fulbright & Jaworski; Greene subsequently sued "Fulbright for malpractice, breach of fiduciary duty, and violations of the Deceptive Trade Practices Act."[35] Fulbright moved for and won summary judgment on the grounds that Greene had no standing to sue because it was never Fulbright's client and, thus, Fulbright never owed Greene any fiduciary duty.[36] Greene argued on appeal that, when it purchased the Coulter Process, it purchased the right to assert the former attorney-client relationship concerning the asset.[37] The First Court of Appeals disagreed.[38]

The court noted that the attorney-client relationship transfers only when there is a merger.[39] "In a merger, the successor organization stands in the shoes of prior management and continues the operations of the prior entity."[40] When, as in *Greene's*, there "is merely a sale of assets," however, "the rights and liabilities [gener-

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30. 178 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

31. Greene's Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P., 178 S.W.3d 40, 42 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Greene's*, 178 S.W.3d at 42.

37. *Id.* at 43.

38. *See id.* at 44 (holding that the transaction was an asset transfer that did not transfer rights and responsibilities because they were not expressly part of the corporate transaction).

39. *Id.*

40. *Id.*

ally] do not transfer unless expressly assumed."[41] The *Greene's* court did not discuss whether or not Greene could have specifically bargained for the rights to the attorney-client relationship in the original sale.

II. When Can They Sue?

A. *The Statute of Limitations and the Discovery Rule*

Texas courts also have continued to develop the case law regarding the applicable statute of limitations, or how long a malpractice claimant can wait before bringing suit. A "legal malpractice [cause of action] is in the nature of a tort and is thus governed by the two-year limitations statute."[42] However, "[b]ecause it is unrealistic to expect a lay client to have the legal acumen to perceive the negligence of his attorney in giving faulty [legal] advice, and because the injury flowing from faulty [legal] advice is objectively verifiable,"[43] the Texas Supreme Court has recognized that the discovery rule applies to legal malpractice claims.[44] Accordingly, such a claim does not accrue until the claimant "knows or in the exercise of ordinary diligence should know of the wrongful act and resulting injury."[45]

B. *The* Hughes *Tolling Rule*

In addition, the Texas Supreme Court created in 1991 what has become known as the *Hughes* tolling rule.[46] This bright-line rule tolls the statute of limitations "when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation . . . until all appeals on the underlying claim are exhausted."[47] The

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41. *Greene's*, 178 S.W.3d at 44.

42. Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988); *accord* Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon Supp. 2006); Apex Towing Co. v. Tolin, 41 S.W.3d 118, 120 (Tex. 2001).

43. Murphy v. Mullin, Hoard & Brown, L.L.P., 168 S.W.3d 288, 291 (Tex. App.—Dallas 2005, no pet.).

44. *Apex Towing*, 41 S.W.3d at 120-21.

45. *Murphy*, 168 S.W.3d at 291.

46. *See* Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex. 1991) (finding that, in a malpractice cause of action based on a litigated legal matter, the statute of limitations is tolled until all appeals in the underlying action are exhausted).

47. *Id.*; *accord Apex Towing*, 41 S.W.3d at 119. For a few years, an accounting malpractice case, *Murphy v. Campbell*, 964 S.W.2d 265 (Tex. 1997), created confusion in this area. Some appellate courts held that *Murphy* narrowed the *Hughes* tolling rule such that

court reiterated in 2001 the need for bright-line rules in the area of limitations and advised that "without re-examining whether the policy reasons behind the tolling rule apply in each legal-malpractice case matching the *Hughes* paradigm, courts should simply apply the *Hughes* tolling rule to the category of legal malpractice cases encompassed within its definition."[48]

C. *Transactional Malpractice*

In *Murphy v. Mullin, Hoard & Brown, L.L.P.*,[49] the Fifth Court of Appeals decided not to expand the *Hughes* tolling rule to cases of malpractice in a transactional representation that later led to litigation (also known as transactional malpractice).[50] In *Murphy*, the law firm of Mullin, Hoard & Brown had been retained in the mid-1990s to form two family limited partnerships in an effort to reduce the estate taxes that would be owed by the plaintiffs' mother.[51] Three years later, after the mother's death, the IRS sent a letter to the plaintiffs stating that it was contesting the valuation of the partnerships and the resulting tax savings.[52] The IRS later served plaintiffs with a notice of tax deficiency of over $3 million.[53] The tax case settled in July 2000.[54] On March 7, 2002, plaintiffs filed suit against the law firm alleging that the law firm negligently drafted certain partnership agreements and "failed to timely notify [them] of the defects in the agreements."[55] The law firm moved for summary judgment on statute of limitations grounds, alleging that the advice was given in 1994, and that the alleged negligence was or

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the statute of limitations begins to run when a party hires new counsel to handle the underlying litigation. *See Apex Towing*, 41 S.W.3d at 119-20 (listing cases holding such limitation). But by 2001, the Texas Supreme Court confirmed that no such modification had occurred, and that continued representation by the allegedly negligent attorney is not a requirement for the tolling rule. *Id.* at 121-22.

48. *Apex Towing*, 41 S.W.3d at 122.

49. 168 S.W.3d 288 (Tex. App.—Dallas 2005, no pet.).

50. *See* Murphy v. Mullin, Hoard & Brown, L.L.P., 168 S.W.3d 288, 292 (Tex. App.—Dallas 2005, no pet.) (holding that the *Hughes* rule tolling the limitation period in legal malpractice actions does not apply to malpractice claims involving transactional work).

51. *Id.* at 290.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Murphy*, 168 S.W.3d at 290.

should have been discovered no later than June 25, 1998, when plaintiffs received the deficiency notice from the IRS.[56]

The trial court granted a take-nothing summary judgment in favor of the defendant attorney, and refused to apply the *Hughes* tolling rule.[57] The Fifth Court of Appeals affirmed, holding that the *Hughes* tolling rule does *not* apply to malpractice claims based on transactional work because malpractice does not arise during the prosecution or defense of a claim in litigation.[58] The court acknowledged that many of the policy considerations underlying the *Hughes* tolling rule were present in the *Murphy* case as well, but was unmoved by that fact: "Although one of the policy considerations behind [the *Hughes*] rule is to prevent a litigant from being forced to take inconsistent positions, it is not so broad as to apply whenever that would be the case."[59]

In 2006, the Fourteenth Court of Appeals reached the same conclusion in *J.M.K. 6, Inc. v. Gregg & Gregg, P.C.*[60] J.M.K., a developer, brought suit against defendant Gregg, whom it had hired to assist in converting apartment buildings to condominiums.[61] J.M.K claimed that Gregg had advised that the properties complied with all legal requirements and were ready for sale, and that both parties had a conference call with the proposed buyers, BMW and Tyson, during which Gregg said the same thing.[62] The condos did not comply with the legal requirements, however, and the city would not permit the buyers to proceed with the conversion.[63] Gregg contended that the legal malpractice claim accrued with the filing of the paperwork for the condos in August 2000 or, at the latest, by June 26, 2001, when the buyer went before the city's planning committee and the city unanimously passed a motion disapproving the type of condominium conversion at issue in the project.[64] J.M.K

56. *Id.*
57. *Id.* at 291.
58. *Id.* at 292.
59. *Id.*; *see also* Vacek Group, Inc. v. Clark, 95 S.W.3d 439, 441 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("conclud[ing] that *Murphy* dictates that the *Hughes* tolling rule does not apply in" a case involving alleged malpractice in connection with the drafting of a "corporate divorce" agreement).
60. 192 S.W.3d 189, 192 (Tex. App.—Houston [14th Dist.] 2006, no pet.).
61. *Id.* at 193.
62. *Id.*
63. *Id.* at 194.
64. *Id.* at 196.

admitted knowing about the potential claims on June 25, but believed the commissioners would change their minds.[65] J.M.K argued its cause of action did not accrue until December 2001, when the planning committee "definitively informed" J.M.K. that it would have to spend $2 million on various improvements and modifications before the city would recognize the conversion and that compliance was, therefore, "not a viable solution."[66]

The court rejected J.M.K's argument: "This is an objective inquiry into whether the plaintiff should have discovered the injury, and not an inquiry into the plaintiff's subjective belief as to whether the injury could be remedied affordably."[67] Discovering that no affordable remedy existed was not the same as finding out about additional wrongful acts or omissions by Gregg.[68] The court also declined J.M.K's invitation to extend the *Hughes* tolling rule, holding that the rule could not be applied on a case-by-case basis, but must be applied with a bright-line approach.[69] "Following the bright-line approach set forth in *Apex Towing Co.*," the court restricted its "inquiry to determining whether the malpractice is alleged to have occurred 'in the prosecution or defense of a claim that results in litigation.'"[70]

III. Where Can They Bring the Claim?

Although perhaps not as important as the questions of privity and limitations, the forum in which a legal malpractice claim can be brought can make a real difference in the length, cost, and sometimes even the outcome of the claim.

A. *Which State?*

One issue recently faced by the Texas courts is when to allow non-Texas attorneys to be sued in Texas by Texas citizens. In *Bergenholtz v. Cannata*,[71] the Fifth Court of Appeals determined whether the State of Texas had personal jurisdiction over attorneys

65. *J.M.K.*, 192 S.W.3d at 196-97.
66. *Id.* at 197.
67. *Id.*
68. *Id.*
69. *Id.* at 198.
70. *J.M.K.*, 192 S.W.3d at 198.
71. 200 S.W.3d 287 (Tex. App.—Dallas 2006, no pet.).

licensed and working in California, but whose clients became involved in litigation in Texas.[72] The court considered the extent of the California attorneys' involvement in the Texas litigation in order to determine if they had purposefully availed themselves of the privileges and benefits of conducting business in Texas.[73] Because one attorney's representation of a Texas citizen was limited to a California lawsuit, did not result from the attorney seeking clients in Texas, and did not involve communication with Texas other than regarding the California lawsuit, the court held that he did not purposefully avail himself of the privileges and benefits of doing business in Texas.[74] Therefore, the *Bergenholtz* court found that Texas did not have personal jurisdiction over him.[75] In addition, the court found that Texas courts did not have personal jurisdiction over the second attorney because the attorney had not chosen the Texas forum for the bankruptcy case at issue, and she had only agreed to assist in the Texas bankruptcy case because of the original California lawsuit.[76] The court found that the second California attorney's involvement in the Texas bankruptcy was merely fortuitous and did not constitute a purposeful availment of the benefits of Texas law.[77] Therefore, it appears that for a court in Texas to have personal jurisdiction over an out-of-state attorney, the attorney must engage in some purposeful action to do business in the state, rather than simply being involved in litigation that ends up in Texas.

B. *Court or Arbitration?*

Another forum-related issue that continues to be discussed by Texas courts is the enforceability of arbitration agreements between attorneys and their clients. Many attorney engagement letters contain arbitration agreements. Courts routinely enforce such agreements in fee dispute cases and, in fact, the Dallas Bar Association and other bar associations around the state have established

72. *See* Bergenholtz v. Cannata, 200 S.W.3d 287, 297 (Tex. App.—Dallas 2006, no pet.) (affirming the trial court decision to dismiss the case against the California attorneys for want of personal jurisdiction).

73. *Id.* at 295-97.

74. *Id.*

75. *Id.*

76. *Id.* at 296-97.

77. *Bergenholtz*, 200 S.W.3d at 296-97.

fee dispute committees charged with conducting hearings and ruling on such disputes.

The law is not quite as settled, however, when it comes to arbitration of legal malpractice claims. Malpractice plaintiffs have tried several approaches to avoid compelled arbitration, but those approaches have, with few exceptions, proven unsuccessful.

In the 2000 case of *Henry v. Gonzalez*,[78] the plaintiff client argued that arbitration should not be compelled because an arbitration agreement between attorney and client violates public policy.[79] The dissent agreed, arguing that arbitration provisions between attorneys and clients violate public policy because of the fiduciary relationship involved and the opportunity such agreements would provide for attorneys to take advantage of their clients.[80] However, the majority of the Fourth Court of Appeals disagreed, and summarily rejected the public policy argument, noting that "well established caselaw favors mandatory arbitration . . . ."[81] Accordingly, the court remanded the case to the trial court with instructions to enter an order compelling arbitration.[82]

Also in 2000, the Thirteenth Court of Appeals decided *In re Godt*,[83] which considered "an identical provision in an identical contract (same attorney, same contract, same complaint, and most distressingly, a virtually identical fact pattern with a different client) [as was addressed by] the San Antonio Court of Appeals, *Henry v. Gonzalez*."[84] The Corpus Christi court agreed with the San Antonio court that the Federal Arbitration Act (FAA),[85] which creates a strong policy in favor of enforcing arbitration agreements,[86] did not apply because the agreement did not affect interstate commerce.[87] But the Corpus Christi court disagreed that the agreement was enforceable under the Texas Arbitration Act

78. 18 S.W.3d 684, 691 (Tex. App.—San Antonio 2000, pet. dism'd by agr.).

79. Henry v. Gonzalez, 18 S.W.3d 684, 691 (Tex. App.—San Antonio 2000, pet. dism'd by agr.).

80. *Id.* at 692-93 (Hardberger, C.J., dissenting).

81. *Id.* at 691.

82. *Id.* at 692.

83. 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.).

84. *In re* Godt, 28 S.W.3d 732, 736 (Tex. App.—Corpus Christi 2000, no pet.).

85. 9 U.S.C. §§ 1-16 (2000).

86. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 1207 (2006) (noting that the FAA "embodies the national policy favoring arbitration").

87. *Godt*, 28 S.W.3d at 736.

(TAA).[88] The TAA provides that a written agreement to arbitrate is generally enforceable.[89]

The TAA contains several exclusions, however, and does not purport to apply to a "claim for personal injury" unless (1) each party to the claim agrees in writing to arbitrate with advice of outside counsel and (2) each party to the claim and their attorneys must sign the agreement.[90] The *Godt* court held that a claim for legal malpractice constitutes a "claim for personal injury" and, therefore, is not enforceable under the TAA.[91] The *Godt* court also suggested in a footnote that attorney-client arbitration agreements might be against public policy, citing Texas Disciplinary Rule of Professional Conduct 1.08(g).[92] This contention was rejected by *In re Hartigan*,[93] discussed below.

In *In re Hartigan*, a legal malpractice case arising out of the attorney's representation of a client in an underlying divorce proceeding, the Fourth Court of Appeals considered the same issues discussed in *Godt*.[94] The court expressly disagreed with *Godt* and the other cases that had held a legal malpractice claim should be characterized as a claim for "personal injury" and held instead that a claim for legal malpractice is *not* excluded from the Texas Arbitration Act.[95] The plaintiff also argued, as suggested by the *Godt* court, that the arbitration agreement should not be enforced because it violated Texas Disciplinary Rule of Professional Conduct 1.08(g).[96] That rule, entitled "Conflict of Interest: Prohibited Transactions," provides: "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently repre-

88. *Id.* at 736-37 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.098 (Vernon Supp. 2000)).

89. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001-.003 (Vernon 2005) (outlining the requirements for validity and enforceability of arbitration agreements).

90. *Id.* §§ 171.002(a)(3), 171.002(c).

91. *Godt*, 28 S.W.3d at 738-39.

92. *Id.* at 739-40 n.7 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(g), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9)).

93. 107 S.W.3d 684 (Tex. App.—San Antonio 2003, pet. denied).

94. *See In re* Hartigan, 107 S.W.3d 684, 687-88 (Tex. App.—San Antonio 2003, orig. proceeding [mand. denied]) (explaining the background and applicable law of arbitration).

95. *Id.* at 690.

96. *Id.* at 689.

sented in making the agreement . . . ."[97] The San Antonio court held, however, that an arbitration agreement does not limit the liability of a lawyer; it "merely prescribes the procedure for resolving any disputes between attorney and client"; therefore, an agreement to arbitrate does not violate Rule 1.08.[98]

In *Feldman/Matz Interests, L.L.P. v. Settlement Capital Corp.*,[99] the Fourteenth Court of Appeals did not reach the "personal injury" question because it found that the case involved interstate commerce and, therefore, the FAA applied rather than the TAA.[100] The court noted that "the FAA extends to any contract affecting commerce, as far as the Commerce Clause of the United States Constitution will reach."[101]

One of the most recent cases on this subject, also out of the Fourteenth Court of Appeals, is *Taylor v. Wilson*.[102] The court in *Taylor* agreed with the *Hartigan* court that legal malpractice claims are not claims for personal injury and therefore are not excluded from the Texas Arbitration Act.[103] The court also distinguished *Godt* on the basis that the underlying claim in *Godt* was for personal injury, whereas the underlying claim in *Taylor* was against an investment firm and its banker.[104]

In sum, while Texas courts continue to wrestle with this issue, it appears likely that arbitration agreements between attorneys and clients, especially those involving interstate commerce, will be enforced. A separate question entirely, and one that is beyond the scope of this Article, is whether attorneys *should* try to get potential clients to agree to arbitrate any future malpractice claims in the initial engagement letter. As mentioned above, arbitrating fee disputes is common and may be a quick and efficient way to resolve that type of disagreement. But many insurers and experienced

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97. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(g).

98. *In re Hartigan*, 107 S.W.3d at 689.

99. 140 S.W.3d 879 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

100. Feldman/Matz Interests, L.L.P. v. Settlement Capital Corp., 140 S.W.3d 879, 884 n.3 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

101. *Id.* at 883 (citing *In re* L & L Kempwood Assocs., L.P., 9 S.W.3d 125, 127 (Tex. 1999) (per curiam)).

102. 180 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

103. *Id.* at 635.

104. *Id* at 630. A similar result was reached in *Miller v. Brewer*, 118 S.W.3d 896 (Tex. App.—Amarillo 2003, no pet.), which was a legal malpractice case arising out of a lawyer's representation of a client in an underlying employment discrimination suit. *Id.* at 897.

malpractice defense counsel strongly believe that arbitration is not the best forum for resolving malpractice allegations. A law firm's "technical" defenses such as limitations, lack of privity, and lack of "but for" causation, have a better chance of success in front of a judge, as opposed to an arbitration panel that might have a tendency to ignore technical arguments in favor of equitable ones.

IV. WHAT CAN THEY SUE YOU FOR?

The outcome of a legal malpractice action may turn on the particular cause of action that is pursued and ultimately allowed by the court. Generally, a malpractice claim is based on "the improper representation of a client or upon the failure of an attorney to exercise the degree of care and diligence that a lawyer would commonly exercise."[105]

Two Texas courts recently have confirmed that there is no private right of action for a violation of the State Bar disciplinary rules.[106] In *Jones v. Blume*,[107] for example, one plaintiff's attorney sued another over the allegedly improper division of a contingent fee claiming (among other things) that the defendant attorney violated the disciplinary rules of professional conduct.[108] The Fifth Court of Appeals affirmed summary judgment on behalf of the defendant on that claim, however, holding that a "private cause of action does not exist for violation of the disciplinary rules."[109] The court found that the disciplinary rules set forth the proper conduct of lawyers "'solely for the purpose of discipline within the profession,'" and that any claim for breach of those rules should be addressed in a disciplinary proceeding.[110] Likewise, the Fourth Court of Appeals has held that a violation of the disciplinary rules, standing alone, does not give rise to a claim for legal malpractice.[111]

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105. Lajzerowicz v. McCormick, No. 04-05-00681-CV, 2006 WL 2871298, at *1 (Tex. App.—San Antonio Oct. 11, 2006, no pet.) (mem. op.).

106. *See id.* (affirming summary judgment on claim based on alleged violation of disciplinary rules); Jones v. Blume, 196 S.W.3d 440, 450 (Tex. App.—Dallas 2006, pet. denied) (recognizing that a private cause of action does not exist for an attorney's violation of disclipinary rules).

107. 196 S.W.3d 440 (Tex. App.—Dallas 2006, pet. denied).

108. Jones v. Blume, 196 S.W.3d 440, 449-50 (Tex. App.—Dallas 2006, pet. denied).

109. *Id.* at 450.

110. *Id.* (quoting 1 J. HADLEY EDGAR, JR. & JAMES B. SALES, TEXAS TORTS AND REMEDIES § 12.02[1][a][ii][A] (2000)).

111. *Lajzerowicz*, 2006 WL 2871298, at *1.

Texas courts also have continued to reinforce the Texas rule that claims arising out of bad legal advice or representation are claims of negligence, and that a plaintiff may not fracture legal malpractice claims into other causes of action.[112]

A. *Breach of Fiduciary Duty*

Often, a malpractice claim will be accompanied by a claim for breach of fiduciary duty. A breach of fiduciary duty claim is subject to a four-year, as opposed to a two-year, statute of limitations[113] and may give rise to punitive damages.[114] In addition, where there has been a breach of the attorney's fiduciary duty to the client, the client need not prove actual damages in order to obtain forfeiture of the attorney's fee.[115] However, when the fiduciary duty claim arises from the same set of facts as the malpractice claim, it is subsumed within the malpractice claim and cannot be separately maintained.[116] The Fifth Court of Appeals recently affirmed that, unless the defendant attorney allegedly received an improper personal benefit, there can be no separate claim for breach of fiduciary duty arising out of legal representation.[117]

B. *Combining Breach of Contract Elements With Malpractice*

Similarly, the First Court of Appeals recently held that a malpractice claim cannot be recast as a claim for breach of contract.[118] Obviously, there are several potential benefits of combining a breach of contract claim with a malpractice claim. A plaintiff could take advantage of the four-year statute of limitations, and the Texas Civil Practice and Remedies Code provides for the recovery

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112. *Id.*

113. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5) (Vernon 2002).

114. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001 (Vernon Supp. 2006).

115. Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999).

116. *See, e.g.*, Cuyler v. Minns, 60 S.W.3d 209, 216 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (finding that the plaintiff's claims for breach of fiduciary duty and breach of contract constituted an unauthorized fracturing of a claim for legal malpractice).

117. Murphy v. Mullin, Hoard & Brown, L.L.P., 168 S.W.3d 288 (Tex. App.—Dallas 2005, no pet.); *see also* Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2002, pet. denied) (asserting that a legal malpractice claim cannot be divided into separate claims).

118. *See* Rangel v. Lapin, 177 S.W.3d 17, 24 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (refusing to recognize plaintiff's breach of contract claim as anything more than a legal malpractice claim).

of attorneys' fees in a claim for breach of contract.[119] But the court in *Rangel v. Lapin*[120] confirmed that where the breach of contract claim is merely a "means to an end" to complain of legal malpractice, and the "crux" of the claim is an alleged failure to provide adequate legal advice, there can be no separate claim for breach of contract.[121]

C. *Texas Deceptive Trade Practices Act*

Another popular addition is the ubiquitous claim for violation of the Texas Deceptive Trace Practices Act (DTPA). "Attorneys can be found to have engaged in unconscionable conduct by the way they represent their clients."[122] Unlike a legal malpractice claim, a DTPA cause of action provides for treble damages and attorneys' fees.[123] Perhaps more importantly, the Texas Supreme Court has held that a DTPA plaintiff need not prove the "suit within a suit" element required in a legal malpractice action (causation and "suit within a suit" are discussed below in Section V).[124]

Generally, however, DTPA claims are not available in legal malpractice actions because of the professional services exception to the statute.[125] Section 17.49(c) of the DTPA provides:

> 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.[126]

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119. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 1997).

120. 177 S.W.3d 17 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

121. *Id.* at 24.

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

123. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1), (d) (Vernon Supp. 2006).

124. *Latham*, 972 S.W.2d at 69. *But see Rangel*, 177 S.W.3d at 23-24 (stating that, as with a negligence claim, the DTPA requires that a malpractice plaintiff prove that "but for" the attorney's breach of duty, the plaintiff would not have sustained injury); *see also* Alexander v. Turtur & Assocs., 146 S.W.3d 113, 117 (Tex. 2004) (noting that while negligence requires a finding of "proximate cause" and the DTPA requires a finding of "producing cause," both "require[ ] proof of causation in fact").

125. *See* Lajzerowicz v. McCormick, No. 04-05-00681-CV, 2006 WL 2871298, at *1 (Tex. App.—San Antonio Oct. 11, 2006, no pet.) (mem. op.) (stating that a plaintiff "is not permitted to recast a negligence claim as a DTPA claim").

126. TEX. BUS. & COM. CODE ANN. § 17.49(c) (Vernon Supp. 2006).

"To qualify as a professional service, the task must arise out of acts particular to the individual's specialized vocation."[127] Accordingly, an act is not a professional service merely because it is performed by a professional; instead, the act must require the "professional to use his specialized knowledge or training."[128] This exception is broad enough to shield most legal malpractice claims from the DTPA's reach, but it does not apply to "express misrepresentations of material fact" and other itemized conduct "that cannot be characterized as advice, judgment, or opinion."[129] However, it can be difficult to predict where the line between "express misrepresentation" and "legal advice" will be drawn in a particular case.

In *Rangel v. Lapin*, for example, the First Court of Appeals stated in dicta that a law firm's alleged representation that a paralegal was actually an attorney and an attorney's alleged misrepresentation that he was board certified were both covered by the professional services exception to the DTPA.[130] The court wrote that, because plaintiff claimed that the alleged misrepresentations "caused him to weigh the firm's advice with undue favor," it was "a claim that soundly rests within the arena of professional advice" and could not be pursued as a DTPA claim.[131]

D. *Negligent Misrepresentation*

Another claim often found in legal malpractice cases is one for negligent misrepresentation. As with fiduciary duty claims, if the negligent misrepresentation claim is based on the same facts as the alleged malpractice, it cannot be separately maintained.[132] A negligent misrepresentation claim, however, has one distinct advantage over a malpractice claim. The theory of negligent misrepresentation "permits plaintiffs who are not parties to a contract for profes-

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127. Nast v. State Farm Fire & Cas. Co., 82 S.W.3d 114, 122 (Tex. App.—San Antonio 2002, no pet.) (quoting Atlantic Lloyd's Ins. Co. v. Susman Godfrey, L.L.P., 982 S.W.2d 472, 476-77 (Tex. App.—Dallas 1998, pet. denied)).

128. *Nast*, 82 S.W.3d at 122.

129. TEX. BUS. & COM. CODE ANN. § 17.49(c) (Vernon Supp. 2006).

130. Rangel v. Lapin, 177 S.W.3d 17, 23 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

131. *Id.* at 24.

132. Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

sional services to recover from the contracting professionals."[133] Such a claim is not a legal malpractice claim and, thus, does not require privity.[134] The duty imposed on an attorney to a non-client is limited to those situations in which (1) the attorney is aware of the non-client and intends that the non-client rely on the representation, and (2) the non-client justifiably relies on the attorney's representation of a material fact.[135]

V. How Can They Prove Causation?

As more and more courts are confirming, proving a mistake by a lawyer is not enough to prevail on a legal malpractice claim. As legal malpractice claims arise in tort, they are treated like any other negligence claim. Therefore, the plaintiff must prove the traditional elements of negligence: duty, breach, causation, and damages.[136] When the alleged malpractice involves advice to the client, proving causation may not be difficult. The client, as the key decision maker, may be able to testify that she relied on the attorney's advice with unfortunate consequences.[137] But if "'a legal malpractice case arises from prior litigation, a plaintiff must prove that, but for the attorney's breach of his duty, the plaintiff would have prevailed in the underlying case.'"[138] This aspect is referred to as "but for" causation or the "suit-within-a-suit requirement."[139]

This "but for" link requires the fact-finder "to compare what did occur with what would have occurred if hypothetical, contrary-to-fact circumstances had existed."[140] A plaintiff establishes this link if he can show that the defendant's negligent conduct was the rea-

133. McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 792 (Tex. 1999).

134. *Id.*

135. *Id.* at 795.

136. *See, e.g.*, Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 117 (Tex. 2004) (affirming legal malpractice as a tort).

137. *Id.* at 119; *see, e.g.*, Delp v. Douglas, 948 S.W.2d 483, 496 (Tex. App.—Fort Worth 1997), (accepting testimony from client as evidence of proximate cause), *rev'd on other grounds*, 987 S.W.2d 879 (Tex. 1999).

138. Collins v. Snow, No. 04-05-00903-CV, 2006 WL 2955478, at *1 (Tex. App.—San Antonio Oct. 18, 2006, no pet.) (mem. op.) (quoting Hoover v. Larkin, 196 S.W.3d 227, 231 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)).

139. Rangel v. Lapin, 177 S.W.3d 17, 22 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

140. Greene v. Thiet, 846 S.W.2d 26, 30 (Tex. App.—San Antonio 1993, writ denied).

son the alternative scenario did not take place. But alleged negligence "is not a cause of the injury if the injury would have occurred even without the defendant's conduct sued upon."[141]

In *Rangel v. Lapin,* for example, the alleged malpractice was the personal injury attorney's advice to the client that he should sell the car that was involved in the accident at issue.[142] The client later decided to sue the automobile manufacturer, Honda, claiming that the car had a defective restraint system.[143] But because the client no longer had the car, he was unable to pursue that claim.[144] Instead, the client sued his original lawyers for giving him bad advice.[145]

In the malpractice case, the client offered expert testimony from an attorney who had handled similar cases against Honda and who "testified that there was 'no doubt in his mind' that he could have recovered a substantial recovery on behalf of [the client] had the vehicle been preserved."[146] Because the client could not prove the elements of the underlying products liability case (since he was no longer in possession of the car), the appellate court affirmed the summary judgment in favor of the defendant attorney.[147] The court wrote:

> To prevail in a passive restraint products liability suit, some combination of expert medical, biomechanical, and/or design opinions that the seat belt in Rangel's Honda was, in fact, defective, and furthermore, that failure of a seat belt passive restraint system caused Rangel's injuries would have been necessary to prevail in the underlying lawsuit.[148]

In another recent malpractice case, *Alexander v. Turtur & Associates, Inc.*,[149] a client sued a law firm regarding its handling of a

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141. *Id.*; *see also* Indus. Clearinghouse, Inc. v. Jackson Walker, L.L.P., 162 S.W.3d 384, 389 (Tex. App.—Dallas 2005, pet. denied) (stating that "[w]hile this evidence arguably raises a fact issue on the element of duty, it is irrelevant with respect to the issue of causation").

142. *Rangel*, 177 S.W.3d at 20.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 22.

147. *Rangel*, 177 S.W.3d at 25.

148. *Id.* at 22.

149. 146 S.W.3d 113 (Tex. 2004).

complex bankruptcy case.[150] The client had hired the named partner Alexander personally, but Alexander had passed the case off to a new associate who ultimately tried the case (to a bad result).[151] The client claimed that causation was obvious, relying on the "sheer number of errors made by counsel in the preparation and trial of the underlying adversary proceeding."[152] The Texas Supreme Court disagreed, noting that "even when negligence is admitted, causation is not presumed."[153] The reasoning behind and the effect of legal tactics are something "beyond the ken of most jurors. And when the causal link is beyond the jury's common understanding, expert testimony is necessary."[154] Because the plaintiff had not offered any expert testimony on the probable outcome of the case in the absence of the alleged mistakes, the court found that the trial court was correct in entering a take-nothing judgment.[155] In a concurring opinion, Justice Hecht expressed doubt as to whether a jury could ever be fairly expected to determine what a judge would have decided in such hypothetical circumstances.[156]

The Fourth Court of Appeals also recently affirmed a summary judgment in a legal malpractice case on the grounds that the plaintiff had failed to raise an issue of fact regarding causation. *Collins v. Snow*[157] arose from Mr. Snow's allegedly negligent representation of Mr. Collins in a medical malpractice action.[158] Plaintiff alleged that the lawyer failed to adequately plead, prove, and submit a claim for lack of informed consent in connection with a medical procedure that resulted in his wife's death.[159] The court of appeals affirmed the trial court's grant of summary judgment on the premise that the plaintiff had failed to establish an issue of fact with regard to one of the elements of the underlying medical malpractice claim—that is that the patient would have refused the treat-

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

151. *Id.* at 116.

152. *Id.* at 119.

153. *Id.*

154. *Id.* at 119-20.

155. *Alexander*, 146 S.W.3d at 122.

156. *Id.*

157. No. 04-05-00903-CV, 2006 WL 2955478 (Tex. App.—San Antonio Oct. 18, 2006, no pet.) (mem. op.).

158. Collins v. Snow, No. 04-05-00903-CV, 2006 WL 2955478, at *1 (Tex. App.—San Antonio Oct. 18, 2006, no pet.) (mem. op.).

159. *Id.*

ment had she been informed of the undisclosed risks.[160] Because the plaintiff could not establish the merits of his underlying claim, he could not prove causation in the malpractice case.[161]

Courts and commentators have recognized the problems that can be created by requiring a malpractice plaintiff to effectively try her underlying case.[162] First, in a case like *Alexander*, it would be very difficult, if not impossible, to accurately re-create the original trial such that the effect of different trial strategies could be measured. Also, some courts have opined that "it is unfair to require the [client] to litigate the case against . . . her own lawyer, who has superior knowledge about the strengths and weaknesses of the case, including knowledge obtained from the client's own confidences."[163] In addition, it may be difficult to conduct adequate discovery into the merits of the underlying case, because the original defendant will not be a party to the malpractice action. Finally, it can be unfair to the defendant attorney that all of the optimistic statements and high-damage estimates he made in the underlying lawsuit may now be used against him as admissions by a party-opponent. Nevertheless, as evidenced by the cases discussed above, Texas continues to follow the suit within a suit requirement.

VI. Conclusion

As demonstrated by the cases discussed in this Article, Texas courts are continuing to struggle to find the fairest and most efficient way to resolve legal malpractice cases. Given the complexity of the issues and the difficulties of proof involved, these debates likely will continue for some time.

160. *Id.*

161. *Id.*

162. *See* Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 845 A.2d 602, 612 (N.J. 2004) (noting the unfairness of forcing plaintiffs to litigate a claim against the lawyer who originally prepared it); Thomas v. Bethea, 718 A.2d 1187, 1197, 1201 (Md. 1998) (discussing how malpractice plaintiffs may have difficulties in gathering evidence for the underlying claim).

163. *Thomas*, 718 A.2d at 1197.