THE ETHICAL ATTORNEY: AVOIDING MALPRACTICE AND HONORING THE LAW

ROBERT L. TOBEY
COYT RANDAL JOHNSTON
Johnston ♦ Tobey, P.C.
3308 Oak Grove Avenue
Dallas, Texas 75204
214/741-6260 Telephone
214/741-6248 Facsimile
Email: info@johnstontobey.com
Website: www.johnstontobey.com

DALLAS BAR ASSOCIATION
SOLO AND SMALL FIRM SECTION
March 7, 2012
Table of Contents

I. INTRODUCTION .................................................................................................................. 1
II. WHO CAN SUE A LAWYER ................................................................................................. 1
   A. FORMATION OF THE ATTORNEY-CLIENT RELATIONSHIP ........................................ 1
   B. NON-CLIENTS WHO MAY SUE A LAWYER ................................................................. 2
   C. ASSIGNMENTS OF LEGAL MALPRACTICE CLAIMS .................................................. 2
   D. THE PRIVITY RULE ....................................................................................................... 4
      1. Strict Applicaton of the Rule ....................................................................................... 4
      2. Negligent Misrepresentation Claim ............................................................................ 5
      3. Secondary Liability Under the Securities Laws ......................................................... 6
      4. Suing Opposing Counsel ......................................................................................... 7
      5. Claims Against Criminal Attorneys ......................................................................... 7
   E. CRACKS IN THE PRIVITY RULE? ............................................................................... 8
      1. Slander Claims ........................................................................................................... 8
      2. Insurance Defense Counsel Issues ............................................................................ 9
      3. Estate Legal Malpractice Claims ............................................................................. 12

CONCLUSION ....................................................................................................................... 14

III. WHO TO REPRESENT ..................................................................................................... 14

CONCLUSION ....................................................................................................................... 15

IV. WHEN TO SUE A LAWYER ............................................................................................ 15

CONCLUSION ....................................................................................................................... 16

V. WHAT CAN YOU SUE A LAWYER FOR? ........................................................................ 16
   1. Negligence .................................................................................................................. 16
   2. DTPA ........................................................................................................................... 17
   3. Negligent Misrepresentations ..................................................................................... 18
   4. Breach of Fiduciary Duty ............................................................................................ 18

CONCLUSION ....................................................................................................................... 19

VI. WHAT CAN THE CLIENT RECOVER? ............................................................................ 20
   1. Mental Anguish Damages ............................................................................................ 20
   2. Fee Forfeiture ............................................................................................................. 20
   3. Attorney’s Fees as Damages & Collectibility .............................................................. 21

VII. HOW MUCH IS ENOUGH AND CONTINGENT FEE PROBLEM AREAS ................ 23

CONCLUSION ....................................................................................................................... 26

VIII. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT ....................... 27

CONCLUSION ....................................................................................................................... 27

IX. ADDITIONAL MISCELLANEOUS THOUGHTS AND MUSINGS ............................. 28
   The Good Faith Rule ....................................................................................................... 28
   INSURANCE ISSUES ...................................................................................................... 28
   PROXIMATE CAUSE ....................................................................................................... 28
   LAW OFFICE ISSUES ...................................................................................................... 29

X. HOT SPOTS, DANGER ZONES, RED FLAGS .............................................................. 30

XI. PREVENTION AND AVOIDANCE ............................................................................... 31

XII. THE GRIEVANCE PROCESS ......................................................................................... 32
   1. OVERVIEW OF THE GRIEVANCE PROCESS AND SOME STATISTICS ................ 32
   2. THE PRIVATE REPRIMAND SANCTION ................................................................. 33
   3. CONFIDENTIALITY IN THE GRIEVANCE PROCESS ............................................. 34
XIII. THE ATTORNEY CLIENT PRIVILEGE AND RULE 1.05 OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT ........................................................................................................................................... 34
1. THE ATTORNEY-CLIENT PRIVILEGE .................................................................................................................................................................................. 34
2. CONFIDENTIAL INFORMATION – RULE 1.05 ........................................................................................................................................................................... 36
3. THE LAWYER’S DILEMMA IF THE CLIENT INTENDS TO COMMIT A CRIMINAL OR FRAUDULENT ACT ........................................ 37
4. CASE LAW UNDER RULE 1.05 .............................................................................................................................................................................................. 39
5. PUBLIC POLICY ISSUES ................................................................................................................................................................................................. 42
I. INTRODUCTION

Some years back, the insurance industry predicted that legal malpractice would be the second fastest growing area of tort litigation in this decade. The prediction appears to be coming true. Over 15% of the bar has already been named in a malpractice suit and new lawyers can expect at least three (3) claims during their careers.

There are many lessons to be learned from a review of this trend and the type of cases being filed. Perhaps the biggest lesson is that over 26% of all claims are related to "failure-to-act-on-time" problems: these errors result from procrastination, failure to know deadlines, failure to calendar, failure to react to calendar, etc. Fully one fourth of all claims could be eliminated just by knowing and following the rules and law on timing matters. See Appendix No. 1 for an analysis of claims made.

A second, and less palatable lesson suggested by the trend may be that attorneys need to change their attitudes about the stigma of being sued. Doctors have learned that being sued is part of the cost of doing business (guess who taught them that): as the practice of law becomes more and more a BUSINESS, lawyers may have to accept this same reality. One should remember that it is hard to go through life and never be negligent, so it should be no surprise that lawyers will sooner or later damage another by their negligence and be sued for that damage. Being sued for malpractice is not the end of the world and even a successful suit should not be the end of a career either. Few drivers abandon their cars just because they were once negligent in its operation.

There are also trends in the law governing legal malpractice, but it is often hard to discern which way the trend in the law is going and what is pushing the changes. Most of the changes in the law were initially the result of more cases being filed and old, outdated legal principles being challenged anew: these changes in the law, however, once made, quickly converted from effect to cause, and began motivating the assertion of new cases. Tort reform has slowed or reversed some of the trend. There are, however, still significant areas where there have been changes or where changes are predicted for the future.

II. WHO CAN SUE A LAWYER

Texas courts continue to be preoccupied with the question of who can sue a lawyer. The cases touch upon issues of privity, standing, duty, subrogation, assignment, and public policy, but the bottom line question remains, who gets to sue the lawyer.

A. Formation of the Attorney-Client Relationship.

Clearly clients can sue lawyers for malpractice, but there is often a question as to who is the client. Like many issues presented by legal malpractice claims, there is no clear, bright line as to when an attorney/client relationship actually begins. Surveys of lawyers indicate that many are unfamiliar with the standard which determines when the relationship begins. Typical answers from lawyers include the signing of a contract, the filing of suit, the acceptance of funds, the in-office meeting, etc. While all of these events (and many others) are indications of whether an attorney/client relationship exists, none of these factors decide the issue. In Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex. App.- Corpus Christi, 1991), the court ruled that attorney/client duties arise as soon as the client subjectively thinks he or she has representation. In that case, lawyers had been hired to represent the Coca Cola companies involved in the school bus crash in the Rio Grande Valley and, in that capacity, were interviewing the employee/bus driver of the company in the hospital. The lawyers subsequently turned over the substance of their interview to the district attorney for the purpose of prosecuting criminal claims against the bus driver and the bus driver sued. The court, in reversing summary judgment in favor of the attorneys, held that the attorneys may have breached a fiduciary owed to the bus driver and violated the DTPA.

In Vinson & Elkins v. Moran, 946 S.W.2d 381 (Houston [14th Dist.] 1997), the court held that subjective belief of the client is not enough to establish an attorney/client relationship. In considering the law firm’s objection to the trial court’s refusal to submit an instruction that the attorney/client relationship required a “meeting of the minds” between the law firm and the client, the court stated the following:

“An instruction that fails to limit the jury’s consideration to objective indication showing a meeting of the minds and that allows the jury to base its decision, even in part, on a subjective belief is improper. It is not enough that one party thinks he has made a contract, there must be objective indications.” 946 S.W.2d at 406.
B. Non-clients Who May Sue a Lawyer

A determination that a person is not a client, does not, however, end the discussion of whether that person can successfully sue the lawyer. Under some circumstances, there is a specific duty to inform a non-client that they are a “non-client” and are not being represented. Breach of this duty can result in a law suit against the lawyer. The trigger for imposition of this duty appears to be primarily an objective test: was the lawyer aware or should the lawyer have been aware that the lawyer’s conduct would have led a reasonable person to believe that the reasonable person was being represented by the attorney. Parker v. Carnahan, 772 S.W.2d 151 at 156 (Tex. App. -- Texarkana 1989, writ denided). Randolph v. Resolution Trust Corp., 995 F.2d 611 at 615 (5th Cir. 1993), cert denied, 114 S.Ct. 1294 (1994). Although no case appears to have focused 100% on the subjective belief of the non-client, it is not difficult to postulate a hypothetical which might expand this area of the law: what if the lawyer knows that this particular client unreasonably believes he (or she) is represented, even though a reasonable person would not have reached that same result.

Another class of “non-clients” that can sue for malpractice consists of insurance companies, both primary and excess carriers. In American Centennial Ins. v. Canal Ins., 843 S.W.2d 480 (Tex. 1992) the Texas Supreme Court held that an excess insurance carrier could pursue a legal malpractice claim against a lawyer hired by the primary insurance carrier for acts of negligence in the representation of the insured. Since Texas adheres strictly to the principle that trial counsel for the insured represents only the insured (and not the insurance company), the court used the doctrine of equitable subrogation to permit the excess carrier to sue trial counsel for negligence. “Under this theory, the insurer paying a loss under a policy becomes equitably subrogated to any cause of action the insured may have against a third party responsible for the loss.” Id. at 482.

In permitting the excess insurance company to sue the insured’s trial counsel, the court acknowledged that “attorneys are not ordinarily liable for damages to a non-client, because privity of contract is absent.” Id. at 484. After examining the public policy concerns which require privity for a malpractice case (potential interference with the duties of the attorney to the client), the court concluded that a lack of privity would not be a defense to such a claim. The concurring opinion, joined in by five Justices, advanced the advisory opinion that the excess carrier’s only cause of action would be for negligence and there would be no right to pursue a claim for gross negligence, punitive damages, or violation of the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code §17.41, et seq. The concurring opinion went further to state that the Court’s holding should not be interpreted as to “suggest that a client’s rights against his attorney may be assigned.” Id. at 486.

C. Assignments of Legal Malpractice Claims

In Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. App. -- San Antonio 1994, writ denied) the question of the assignability of a legal malpractice case, which had been reserved in the Canal decision, was decided in the negative. The Zunigas brought a personal injury lawsuit, prevailed at trial and obtained a judgment against the defendant, but the insurer of the defendant had become insolvent. To satisfy the judgment against it, the defendant assigned its right to sue its lawyers for malpractice to the Zuniga plaintiffs. Armed with the assignment, Zuniga sued the defendants’ lawyers and the trial court granted summary judgment for the law firm on the sole ground that a legal malpractice claim was not assignable.

Recognizing that the issue had been left open by the Canal decision, the court observed that the “commercial marketing of legal malpractice causes of action by strangers...would demean the legal profession.” Id. at 316. The court went on to state that “Most legal malpractice assignments seem to be driven by forces other than the ordinary commercial market. In most of the reported cases, the motive for the assignment was the plaintiff’s inability to collect a judgment from an insolvent...defendant.” Id. at 316.

The court seemed to consider a case where a plaintiff took an assignment to satisfy an otherwise uncollectible judgment as being much more offensive than claims which are assigned as part of the “ordinary commercial market.” To justify its conclusion that assignability of legal malpractice cases would not be allowed, the court observed that the Zuniga suit was precisely such a “transparent device,” to collect a judgment from an insured defendant. Allowing such suits to proceed would, according to the court, “Make lawyers reluctant -- and perhaps unwilling -- to represent defendants with inadequate insurance and assets.” Id. at 317.

The court also found it demeaning to the profession that assignment of legal malpractice cases
could result in a role reversal under which a plaintiff in the underlying suit maintains that he has a good case but then, after assignment of the legal malpractice claim, maintains that his case was really worthless and he would not have won but for the legal malpractice of the defense attorney.

“For the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth.”

_Id_. at 318.

When the _Zuniga_ decision went to the Texas Supreme Court, the court denied review with the notation “writ denied.” That designation is the precedential equivalent of stating that there is no error in the underlying Opinion and converts the San Antonio Court of Appeals’ decision to Supreme Court precedent.

The court failed to consider that this role reversal was expressly sanctioned by the Texas Supreme Court in _Hughes v. Mahaney & Higgins_, 821 S.W.2d 154 (Tex. 1991). In that case, the Supreme Court ruled that limitations would not begin to run until such time as all appeals in the underlying lawsuit had been exhausted, because to do otherwise would require the client to take simultaneous inconsistent positions (on the appeal, the client argues that the lawyer properly disclosed the expert witness whom the court barred and in the legal malpractice case, the client argues that the lawyer failed properly to disclose the expert witness). By ruling that limitations do not begin to run until the appeals had been exhausted, the Texas Supreme Court effectively said that clients pursuing legal malpractice cases are entitled to and even encouraged to make this “shameless shift of positions,” “depending on where the money lies.”

This issue (assignability of a legal malpractice case) has been a heavily litigated and reported issue. In _Izen vs. Nichols_, 944 S.W.2d 683 (Tex. App. – Houston [14th Dist.] 1997, no pet.), the wife purported to assign 50% of her legal malpractice case against the attorneys who handled her divorce to her ex-husband, as part of a divorce decree. When the husband filed suit based upon the assignment, the wife filed an affidavit stating that she did not believe her lawyers had committed any malpractice and that she made the assignment only to gain additional visitation with her children. The court analyzed the factors set out in _Zuniga_ and determined that this case fell within those policy considerations and ruled that the assignment barred the lawsuit, affirming a summary judgment for the lawyer. The court went on to observe that _Zuniga’s_ predictions of an increase in unjustified lawsuits appeared to be coming to pass.

The Dallas Court of Appeals has dealt with the issue of assignability several times during the last decade. In _City of Garland vs. Booth_, 971 S.W.2d 631 (Tex. App. – Dallas 1998, writ denied), the court considered an assignment between former adversaries of claims which arguably did not involve legal malpractice. The claims were characterized as inappropriate billing practices and breach of warranty claims (the firm billed a significant amount of money to defend a motion to disqualify the firm for a conflict of interest, which motion was ultimately granted). The court ruled that _Zuniga_ was not limited to legal malpractice and found that the claims before it, “like those in _Zuniga_ … are based on the attorney/client relationship.” 971 S.W.2d 631, 635. The court affirmed the trial court’s granting of summary judgment for the lawyer, with the following language:

“The possibility that an attorney’s billing practices, correspondence with the client or lack thereof, or strategic decisions (such as to defend against a motion to disqualify), could be used as a bargaining chip in settlement negotiations could deter attorneys from zealous advocacy on behalf of their clients.”

_Id_.

The most interesting case in this area is the Texas Supreme Court’s decision in _Mallios vs. Baker_, 11 S.W. 3d 157 (Tex. 2000), which was appealed from the Dallas Court of Appeals. In this case, Baker sued his former lawyers who had represented him in a dram shop case, but had sued the wrong entity as the purported owner of the bar. By the time the identity of the true owner was discovered, the statute of limitations had run on Baker’s claims. _Id_. at 158

Baker signed an agreement with T. J. Herron, a lawsuit financier, whereby Baker assigned an interest in the proceeds from his malpractice claim against Mallios to Herron in exchange for Herron’s assistance in pursuing the same. The agreement provided that Herron would recommend legal counsel and negotiate the terms of employment for Baker subject to his approval, and would pay “all attorney fees, costs and expenses of the investigation, pursuit and prosecution” of those claims. Herron would be reimbursed out of any recovery from Mallios and would also be entitled to 50 percent of any recovery net of all expenses. The parties also agreed that Baker’s claims could not be settled without both Baker’s and Herron’s consent and
Baker would “fully cooperate in the investigation, pursuit and prosecution” of the claims against Mallios. The agreement also allowed Herron to terminate it if he determined that prosecuting Baker’s claims “would prove not to be economically feasible.” Id.

The trial court granted summary judgment in favor of Mallios on the theory that Baker had assigned part of his claim to Herron and therefore Baker’s prosecution of the claim contravened public policy. The Court of Appeals reversed the summary judgment. While the Supreme Court did not express an opinion on the validity of the underlying arrangement between Baker and Herron, it affirmed the reversal of the summary judgment, and stated in its holding:

“And even if we were to reach the issue of the agreement’s validity and determined that Mallios is correct that it is an invalid assignment, that would not vitiate Baker’s right to sue Mallios.”

In the concurring opinion, Justice Hecht argued that the agreement between Baker and Herron was void against public policy, but there was nothing that would prohibit Baker from suing Mallios for legal malpractice in his own name. Id. at 171. To date, the issue of whether a financing arrangement, such as that agreed upon by Baker and Herron is void against public policy remains open.

In Tate v. Goins, Underkofler, Crawford and Langdon, 24 S.W.3d 627 (Tex. App.-Dallas 2000, petition denied), the Dallas Court of Appeals again considered the validity of an assignment of the proceeds of a legal malpractice claim. In the underlying suit, Tate retained Goins to file a collection suit in Tarrant County against Sidco International Distribution Corporation of Texas (“Sidco”). Sidco responded by suing Tate in Bexar County, and Tate was represented by Goins in that action as well. A plea in abatement to be filed in the Bexar County action was prepared, but it was never verified or filed. As a result, no answer was filed on behalf of Tate in the Bexar County lawsuit, and Sidco obtained a default judgment against Tate in the amount of $233,166.66. A motion for new trial on Tate’s behalf was denied in the Bexar County suit and after Tate hired new counsel, Tate and Sidco entered into a settlement agreement. In the agreement, Tate agreed to assign a portion of the proceeds of his malpractice suit against Goins to Sidco. Id. at 630-631

Tate then filed suit against Goins alleging legal malpractice. After Goins obtained summary judgment, the Court of Appeals reversed it holding that in accordance with Mallios, Tate was entitled to pursue his legal malpractice claim in his own name. As was the case with the concurring opinion in Mallios, the Dallas Court of Appeals expressed doubt about the validity of the assignment of the legal malpractice cause of action from Tate to Sidco. Since the court found that Tate rather than Sidco was the real party in interest in the legal malpractice case, it allowed the suit to continue. Id. at 637

The Supreme Court also revisited the issue of transferability of a legal malpractice case in Douglas vs. Delp, 987 S.W. 2d 879 (Tex. 1999). The assignment which the Court analyzed was the result of the client having filed bankruptcy, after which his bankruptcy trustee sold his malpractice claim to a representative of the malpractice carrier for the attorney, who then dismissed the case with prejudice. On appeal, the client argued that the dismissal was improper because the bankruptcy trustee could not assign his legal malpractice claim under Zuniga. The court sidestepped the issue of whether a bankruptcy trustee has authority to prosecute or transfer a legal malpractice claim by ruling that, after the client filed bankruptcy, the only person with standing to pursue the claim was the bankruptcy trustee. Because the client lacked standing to pursue his own malpractice case, the court dismissed his appeal and his claims based upon lack of subject matter jurisdiction:

“Without addressing the validity of the assignment or the dismissal, we agree with [the lawyer] that [the client] lacks standing to challenge the assignment or dismissal in this proceeding.”

We are left to wonder what would happen if the claims had been purchased through the bankruptcy court by an independent third party with no distasteful “inherent reversal of roles.” Would the court under those circumstances have allowed the third party to pursue the claims? Until that question is answered, anyone purchasing a malpractice claim in bankruptcy court in Texas does so at his or her own risk.

D. The Privity Rule

1. Strict Application of the Rule

In Barcelo v. Elliot, 923 S.W.2d 575 (Tex. 1996), the Texas Supreme Court reaffirmed the privity
requirement for certain legal malpractice claims with a clear and unequivocal conclusion: only the client can sue the lawyer. The lawyer in Barcelo was hired to draft a will and certain trust documents. After the death of the client, the trust was declared to be invalid and unenforceable. Barcelo’s grandchildren, the intended beneficiaries under the trust, sued the lawyer alleging negligence in the creation of the trust. Summary judgment was granted in favor of the lawyer on the sole ground that he owed no professional duty to the grandchildren, because he never represented them. The Court of Appeals affirmed, concluding that an attorney owes no duty to parties intended to be beneficiaries under an estate plan.

The plaintiffs sought a narrow exception to the general rule that an attorney owes the duty of care only to the client: an exception for lawyers drafting wills or trust agreements, since the privity rule otherwise precludes the negligent attorney from ever being responsible for damages caused by the negligent acts. The court recognized that the majority of other states have relaxed the privity requirement in connection with estate planning, but refused to follow that lead. The primary rationale of the court seems to be that the “true intentions of the testator” are inherently unknowable and unprovable, making it impossible to prove that the lawyer did not implement them, even when a signed will or trust is declared invalid. The court concluded the opinion as follows:

“In sum, we are unable to craft a bright line rule that allows a law suit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no real doubt on the testator’s intentions, while prohibiting actions in other situations. We believe the greater is good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent.” Id. at 578.

It would seem that this same rationale would prohibit many other types of litigation currently sanctioned by the Court, such as an attempt to set a will aside for undue influence, but that did not slow the court down in its conclusion. Although the opinion is limited to legal malpractice in the context of drafting of wills and trust instruments, the opinion does not give any hope that the privity requirement would be relaxed in other situations involving other acts of negligence.

In Gamboa v. Shaw, 956 S.W.2d 662 (Tex. App. -- San Antonio 1997, no writ), the San Antonio Court of Appeals followed the direction to which the Supreme Court pointed in the Barcelo decision and refused to permit a shareholder of a corporation to file suit against a lawyer who allegedly committed malpractice in the representation of the corporation, pointing out that corporations can have thousands of shareholders and such an exception would expose attorneys to thousands of law suits. The court does not address and the ruling presumably does not disturb the case law which permits derivative law suits, where a shareholder brings the suit in the name of the corporation because the corporation has refused to do so.

2. Negligent Misrepresentation Claim

There has been, however, a slight departure from strict adherence to privity, albeit by a federal court. The U.S. Fifth Circuit Court of Appeals in First National Bank of Durant v. Trans Terra Corp., International, et al., 142 F. 3d 802 (5th Cir. 1998), held that a bank could sue the borrower’s lawyer for negligent misrepresentation. The dispute arose over a title opinion involving oil and gas interests on which the bank had loaned money, only to discover at foreclosure that the collateral was not as represented in the title opinion.

The U.S. Circuit Court for the Fifth Circuit agreed that the privity requirement barred a legal malpractice claim, but it permitted a claim against the lawyer for negligent misrepresentation. In the face of conflicting opinions from the Texas Courts of Appeals, the federal court acknowledged that it was predicting the result the Texas Supreme Court would reach when presented with the issue. The Barcelo case is distinguished because of the Texas Supreme Court’s reliance upon issues of divided loyalties, which the federal court found not to be present in this case.

In McCamish, Martin, Brown & Loeffler vs. F.E. Appling, Interests, 998 S.W. 2d 787 (Tex. 1999), the Texas Supreme Court made good on the federal court’s prediction. Justice Hankinson delivered the unanimous opinion of the court (Justice Gonzales did not participate), holding that,

“A negligent misrepresentation claim is not the equivalent of a legal malpractice claim and is not barred by the privity rule.

The case arose from the settlement of a lawsuit between a real estate developer and a bank in which there were accusations of lender liability by the developer and default on a note by the bank. To insure that the settlement was binding in the event of a bank failure (which the developer feared was imminent), the
developer insisted that the bank and the lawyers for the bank affirmatively represent that the settlement had been approved by the Board of Directors of the Bank, a condition precedent to binding the FDIC. The lawyer for the bank made the representation, but he was wrong. Prior to settlement, the Board of Directors of the bank (which included a shareholder in the law firm), adopted a resolution consenting to voluntary supervision by the Texas Savings and Loan Commissioner. The effect of this resolution was to transfer power to settle lawsuits to the representative of the Commissioner. The court analyzes the tort of negligent misrepresentation as described in the Restatement (Second) of Torts and lists all of the other professionals to whom this tort has been applied. Recognizing that liability for negligent misrepresentation is not based upon breach of any duty owed to a client, the court held that lawyers could be liable for negligent misrepresentation:

“based on the professional’s manifest awareness of the non-client’s reliance on the misrepresentation and the professional’s intention that the non-client so rely.

***

“This formulation limits liability to situations in which the attorney who provides the information is aware of the non-client and intends that the non-client rely on the information.”

***

“In other words, a non-client cannot rely on the attorneys’ statements, such as an opinion letter, unless the attorney invites that reliance.”

The court also acknowledged case law of other jurisdictions which has held that,

“A third party’s reliance on an attorney’s representation is not justified when the representation takes place in an adversarial context.”

Because the court found privity did not bar the suit, the court reversed the summary judgment for the lawyer and remanded to the trial court for trial.

3. Secondary Liability Under the Securities Laws

In Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148; 128 S.Ct. 761; 169 L.Ed. 2d 627 (2008), the United States Supreme Court decided that the implied private right of action that investors have to sue under 15 U.S.C. § 78j(b) and SEC Rule 10b-5 does not reach customer or supplier companies when the investors did not rely upon their statements or representations. 552 U.S. at 152. In this case, the investors purchased common stock of Charter Communications. Subsequently, the investors contended that Scientific-Atlanta and Motorola engaged in a fraudulent transaction with Charter whereby Charter overpaid Scientific-Atlanta and Motorola $20.00 for each set top box if purchased with the understanding that Scientific-Atlanta and Motorola would return the overpayment by purchasing advertising from Charter. The investors alleged that the sole purpose of these transactions was to inflate Charter’s revenues all in violation of Generally Accepted Accounting Principles. Id. at 154. The issue in the case therefore was whether or not the investors could sue Scientific-Atlanta and Motorola on the theory that they aided and abetted a breach of securities laws under Rule 10b-5.

The district court granted a motion to dismiss for failure to set a claim on which relief can be granted, which the Eighth Circuit Court of Appeals affirmed. Id. at 155. The Supreme Court affirmed the holding of the lower courts and held that the §10(b) implied private right of action does not extend to aiders and abettors, because the conduct of a secondary actor must satisfy each of the elements or pre-conditions for liability under §10(b). Id. at 158. To be actionable, the wrongdoer’s acts or statements must be relied upon by the investors.

The Supreme Court went on to hold that there is a rebuttable presumption of reliance in two different circumstances. First, if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance. Second, under the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public. The public information is reflected in the market price of the security. Then it can be assumed that an investor who buys or sells stock at the market price relies upon the statement. Id. at 159. Finding neither of the presumptions applied under the facts of the case, the Supreme Court affirmed the dismissal of the claims against Scientific-Atlanta and Motorola.
While the Stoneridge decision does not specifically address the potential for lawyer liability for aiding and abetting violations of the securities laws, the holding will clearly be applied to claims against lawyers in securities cases.

4. Suing Opposing Counsel

Another interesting case dealing with the subject of who can sue is Taco Bell Corp. v. Cracken, 939 F.Supp. 528 (N.D. Tex. 1996). In that case, it was not the client who sued the lawyer handling a wrongful death case; it was the opponent whom the lawyer had sued, and with whom the lawyer had negotiated a settlement for wrongful death claims.

This lawsuit had its genesis in an armed robbery of a Taco Bell restaurant in Irving, Texas in which several people were murdered. The lawyers representing the plaintiffs sued the murderer and the manufacturer of a wall safe inside the Taco Bell facility but did not sue Taco Bell initially. Suit was filed in Duvall County, a county generally perceived to be more favorable to plaintiff’s claims than Dallas County during the relevant time period. Because the murderer was indigent and incarcerated for murder, the plaintiffs’ attorney hired a lawyer to represent the murderer and the murderer thereafter consented to venue and admitted that he had chosen Duvall County as his residence. The safe manufacturer, however, challenged venue. Taco Bell, not a party to the lawsuit, requested that the venue hearing not be set until after limitations had run so that Taco Bell could participate in the venue hearing or alternatively avoid the lawsuit altogether based upon limitations.

The plaintiffs, however, negotiated a high/low settlement with the safe manufacturer and the safe manufacturer proceeded with its motion to transfer venue, which was denied. Under then existing law, venue was fixed in Duvall County, without regard to whether additional parties were brought in after the motion was denied. Within minutes of the denial of the motion, plaintiffs added Taco Bell as a defendant to the lawsuit in Duvall County.

Taco Bell ultimately settled the plaintiffs’ claims for $8.25 million dollars but also filed its own lawsuit against the plaintiffs’ attorneys alleging fraud, abuse of process, negligent misrepresentation, and conspiracy to fraudulently fix venue.

In deciding the case, the federal district court relied upon Brandt v. West, 892 S.W.2d 56 (Tex. App. -- Houston [1st Dist.] 1994, writ denied) in which the Houston Court of Appeals held that one attorney “does not have a right of recovery, under any cause of action, against another attorney arising from conduct the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first party also represented a party.” Id. 71-72. The basis of the court’s opinion was that allowing such lawsuits “would delude the vigor with which Texas attorneys represent their clients.” Id. at 72.

After observing that an attorney is probably more likely to be sued by an opposing party than by the opposing counsel, the federal court concluded that Texas law would also prohibit lawsuits of the type filed by Taco Bell. The clear bright line drawn by the court is that an attorney may not be sued by an opposing party (or opposing attorney) for any act or omission undertaken by the attorney in furtherance of representation of a client in a lawsuit. The court emphasized that, under Texas law, “it is the kind -- not the nature -- of conduct that is controlling.” Id. 532-33.

The court, therefore, granted summary judgment for the attorneys and against Taco Bell.

In Renfroe v. Jones Associates, 947 S.W.2d 285 (Tex. App. -- Fort Worth 1987, no petition), a judgment debtor brought suit for wrongful garnishment against the judgment creditor and the attorneys representing the judgment creditor, claiming that she had sufficient assets to satisfy the judgment and that the garnishment action filed three days after judgment was improper because it was precipitated on false facts (her lack of assets to satisfy the judgment). The Fort Worth Court of Appeals cited Taco Bell and upheld summary judgment in favor of the lawyer.

5. Claims Against Criminal Attorneys

In Peeler vs. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995) the Texas Supreme Court was confronted with a plaintiff who had been indicted for illegal tax write offs and had signed a plea agreement, admitting guilt to eighteen counts. Within days of pleading guilty, the client learned that her attorney had failed to communicate to her an earlier plea offer from the United States Attorney for absolute transactional immunity in return for her testimony. She sued the lawyer for failing to advise her of the offer of transactional immunity on the theory that, had she known, she would have accepted that offer and been spared a federal criminal conviction and federal imprisonment.

The case came to the court by way of a summary judgment granted in favor of the lawyer at the trial.
court and upheld by the appellate court. After reviewing the law of several states, the court purported to side with the majority of other states and held that,

“Plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise. We therefore hold that, as a matter of law, it is the illegal conduct rather than the negligence of the convict’s counsel that is the cause in fact of any injuries flowing from the conviction, unless the conviction has been overturned.” 909 S.W.2d at 497-498.

In reaching its result, the court also overruled the plaintiff’s claims under the DTPA with its producing cause requirement, as well as constitutional challenges under the open courts provisions, outlay, and the Equal Protection provision of the Texas Constitution.

The dissenting opinion by Chief Justice Phillips pointed out that none of the cases relied upon by the majority presented situations where the criminal defendant would have avoided conviction altogether but for the attorneys’ malpractice. The dissenting opinion would appear, however, to limit such claims by those convicted of crimes to situations to where there was an offer of immunity communicated to an attorney which the attorney failed to communicate to the client.

E. Cracks in the Privity Rule?

1. Slander Claims

There does appear to be one hole in the wall of protection between lawyers and opposing parties, however. In September, 1998, a Dallas jury awarded “an opposing party” $8.5 million dollars against a lawyer for slander. The plaintiff was adverse to the lawyer’s client in high profile court proceedings. The statements alleged to be slanderous were made to a newspaper reporter in a telephone interview that the lawyer argued was unsolicited.

Slander is a false statement orally communicated to a third person without excuse that damages another in his/her reputation. Randall’s Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 645 (Tex. 1995). Truth is not a defense: it is an inferential rebuttal of an element of the cause of action; namely, that the statement be false. Absolute truth is also not required to defeat a slander claim. It is enough if the statement is substantially true. McIlvain v. Jacobs, 794 S.W.2d 14, 15 (Tex. 1990).

There is no requirement of sciento or negligence. For a non-“public figure,” it is enough that the false statement was made and he/she suffered as a result; that the speaker could not have know of the falsity is irrelevant and often inadmissible. For a “public figure,” there is the additional requirement of malice: i.e., the statement must be made with knowledge of its falsity or with reckless disregard for the truth. A plaintiff is not a public figure, however, merely because the lawsuit or plaintiff is found to newsworthy by the press. “Essentially private concerns or disagreements do not become public controversy simply because they attract attention.” Barbouri vs. Hearst Corp., 927 S.W.2d 37, 48 (Tex. App. – Houston [1st Dist.] 1996, writ denied). In Time, Inc. vs. Firestone, 424 U.S. 448, the U. S. Supreme Court held that the highly publicized divorce of Russell Firestone was not a public controversy merely because it was, “of interest to the public.” Id. at 454.

To be a public controversy (and require a finding of malice) a dispute must be one which “receives public attention because its ramifications will be felt by persons who are not direct participants.” Barbouri, 927 S.W.2d at 48. Whether the underlying lawsuit rises to the level of a public controversy so as to require a finding of malice, is a question of law for the court. Even when the opposing party is clearly a public figure or the matter clearly involves a public controversy, the lawyer should remember that the public is fairly receptive to the notion that lawyers are capable of malice and have little regard for the truth.

Slander per se occurs when the false statement is, “so obviously harmful to the person aggrieved that no proof of damage to the reputation is necessary to make them actionable. Among the matters characterized as slander per se are those that, “affect a person in his office, profession or occupation.” Shearson Lehman Hutton, Inc. vs. Tucker, 806 S.W.2d 914, 921 (Tex. App. – Corpus Christi 1991, writ dismissed w.o.j.) Historically, statements suggesting criminal conduct, dishonesty, and deceit have been found to constitute slander per se, ironically, the very type things lawyers say about their clients’ opponents.

The lawyers’ privilege/immunity is limited to “communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding,” in which the
The Ethical Attorney Avoiding Malpractice and Honoring the Law

lawyer was participating as counsel on behalf of the client. In addition, the statements must bear some relationship to the proceeding. *Russell v. Clark*, 620 S.W.2d at 868-869 (Tex. App. – Dallas 1981, writ ref’d, n.r.e.); *Restatement of Torts (Second)*, § 586 (1977).

“Public policy demands that attorneys be granted the utmost freedom in their efforts to represent their clients. To grant immunity short of absolute privilege to communications relating to pending or proposed litigation, and thus subject the attorney to liability for defamation, might tend to lessen an attorney’s efforts on behalf of his client.”

*Russell v. Clark*, 620 S.W.2d at 868. The key to the lock on this wall of absolute privilege is, therefore, whether the defamatory statement is related to an existing judicial proceeding. That question is a matter of law to be determined by the court. The burden of proving the privilege is on the lawyer.

The court in the *Russell* decision acknowledged that the immunity/privilege enjoyed by attorneys, “must not be extended to an attorney *cart blanche*.” *Russell*, at 868. To enjoy the immunity, the attorney’s statements must “bear some relationship to a judicial proceeding in which the attorney is employed and must be in furtherance of that representation.”

The privilege did not protect attorneys who held a press conference. *Hill vs. Herald-Post Publishing, Co.*, 877 S.W.2d 774 (Tex. App. – El Paso 1994, rev’d in part on other grounds); 891 S.W.2d (Tex. 1994). The immunity/privilege granted attorneys does not constitute, “a license to go about in the community and make false and slanderous charges against a court adversary and escape liability for damages caused by such charges.” *Levingston Ship Building, Co. vs. Inland West Corp.*, 688 S.W.2d 192, 196 (Tex. App. – Beaumont 1985, writ ref’d, n.r.e.)

Shelter is occasionally sought behind the defense of “opinion.” In *Gertz vs. Robert Welch, Inc.*, 418 U.S. 223 (1974), the U.S. Supreme Court stated: “however pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Gertz*, 418 U.S. at 339-340. At first blush, this would appear to cloak many otherwise slanderous statements with immunity (“*It is my opinion that John Doe is a thief*”.)

In *Milkovich vs. Lorain Journal Co.*, 497 U.S. 1 1990, the court explained that in the *Gertz* case, it did not intend to “create a wholesale defamation exception for anything that might be labeled ‘opinion’”. That concept is also found in *El Paso Times, Inc. vs. Kerr*, 706 S.W.2d 797, 799 (Tex. App. – El Paso 1986 writ refused n.r.e.) when the court stated that, “even a statement of opinion will not be protected if it is couched in such a way to imply that the author possesses undisclosed facts.” Reaching a similar result is *Shearson Lehman Hutton vs. Tucker*, 806 S.W.2d 914 @ 920 (Tex. App. – Corpus Christi 1991, writ dismissed w.o.j.); “An opinion may be actionable in a defamation case if the statement contains an implied assertion of fact.” Bottom line: phrasing an unflattering objection as an opinion may offer little protection from liability.

For each of the cited cases, there are others addressing the same issues with different language and occasionally different results. The somewhat confusing state of the law, when combined with (1) lawyers’ desire for publicity, (2) incendiary emotions generated by litigation, and (3) media eager to convert otherwise private court proceedings into public spectacles, guarantees that some lawyers will be sued. Attorneys have been put in situations where representation of the client would include conveying their clients’ position to the press. Immunity should and probably does extend to those situations. The determination of exactly when the lawyer’s duties include communicating to the press is still unclear. A California court has perhaps offered the most accurate description of the current state of the law:

“No inhibitions are imposed on the rhetoric an attorney may use in official court papers, pleadings and arguments. However, attorneys who wish to litigate their cases in the press do so at their own risk – that is to say, protected by the First Amendment…and all principals which protect speech and expression generally, but *without the mantel of absolute immunity*.”


2. Insurance Defense Counsel Issues

Although the case did not directly deal with who can sue a lawyer, *State Farm Mutual vs. Traver*, 980 S.W.2d 625 (Tex. 1998), did address a related question: Who can the client sue other than the lawyer for the lawyer’s malpractice? The answer is, not the insurance company that hired the lawyer. Over the dissent of Justice Gonzales and Justice Abbott, the majority held that,
“An insurer is not vicariously liable for the malpractice of an independent attorney it selects to defend an insured.” *Id.* at 625, 626.

The client’s allegations in *State Farm*, if true, should create liability for the insurer on some theory. Following a head-on collision, a passenger sues both drivers and both drivers are insured by State Farm, who hires a separate attorney to defend each driver. Early in the litigation, plaintiff’s attorney arguably created a *Stower’s* situation as to one driver and one policy, but not the other. The case proceeded to trial, with the result that the driver who had no *Stower’s* liability was found to be primarily liable for injuries of the plaintiff, far in excess of the client’s policy. The client alleged that State Farm purposefully structured the defense of the two drivers so as to shift liability to him, thereby protecting itself from *Stower’s* liability to the second driver.

The court appears to hold that the barrier it has erected isolating State Farm from liability is limited to,

“Any common law or statutory claims based solely on [the lawyer’s] conduct.” *Id.* at 629. (Emphasis added.)

The concurring and dissenting opinion of Judge Abbott observes that,

“If the insurer uses its influence with the retained attorney to the detriment of the insured, the insurer’s liability to the insured for its own conduct is direct” *Id.* at 630

***

“There may be circumstances where an insurer would breach its contractual duty to defend by retaining incompetent counsel or failing to adequately fund the defense.” *Id.*

Justice Gonzales also observes that there are serious ethical implications for the so called “captive law firm,” suggesting that this arrangement may not be entitled to the exemption of the majority opinion, that an insurer has no vicarious liability so long as it selects “an independent attorney,” to defend the insured. The opinion certainly appears to leave open a future attack on an insurance company based upon the lack of true independence of the counsel it retains. One can imagine the nightmare inherent in the discovery that might be required from both the insurance company and the lawyer if courts are required to determine whether an attorney is independent of the insurance company that hired her

In *Unauthorized Practice of Law Committee v. American Home Assurance Company, Inc.*, 261 S.W. 3d 24 (Tex. 2008), the Supreme Court decided whether or not a captive law firm engages in the unauthorized practice of law. This was a very hotly contested case with numerous *amicus* briefs filed on behalf of both sides. Justice Hecht’s opinion starts off with language that is consistent with the ruling in *Traver* as follows:

“Liability insurance companies commonly provide that the insurer must indemnify the insured from liability for covered claims and give the insurer the duty, and also the right, to defend such claims. The right to defend in many policies gives the insurer complete, exclusive control of the defense. Insurance companies retain attorneys in private practice to represent insureds in defending claims against them, but for decades, in Texas and other states, insurers have also used staff attorneys—salaried company employees—to save costs.

“Generally, a corporation can employ attorneys in house to represent its own interests but cannot engage in the practice of law by providing legal representation to others with different interests. Because of its potential indemnity obligation, an insurer has a direct, substantial financial interest in defending claims against its insured, and often an insurer and an insured’s interests are aligned toward simply defeating such claims. But their interests can diverge, as for example when all or part of the claim may not be covered. The issue in this case is whether a liability insurer that uses staff attorneys to defend claims against its insureds is representing its own interests, which is permitted, or engaging in the unauthorized practice of law, which is not.” *Id.* at 26.
The Supreme Court noted the growth in the use of captive counsel by insurance companies in the state. One of the amicus briefs estimated that in September, 2005, over ten thousand cases in Texas were being defended by staff attorneys. *Id.* at 29. The Supreme Court concluded in its opinion that an insurer may use staff attorneys to defend a claim against an insured if the insurer’s interests and the insured’s interests are congruent, but not otherwise. Their interests are congruent when they are aligned in defeating the claim and there is no conflict of interest between the insurer and the insured. The Supreme Court also held that a staff attorney must fully disclose to an insured his or her affiliation with the insurer. *Id.* at 26-27.

In connection with rendering this opinion, the Supreme Court discussed the issue of whether confidential information that is provided by an insured to staff counsel would be imputed to the insurer. The Supreme Court held that while this problem presented risks to the insurer in using staff counsel, it did not necessarily destroy the congruence of the insurer’s and insured’s interests. *Id.* at 41.

In what appears to be an erosion of the *Tilley* doctrine (the insured is defense counsel’s only client), the Supreme Court discussed the fact that the staff attorney might in fact have two masters, the insured and the insurance company.

“But we have never held that an insurance defense lawyer cannot represent both the insurer and the insured, only that the lawyer must represent the insured and protect his interests from compromise by the insurer. And we have noted that ‘an insurer’s right of control generally includes the authority to make defense decisions as if it were the client’ ‘where no conflict of interests exists.’ *Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct* allows a lawyer to represent more than one client in the matter if not precluded by conflicts between them. Whether defense counsel also represents the insurer is a matter of contract between them.” *Id.* at 42.

The Supreme Court concluded the majority opinion as follows:

“In sum, the Committee argues that while an insurer’s control of defense counsel always impinges on counsel’s professional judgment and loyalty to the insured, the ethical problems are greater in number and magnitude when the defense is conducted by a staff attorney who owes the insurer allegiance as both a client and boss. These problems, the Committee argues, even though they may sometimes be resolved satisfactorily, should be avoided altogether. We do not minimize these difficulties or criticize the Committee for raising them by means of this proceeding. And we are especially concerned that the use of staff attorneys not diminish professionalism in insurance defense or harm the public. The use of staff attorneys comes with risks, as American Home and Travelers themselves acknowledge. If an insurer’s interest conflicts with an insured’s, or the insurer acquires confidential information that it cannot be permitted to use against the insured, or an insurer attempts to compromise a staff attorney’s independent, professional judgment, or in some other way the insurer’s and insured’s interests do not have the congruence they have in the many cases in which they are united in simple opposition to the claim, then the insurer cannot use a staff attorney to defend the claim without engaging in the practice of law. But there are a great many cases that can be defended by staff attorneys without conflict and to the benefit of mutual interests. The use of staff attorneys in those cases does not constitute the unauthorized practice of law.” *Id.* at 43.

Interestingly, there is a strong dissent by Justices Johnson and Green who in essence contend that you cannot be a little bit pregnant (my metaphor—not the court’s). In other words, the rules prohibiting the unauthorized practice of law mean what they say, and even if the interests of the insured
and the insurer are congruous that does not excuse the clear ethical prohibition against a corporation practicing law. Justice Johnson concluded “because acts of staff attorneys are acts of the insurer, when staff attorneys defend insureds in lawsuits the insurer violates the Act, is practicing law without a license, and is engaging in the unauthorized practice of law”. Id. at 54.

Traver and American Home show several interesting trends. We have gone from a “one-client” state in Tilley where the attorney clearly represents only the insured to perhaps a “two-client” state where the attorney represents both the insurer and the insured as set forth in American Home. While Traver was clear in holding that the insurer may not be held vicariously liable for the acts of malpractice of insurance defense counsel, the question is has that rule been changed at least to some extent by American Home? If staff counsel commits malpractice, doesn’t the insured in that situation have the right to sue the insurance company which employs the staff attorney? That would be the logical result.

One thing that is clear is that defense counsel is at the center of the storm. As was made clear in Traver, it is up to the attorney to prohibit the insurer from interfering with the lawyer’s independence of professional judgment to the insured client. If that happens, it is the lawyer, not the insurer, that is responsible to the insured.

Lawsuits against defense lawyers for “restricted case defenses” can come from three sources. First, the carrier who retained the lawyer can still sue. There may not even be a comparative fault issue. The Supreme Court has made clear that it is the lawyer who is responsible to the client for providing a defense, whether the lawyer gets paid or not. It has also made clear that insurance carriers can sue only as subrogees to the client’s interests if there is malpractice. Since carriers are suing in a representative capacity only, their own wrongful conduct may be irrelevant in a malpractice case against the lawyer. Even though carriers dictate what they will pay for, they are not asking for malpractice or a bad result.

If a lawyer wants protection from a subsequent suit by the carrier who restricted the defense, the lawyer should, at a minimum, secure the proverbial “informed consent” from both the carrier and the client – with the legal equivalent of the medical notation of a patient acting, “against medical advice.”

A second source of a malpractice lawsuit is the pool of excess carriers that might be lurking behind the primary coverage. Under the American Centennial Insurance Co. v. Canal Insurance Company, 843 S.W.2d 480 (Tex. 1992) decision, excess carriers are also subrogated to the full extent of their payments on behalf of the insured, and they are seldom involved in directing the defense. Most defense counsel ignore excess carriers, but they should not. If the excess carrier is complaining about the defense that the primary carrier is directing, the lawyer should anticipate that he or she will be sued for any bad result.

The third source of malpractice lawsuits against the insurance defense lawyer is, of course, the clients themselves. The Traver case demonstrates the most likely client-based malpractice suit: a judgment in excess of the policy limits. Until recently, however, most defense attorneys have thought that they had no exposure to a malpractice lawsuit from the client if all the cost of a bad result is borne by the insurance carrier. This is certainly not true today, if it ever was. There was recently a malpractice lawsuit in Fort Worth by a doctor against his defense counsel, where the doctor criticized counsel for advising him to settle a medical malpractice case, even though the settlement was fully funded by the carrier. Most people are harmed in some way by an adverse judgment, even if the carrier pays the judgment. If that adverse judgment results from what is perceived to be an inadequate defense, and if defense counsel has allowed the carrier to direct the defense with an eye to cutting defense costs instead of the interests of the client, a malpractice lawsuit is likely.

3. Estate Legal Malpractice Claims

In Belt v. Oppenheimer, Blend, Harrison & Tate, 192 S.W.3d 780 (Tex. 2006), the Supreme Court held that there is no legal bar preventing an estate’s personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent’s estate planners. In this case, David Terk hired the attorneys to prepare his will. After his death, Mr. Terk’s two daughters became the joint, independent executors of their father’s estate. The Terks sued the attorneys for legal malpractice in their capacity as executors of the estate, alleging that the attorneys were negligent in drafting their father’s will and then advising him on asset management. They
claimed that the estate incurred over $1,500,000.00 in tax liability that could have been avoided by competent estate planning. *Id.* at 782. While upholding the rule set out in *Barcelo* that beneficiaries of an estate could not sue the testator’s estate planning attorney for legal malpractice, the Supreme Court held that a legal malpractice claim survives the decedent to the decedent’s estate so that the estate has a justiciable interest in the controversy sufficient to confer standing. *Id.* at 786.

In *Smith v. O’Donnell*, 288 S.W. 3d 417 (Tex. 2009), the Texas Supreme Court held that the executor of an estate may sue a decedent’s attorney for alleged malpractice committed outside the realm of estate planning. *Id.* at 419. By way of background, when Corwin Denney’s wife, Des Cygne died, Denney served as executor of her estate. He retained Cox & Smith to advise him in the independent administration of her estate, and consulted with the law firm regarding the separate versus community character of the couple’s assets. *Id.* According to Denney, he and his wife had orally agreed that stock in Automation Industries, Inc., would be his separate property and stock in Gilcrease Oil Company would be hers. Cox & Smith prepared a memorandum advising Denney that the Automation and Gilcrease stock were presumed to be community property, and that additional information was necessary before classifying the assets. *Id.* at 420. According to Cox & Smith, Denney was also advised that he should probably pursue a declaratory judgment action to properly classify the stock, which he declined to do. Cox & Smith, relying upon an analysis performed by Denney’s California accountant and without seeking a declaratory judgment, prepared an estate tax return that omitted any Automation stock from a list of Des Cygne’s assets.

Denney died 29 years later, leaving the bulk of his estate to charity. Approximately one month after his death, the Denney children as beneficiaries of Des Cygne’s trust, sued Denney’s estate alleging that Denney had misclassified the Automation stock as his separate property, and as a result under funded their mother’s trust. *Id.* O’Donnell, the executor of Denney’s estate, settled the children’s claims for approximately $12.9 million, less than half of their estimated value. *Id.* O’Donnell then brought suit for legal malpractice against Cox & Smith alleging that the attorneys failed to properly advise Denney about the serious consequences of mischaracterizing assets, and that their negligence caused damage to Denney’s estate. *Id.*

Cox & Smith obtained a summary judgment on all claims asserted in the trial court. On remand, the Court of Appeals held that there was a fact issue as to whether a malpractice cause of action accrued in Denney’s lifetime; that such a claim would survive in favor of the estate; and no evidence supported O’Donnell’s malice claim. *Id.* at 420.

The Supreme Court reiterated its holding in *Belt* that an estate’s personal representative may bring the decedent’s survivable claims on behalf of the estate, since an executor is a personal representative who “stands in the shoes” of the decedent. *Id.* at 421. Having determined that a legal malpractice claim alleging pure economic loss survives in favor of a deceased client’s estate, the court then had to determine if there was any reason for an exception preventing executors from bringing the claims. *Id.*

Cox & Smith argued that *Barcelo* bars all legal malpractice suits brought by non-clients, with the exception of estate-planning malpractice claims brought by executors, like the claim asserted in *Belt*. The Supreme Court responded that to adopt that rule would place Texas alone among the states, and would unnecessarily immunize attorneys who commit malpractice. None of the concerns that the court voiced about third-party malpractice suits apply to malpractice suits brought by an estate’s personal representative. *Id.* The threat of executor lawsuits will not impede the attorney-client relationship, because the estate’s suit is based on injury to the deceased client, as opposed to any third party. The estate’s suit is identical to one the client could have brought during his lifetime. An estate’s interest, unlike a third-party beneficiary’s, mirror those of the decedent. *Id.*

Cox & Smith also argued that the estate’s interest in the suit was not truly in line with the decedent’s because Denney had always intended to keep the community-property stock out of the trust and treat it as his own property, and he did so without seeking the declaratory judgment that Cox & Smith recommended. Cox & Smith also argued that O’Donnell colluded with the Denney children in settling their claims. The Supreme Court dealt with both of these arguments by stating that they go to the weight and evidence to be presented in the legal malpractice case and do not bear on the issue of whether or not a claim could be asserted by the estate. *Id.* at 422.
CONCLUSION

The formerly clear message, that only clients (and those who reasonably believe they are clients) are likely to be permitted to sue attorneys for their behavior while acting in a representative capacity, is now less than clear. One exception has been clear for some time: insurance companies may sue as equitable subrogees, but only to the extent of its insured’s claims for negligence. Another exception is now also clear: anyone who relies on the lawyer’s statements, with the lawyers' knowledge and consent, may sue for negligent misrepresentation. A third exception may be that anyone hurt by the lawyer's defamatory statements out of court may sue. A fourth exception is that an estate may sue an estate planning attorney whose negligence proximately caused damage to an estate. A fifth exception is that an estate may bring suit against a decedent’s attorneys for malpractice committed outside the estate-planning context.

III. WHO TO REPRESENT

A law firm was sued because it apparently did not make clear to an employee that it was representing the employer only. In Dunbar v. Baylor College of Medicine, 984 S.W.2d 338 (Tex. App.—Houston [1st Dist.] 1998), an employee sued her employer and the employer’s law firm because the employer’s law firm told her she was obligated to sign over certain rights to an invention. The opinion does not make clear whether the firm contested its representation of the employee, but the opinion highlights the importance of full disclosure to employees when a lawyer represents a corporate entity.

If one exists, Plaintiff’s Exhibit Number 1 in every legal malpractice case will be a waiver of conflict letter, signed by the client. Juries view a waiver of conflict as proof that the lawyer knew he had a conflict and shouldn’t have represented this client but did so anyway. Jurors have little trouble figuring out whom the waiver favors: if the client doesn’t waive the conflict, the lawyer makes no money. By comparison, the only cost to the client for refusing to waive the conflict is the client must hire another lawyer, perhaps one who won’t ask the client to give up protection to which the law entitles the client.

Even if there is no conflict between multiple clients at the start of representation, conflicts are almost always guaranteed to occur during the course of the representation. Imagine, for example, a scenario under which one of your clients insist on pursuing a weak objection to production of personal financial information, or past history of psychiatric treatment, even after the judge has ordered it produced. Your ethical obligation to the recalcitrant client is to pursue his lawful objectives, even through mandamus, even though the probability of success may be minuscule. That pursuit may, however, cause other clients to lose a valuable trial setting, lose credibility with the judge, or otherwise be procedurally or technically disadvantaged.

Multi-client situations are also pregnant with fee conflict issues. How, for example, do you charge multiple clients for your time asserting objections to a document production that only one client wanted to make? Summary judgment on behalf of one client may well have the effect of increasing the proportioned hourly fees of the remaining clients. And sooner or later, someone will say that he acted in some manner solely in reliance upon the advice or recommendation of a co-defendant.

The situation is no simpler with multiple plaintiffs. If you have done your job so well that the defendants now want to settle all of your cases to stop bad publicity or the continued drain of defense attorneys’ fees, what do you say to your clients when one wants his day in court? Under that scenario, the only reason client A cannot get his money is because you also represent client B.

Some plaintiffs’ lawyers have made the mistake of negotiating a lump sum settlement which they believe to be fair and reasonable and then making the decision as to which client got how much of the pot on their own. See, Burrow v. Arce, supra. These claims are usually couched as breach of fiduciary duty claims and as set forth above, the Supreme Court has ruled that breach of fiduciary duty can result in forfeiture of all fees and compensation received by the fiduciary.

The one ethical way to represent multiple clients appears to be under Rule 1.06(c), sometimes referred to as the “transactional client” rule. The concept of the rule is that the lawyer does not represent the parties, but rather represents the transaction, such as in the preparation of a partnership agreement.

Rule 1.07 of the Texas Disciplinary Rules of Professional Conduct, the “intermediary rule,” also permits representation of multiple clients so long as its requirements are satisfied. The comments to Rules 1.06 and 1.07 both make perfectly clear that strict compliance with all conditions of the respective rules is required. Each rule also acknowledges that multiple
representation may properly begin under these rules and then subsequently become improper, so as to require the lawyer to withdraw.

CONCLUSION

If you are considering representing more than one client in the same dispute, read Rules 1.06 and 1.07 with their respective comments, several times before you decide: after reading them, decline the representation. Attached hereto as Appendix No. 2 is a proposed multi-client representation letter to be considered on those occasions when you proceed with representing multiple clients anyway.

IV. WHEN TO SUE A LAWYER

The second most active area of law involving legal malpractice continues to be limitations. There may be a reversal in the trend allowing cases to be presented on the merits, rather than being barred by limitations.

This trend was started with the 1988 decision in Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988), which established the discovery rule for legal malpractice claims. After Willis, everyone assumed that limitations would run two (2) years from the date that the client discovered or in the exercise of reasonable care should have discovered the nature of the injury. It was never exactly clear what level of knowledge by the client would be enough to start limitations. This ruling exposed many lawyers to claims and lawsuits for acts done years earlier, often after the lawyer had discarded the file in the belief that there was no longer reason to retain it.

In 1992, the court in a series of three cases again altered the rules and standards of limitations in malpractice cases against lawyers. In Hughes v. Mahaney & Higgins, 821 S.W.2d 154, (Tex. 1991), the court ruled that, on claims against lawyers for negligence in the prosecuting or defending of claims, limitations would not start to run until all appeals were over. The rule was reaffirmed in the second case, Adudell v. Parkhill, 821 S.W.2d 158 (Tex. 1992). The third case, Gulf Coast Investment Corp. v. Brown, 821 S.W.2d 159 (Tex. 1992), extended the rule to cases involving non-judicial foreclosure, where the lawyer was not technically prosecuting or defending a claim in court. Many believe that this rule should be applied to all cases where the "viability of the second cause of action depends on the outcome of the first." Hughes, 821 S.W.2d, at 157.

The Dallas Court of Appeals was the first to remind lawyers that they should read the entire Hughes case and not just the headnotes before giving advice on limitations. In Dear v. Scottsdale Ins. Co., 947 S.W.2d 908 (Tex. App. -- Dallas 1997, writ denied), the court refused to follow the equitable tolling rule of Hughes v. Mahaney & Higgins, 821 S.W.2d 154 (Tex. 1991), and followed instead the reasoning and logic behind the rule.

Two reasons are given for the Hughes ruling. The first justification was an acknowledgment that appeals often last more than two years and could result in a client being forced to file a legal malpractice case while the underlying case was still pending. This would have the potential of forcing the client to adopt one position in the appeal (for example, failure to disclose an expert witness is excused for some reason), and, simultaneously, a contradictory position in the legal malpractice case (the lawyer negligently failed to disclose the expert witness). The second justification for the Hughes holding was that conclusion of the appeal is often necessary to give certainty to the malpractice claim. To quote the Dallas court, “if the claimant prevails on the underlying case, his lawyer’s malpractice, if any, caused no damage.” 947 S.W.2d at 918.

Rather than uniformly applying the rule of Hughes to toll limitations until all appeals in the underlying case were concluded, the Dallas court looked to see if the two principles underlying the Hughes decision were applicable and found that neither applied. On that basis, the court distinguished Hughes on the facts and refused to toll limitations: plaintiff’s claims were time barred.

The Dallas Court of Civil Appeals has also held that the principles of the Hughes decision on tolling are applicable only to legal malpractice claims. Hoover v. Gregory, 835 S.W.2d 668 (Tex. App.--Dallas 1992, writ denied). The Austin Court of Civil Appeals, however, reached a different result and applied these same principals to a deficiency suit on a promissory note. Peterson v. Texas Commerce Bank--Austin, 844 S.W.2d 296 Tex. Civ. App.--Austin 1992, no writ).

In Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1998), the Texas Supreme Court was confronted with an accounting malpractice case. On first blush, this case appears to deal only with limitations for accounting malpractice (subject to the discovery rule, but not the Hughes tolling rule during pendency of underlying litigation).
In dicta, however, confusion arose as to whether the court modified the *Hughes* decision so as to impose a new condition for tolling.

The court explained the *Hughes* decision as follows:

“*Hughes* does not hold that limitations is tolled whenever a litigant might be forced to take inconsistent positions. Such an exception to limitations would be far too broad.” *Id.* at 271.

The court then stated that the *Hughes* tolling would be limited to attorney malpractice only and even then only to those attorney malpractice claims involving the prosecution or defense of a claim that resulted in litigation. Explaining its holding, the court stated as follows:

“In such circumstances, to require the client to file a malpractice case against the lawyer representing him in another case would necessarily make it virtually impossible for the lawyer to continue his representation. The client’s only alternative would be to obtain other counsel. That consideration, coupled with the necessity of taking inconsistent positions, persuaded us to adopt a tolling rule in *Hughes*. We restrict it to the circumstances presented.” *Id.* at 272.

In *Apex Towing Company v. Tolin*, 41 S.W. 3d 118 (Tex. 2001), the Supreme Court concluded that Murphy did not modify the rule that had been announced by the Supreme Court in *Hughes*. The Supreme Court reaffirmed the rule as follows:

“When an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on a malpractice claim against that attorney is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded.” *Id.*

The Supreme Court instructed courts to simply apply the *Hughes* tolling rule to the category of legal malpractice cases encompassed within its definition, and not to re-examine the policy reasons behind whether or not the tolling rule should apply. As such the Supreme Court disapproved of the holdings in *Swift v. Seidler*, 988 S.W. 2d 860,861-62 (Tex. App. – San Antonio 1999, pet. denied), *Norman v. Yzaguirre & Chapa*, 988 S.W. 2d 460, 462-63 (Tex. App. – Corpus Christi 1999, no pet.), and *Dear v. Scottsdale Insurance Company*, 947 S.W. 2d 908, 918 (Tex. App. – Dallas 1997, writ denied). *Id.* at 122-123

From these decisions and their progeny, three facts reveal themselves:

1. The law of limitations is still evolving;

2. Generic application of general principles may result in the wrong answer to limitations questions, as limitations becomes more and more fact intensive; and

3. Lawyers can be sued for failing to tell a client when limitations will bar their claims (causing them to delay) and for giving them the wrong answer on when limitations bars their claims (causing them to cease to pursue a claim).

**CONCLUSION**

The applicable standard of care today seems to be that lawyers owe a duty to advise prospective clients on the subject of limitations, whether they accept the case or not. It is a matter of utmost importance to a plaintiff, yet, the subject is often addressed with boiler plate discussions of the law that are inaccurate and, even if accurate, and usually offer little assistance to the client in understanding this important issue of the law. Attached hereto as Appendix No. 3 is a proposed insert for letters to clients rejecting cases. It can and should be improved upon, based upon experience and the developing law of limitations.

**V. WHAT CAN YOU SUA LAWYER FOR?**

1. **Negligence**

Most claims against lawyers are for professional malpractice, which is based in negligence and consists of the standard four elements of any negligence action: duty, breach of the duty, proximate cause and damages. *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989) Texas courts have held that, for limitations purposes, courts will look to the true nature of the dispute being asserted. While many acts of negligence could also be couched in terms of a breach of a contingency or retainer contract with the lawyer, such allegations will not extend the statute of limitations from the two year negligent statute to the four year contract statute. *Judwin Properties, Inc. vs. Griggs & Harrison*, 911
S.W.2d 498 (Tex. App. - Houston [1st Dist. 1995, no writ]).

2. DTPA

Until September 1, 1995, the Deceptive Trade Practices Statute ("DTPA") unquestionably applied to any express warranty, unconscionable action or course of action, or knowing misrepresentation by the attorney or the firm: the battle ground was its application to implied warranties. The Texas Supreme Court in 1985 rejected a DTPA remedy against a physician by refusing to imply a warranty (on the grounds that the aggrieved patient had adequate remedies elsewhere). In 1987, the Texas Supreme Court decided Melody Home Manufacturing v. Barnes, 741 S.W.2d 349 (Tex. 1987), in which it originally held that all service providers impliedly warrant that their services will be provided in a good and workmanlike manner (with the result that a violation of the warranty would also be a violation of the DTPA). The court withdrew this opinion and substituted a narrower one, reserving for another day the question of whether all service providers make such an implied warranty. In Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1998), the Texas Supreme Court held that Texas law does not recognize breach of an implied warranty for professional services.

In 1995, the DTPA was radically revised by the Texas Legislature. Included in the radical revisions was an amendment to Section 17.49 of the DTPA as follows:

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, or 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) (failing to disclose information that is intended to induce a consumer into a transaction which the consumer would not have entered into had the information been disclosed); (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.

Although on its face, the exemption is broad sweeping, it is not clear if the law relating to liabilities of professionals such as attorneys has actually been changed. Richard M. Alderman, Associate Dean at the University of Houston Law Center, a consumer law expert, has opined that the 1995 legislative amendment did not change the law of the DTPA as related to suits against professionals. He argues that the prior law would have exempted from the DTPA the mere provision of advice, opinion, or judgment by a professional. Something more than that has always been required to establish a DTPA cause of action for either violation of the laundry list, to establish breach of an express warranty, or to establish an unconscionable action or course of action.

Latham v. Castillo, 972 S.W.2d 66 (Tex. 1998), now makes it clear that an attorney can be sued under the DTPA pursuant to its prohibition on unconscionable conduct. In Latham, the clients were the parents of twin daughters, one of whom died one week after birth. The clients hired a lawyer who filed a medical malpractice case over the death of the first daughter, which was settled for $70,000, after the lawyer permitted a $6,000,000 default judgment to be set aside. Approximately 2 years later, the surviving daughter also died and the clients hired a second lawyer to sue the first lawyer for malpractice (for allowing the default judgment to be set aside) and to pursue a medical malpractice case over the death of the second daughter. The lawyer pursued and settled the legal malpractice case, but failed to file the medical malpractice case prior to the statute of limitations running. Notwithstanding the fact that the medical malpractice case was never filed, the lawyer affirmatively represented that he had filed this case and was actively prosecuting it. The court found this affirmative misrepresentation to the clients regarding the status of their case to satisfy the requirements of Subsection A, which requires unfairness to be,

“glaring, noticeable, flagrant, complete, and unmitigated.” Id. at 68.

The court further observed that a claim under the DTPA does not require the client to prove the “case within a case” element to prevail. All the client is required to prove is that the unlawful conduct was a producing cause of some damage. In Latham, the clients allege that they had suffered significant mental anguish damages, which the court allowed them to recover notwithstanding the fact that they did not prove any economic injuries.
3. Negligent Misrepresentations

As noted above, non-clients can also now sue lawyers for negligent misrepresentation if they can establish that the lawyer knew of their existence and intended that they rely upon the lawyer’s representations. *McCamish, Martin, Brown & Loffler vs. F.E. Appling, Interests*, 991 S.W. 2d 787 (Tex. 1999).

Virtually every reported decision involving legal malpractice also included claims of breach of fiduciary duty, breach of contract, breach of warranty, and DTPA claims. Courts have uniformly focused strictly on the nature of the acts complained of in determining the nature of the wrong and have refused to allow claims to be “fractured” into numerous legal theories to avoid a defense on the primary claim.

4. Breach of Fiduciary Duty

Lawyers owe their clients a fiduciary duty. *Meyer v. Cathey*, 167 S.W.3d 327, 330-31 (Tex. 2005). As distinguished from a legal malpractice claim which is based on negligence, cases asserting a claim for breach of fiduciary duty are based upon a lawyer allegedly placing his or her own self interest ahead of the client’s self interest.

A recent breach of fiduciary duty case involving alleged lawyer conflicts of interest is *Capital City Church of Christ v. Novak*, 2007 Tex. App. Lexis 4148 (Tex.App.—Austin 2007, no pet.). In this case, the Church filed suit against its former attorneys based upon the attorneys’ subsequent representation of Sam Chen Inc. in a 2003 dispute with the Church. Before the Church’s transaction with Chen which led to the dispute, the attorneys had represented the Church in connection with a possible sale of the church building to a third party that was never consummated. The attorneys had also represented the Church in connection with disputes with tenants in the building. Years after these representations had concluded, the attorneys represented Chen in connection with his dispute with the Church. After the Church complained, the attorneys withdrew as counsel for Chen.

In the lawsuit against the attorneys, the Church contended that the attorneys breached their fiduciary duties to the church as a former client by misusing confidential information obtained through that relationship to further their representation of Chen. *Id.* at *4. The Court of Appeals initially noted that an attorney breaches his fiduciary duty when he benefits improperly from the attorney-client relationship by, among other things, improperly using client confidences. *Id.*

The trial court granted the attorneys’ motion for summary judgment on the Church’s claims holding as a matter of law:

(1) that there was no substantial relationship between the facts and issues of the attorneys’ former representation of the Church and their subsequent representation of Chen;

(2) no confidential information of the Church was used or disclosed in the attorneys’ subsequent representation of Chen; and

(3) no injury and no damages were caused by the attorneys’ representation of Chen.

The Court of Appeals affirmed the summary judgment on the first two grounds.

Initially, the Court of Appeals affirmed the ruling that there was no evidence of a breach of fiduciary duty by the attorneys. The attorneys presented undisputed summary judgment evidence that they did not actually use or divulge to Chen the Church’s confidential information. *Id.* at *7. In response the Church sought to rely on a presumption that confidential information had been imparted by the lawyers to Chen. The Court of Appeals found that no prior Texas decisions had imposed such a presumption, and refused to do so either. The Court stated in its holding as follows:

A former client may seek to disqualify a former attorney from representing a subsequent adversary based on the threat that the attorney will intentionally or inadvertently reveal the former client’s confidences during the later representation. The former client must establish a preponderance of the facts demonstrating a ‘substantial relationship’ between the two representations by proving ‘the existence of a prior attorney-client relationship in which the factual matters involved were so related to the facts in the pending litigation that it creates a genuine threat that confidences revealed to his former counsel will be divulged to the present adversary. Sustaining this burden requires ‘evidence of
specific similarities capable of being recited in the disqualification order.’ If the former client can meet this burden, it is conclusively presumed that the former client revealed confidences and secrets to the attorney that would be at risk of disclosure in the current representation. In this manner, the movant is not required to reveal the very confidences he wishes to protect. Further, by proving the substantial relationship between the two representations, the movant also establishes as a matter of law that an appearance of impropriety exists. As such, although the former attorney will not be presumed to have revealed the confidences to his present client, the trial court should perform its role in the internal regulation of the legal profession and disqualify counsel from further representation in the pending litigation.” Id. at *8-*9 (Internal citations omitted)

Since the Church did not produce evidence that its confidential information had been imparted from the attorneys to Chen, the Court of Appeals affirmed the summary judgment in favor of the attorneys.

The Court of Appeals also went on to analyze the nature of the prior representations of the Church by the attorneys and the attorneys’ subsequent representation of Chen. After analyzing the matters involved, the Court of Appeals again affirmed the trial court’s granting of summary judgment by finding as a matter of law that there was not a substantial relationship between the representations. Id. at *35.


In Murphy v. Gruber, 241 S.W. 3d 689 (Tex.App.-Dallas 2007, petition denied), the court distinguished claims for negligence versus breach of fiduciary duty against an attorney. The clients alleged that the lawyers represented the clients with divided loyalties, failed to inform them of material facts as soon as a conflict arose, and failed to make a full and fair disclosure of every facet of a proposed settlement of their lawsuit. The clients sought fee forfeiture and imposition of a constructive trust as damages. Id. at 692.

The lawyers moved for summary judgment on the breach of fiduciary duty claim asserting that the clients’ claim constituted one claim for legal malpractice and that the statute of limitations on that claim had expired. The trial court agreed and granted the lawyers’ motion on that basis. Id.

The Court of Appeals defined professional negligence as the failure to exercise ordinary care, which would include giving a client bad legal advice or otherwise improperly representing the client. Id at 692-693. For example, a lawyer can commit professional negligence by giving an erroneous legal opinion or erroneous advice, by delaying or failing to handle a matter entrusted to the lawyer’s care, or by not using a lawyer’s ordinary care in preparing, managing and prosecuting a case. Id. at 693.

By contrast, breach of fiduciary duty by a lawyer “involves the integrity and fidelity of an attorney and focuses on whether an attorney obtained an improper benefit from representing the client.” Id. An attorney breaches his fiduciary duty when he benefits improperly from the attorney-client relationship by, among other things, subordinating his client’s interest to his own, retaining the client’s funds, engaging in self-dealing, improperly using client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends.” Id.

The court acknowledged that there was a lack of clarity in this area of the law, in part because the relationship between the lawyer and client is inherently a fiduciary relationship. Id. at 696. The court though after analyzing the allegations made in the clients’ petition concluded that the clients were actually complaining about the quality of the lawyers’ representation, specifically, the lawyers’ failure to properly advise, inform and communicate with the clients about the case, which are claims are for professional negligence. Id at 698. The court also found that even though there was an allegation that the lawyers engaged in self-dealing when they continued to represent both clients, the clients did not allege that the lawyers deceived them, pursued their own pecuniary interest over the clients’ interests, or obtained an improper benefit by continuing to represent both clients. Without more, there was not the type of dishonesty or intentional deception that would support a breach of fiduciary claim. Id at 699. As a result, the Court of Appeals found that the essence of the clients’ allegations were for negligence and that the two-year statute of limitations applied.

CONCLUSION
If you are the client, you can sue a lawyer for malpractice or breach of fiduciary duty, but the two probably need to have an independent basis. If you are one whom the lawyer intended to rely upon his statements, you can sue the lawyer for negligent misrepresentation. If your lawyer makes a specific “laundry list” violation of the DTPA, or if your lawyer simply lies to you about having filed your case, you can sue under the DTPA as well.

VI. WHAT CAN THE CLIENT RECOVER?

1. Mental Anguish Damages

In Latham v. Castillo, 972 S.W.2d 66 (Tex. 1998), the court held that clients can recover for mental anguish damages under the DTPA without first proving an economic injury. In Douglas v. Delp, however, the court ruled that:

“When a plaintiff’s mental anguish is a consequence of economic losses caused by the attorney’s negligence, the plaintiff may not recover damages for that mental anguish.”

The evidence which the Latham court found to be sufficient to prevent reversal consisted of testimony that the client threw up, hurt a lot, was devastated, had their heart broken, and felt physically ill. The court contrasts this testimony with the evidence in other cases which was found insufficient to sustain relief for mental anguish damages where plaintiff’s testimony was merely that they were hot, very disturbed, not pleased, and upset. The distinction appears to be a fine one.

The court left open the question of whether mental anguish would be recoverable and, if so, what standard would be used to gauge those mental anguish damages, when the legal malpractice caused losses more personal in nature and less economic, such as the loss of a child custody dispute or the loss of liberty in a criminal proceeding. The court also reserved the question of whether mental anguish damages might be recoverable when there is “heightened culpability” on the part of the lawyer. The requirement of heightened culpability has been adopted in other jurisdictions and generally means more egregious or extraordinary circumstances on the part of the attorney.

2. Fee Forfeiture

When the lawyer breaches his fiduciary duty, the lawyer may also be liable to the client for a forfeiture of all or part of all fees and compensation earned. Burrow v. Arce, 997 S.W. 2d 229 (Tex. 1999). This case arose out of the explosions at a Phillips 66 chemical plant in 1989 that killed twenty-three workers and injured hundreds of others. A number of wrongful death and personal injury lawsuits were filed, including one on behalf of some 126 plaintiffs filed by the Umphrey Burrow law firm in Beaumont. The case settled for approximately $190 million out of which the attorneys received a contingent fee of more than $60 million. Id. at 232

After the settlement, 49 plaintiffs sued the attorneys alleging professional misconduct and demanding forfeiture of all fees the attorneys received. The plaintiffs alleged that the attorneys in violation of rules governing their professional conduct, solicited business through a lay intermediary, failed to fully investigate and assess individual claims, failed to communicate offers received and demands made, entered into an aggregate settlement with Phillips of all plaintiffs’ claims without plaintiffs’ authority or approval, agreed to limit their law practice by not representing others involved in the same incident, and intimidated and coerced their clients into accepting the settlement.

The trial court granted summary judgment for the attorneys on the ground that the settlement of plaintiffs’ claims in the Phillips accident suit was fair and reasonable, so plaintiffs had therefore suffered no actual damages as a result of any misconduct by the attorneys, and absent actual damages plaintiffs were not entitled to a forfeiture of any of the attorneys’ fees. The trial court conceded that factual disputes over whether the attorneys had engaged in any misconduct remained unresolved. Id. at 233.

The Court of Appeals reversed the summary judgment and the Supreme Court affirmed that reversal. The Supreme Court held that forfeiture of fees is appropriate without regard to whether the breach of fiduciary duty resulted in damages to the client. It is the agent’s disloyalty, not any resulting harm that violates the fiduciary relationship and thus impairs the basis for compensation. An agent’s compensation is not only for specific results but also for loyalty. Removing the disincentive of forfeiture except when harm results would prompt an agent to attempt to calculate whether particular conduct, though disloyal to the principal, might nevertheless be harmful to the principal and profitable to the agent. The main purpose of forfeiture is not to compensate an injured principal, even though it may have that effect. Rather, the central
purpose of the equitable remedy is to protect relationships of trust by discouraging agents’ disloyalty. *Id.* at 238

The Supreme Court went on to say:

“Fee forfeiture for attorney misconduct is not a windfall to the client. An attorney’s compensation is for loyalty as well as services, and his failure to provide either impairs his right to compensation. While a client’s motives may be opportunistic and his claims meritless, the better protection is not a prerequisite of actual damages but the trial court’s discretion to refuse to afford claimants who are seeking to take unfair advantage of their former attorneys, the equitable remedy of forfeiture.” *Id.* at 240

The Supreme Court adopted the standard set forth in §49 THE PROPOSED RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS as follows:

“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.”

To the factors listed in the Restatement, the Supreme Court added another factor that must be given equal weight in applying the fee forfeiture: “the public interest of maintaining the integrity of the attorney-client relationship”. *Id.* at 243

The Supreme Court went on to hold that when forfeiture of an attorney’s fee is sought, a trial court must determine from the parties whether factual disputes exist that must be decided by a jury before the court can determine whether a clear and serious violation of duty has occurred, whether forfeiture is appropriate, and if so, whether all or only part of the attorney’s fees should be forfeited. The factual disputes may include, without limitation, whether or when the misconduct complained of occurred, the attorney’s mental state at the time, and the existence or extent of any harm to the client. Once any necessary factual disputes have been resolved, the court must determine, based on the factors the court set out, whether the attorney’s conduct was a clear and serious breach of duty to his client and whether any of the attorney’s compensation should be forfeited, and if so, what amount. Most importantly in making these determinations, the court must consider whether forfeiture is necessary to satisfy the public’s interest in protecting the attorney-client relationship. *Id.* at 246

Plainly, the Supreme Court has opened the door for parties to sue their attorneys for fee disgorgeement when the lawyer’s fiduciary duty to the client has been breached.

3. Attorney’s Fees as Damages & Collectibility

In Akin Gump Strauss Hauer & Feld, L.L.P. v. National Development and Research Corporation, 299 S.W. 3d 106 (Tex. 2009), the Texas Supreme Court decided what evidence would be necessary to prove the damages that would have been collectible in the underlying lawsuit and held that attorneys’ fees and expenses paid for representation in the underlying lawsuit may be recovered as damages to the extent they were proximately caused by the attorneys’ negligence.

By way of background, in October, 1997, NDR retained Akin Gump to represent it in disputes with Panda Energy Corporation and its affiliates. Those disputes arose from a 1994 letter agreement in which NDR agreed to assist Panda Energy Corporation in its efforts to develop and operate power plants in China. Eventually, disputes arose between those parties and their related entities, and the case was tried to a jury. The jury returned a verdict partially in favor of NDR and partially in favor of the Panda entities. The trial court then granted the Panda entities’ Motion for Judgment Notwithstanding the Verdict because NDR failed to submit jury questions to support the verdict in their favor. The trial court then entered a final judgment in favor of the Panda entities and ordered NDR to pay $111,043.50 in attorneys’ fees to Panda Global Energy for prevailing in the declaratory judgment action, and $347,348.00 in attorneys’ fees to Panda Global Energy and Pan-Sino pursuant to the Shareholders’ Agreement. NDR appealed, but the judgment was affirmed on appeal.

NDR then sued Akin Gump for legal malpractice for failure to submit jury questions to support the verdict in the *Panda* lawsuit. The jury found Akin Gump to have been negligent and awarded NDR $922,631.86 for the following damages: (1)
$168,667.41 for “the judgment paid by NDR in the *Panda* lawsuit”; (2) $427,777.77 as the fair market value of the Pan-Sino stock subject to the Repurchase Agreement; (3) $216,590.00 in attorneys’ fees and expenses paid by NDR to Akin Gump in the *Panda* lawsuit; (4) $109,596.68 in success fees owed to NDR by Panda. The trial court denied Akin Gump’s request for an offset in the amount of a ten percent contingency fee it would have earned for prevailing in the *Panda* lawsuit.

On appeal, Akin Gump did not appeal the finding of negligence or the award of $168,667.40 for the judgment NDR paid the Panda entities in the underlying suit.

The Court of Appeals struck the award of $216,590.00 for attorneys’ fees and expenses paid by NDR to Akin Gump in the *Panda* lawsuit. The court held that it has consistently concluded that attorneys’ fees are not recoverable as damages for legal malpractice. While recognizing that this was a minority position statewide, the court declined to adopt an equitable exception to this general rule.

The Court of Appeals also denied Akin Gump’s argument that the award should have been reduced by the ten percent contingency fee that NDR would have owed Akin Gump had NDR prevailed in the *Panda* lawsuit. The court acknowledged that this was a issue of first impression in Texas. After acknowledging the split of authority in other jurisdictions on this issue, the court held that under the facts of the underlying litigation, NDR did not prevail, so that Akin Gump’s contingent fee had not been earned. As a result there was no viable breach of contract action for Akin Gump to recover the contingent fee. A *quantum meruit* theory is an alternative avenue to recover all or part of a contingent fee based on services rendered. But on the record, Akin Gump could not prevail on a *quantum meruit* basis because the jury found that Akin Gump did not render any compensable services to NDR in the *Panda* lawsuit.

The first issue dealt with by the Supreme Court was the collectability of a judgment in the underlying lawsuit. The Supreme Court quoted *Cosgrove v. Grimes*, 774 S.W. 2d 662, 666 (Tex. 1989) for the standard that “when the claim is that lawyers improperly represented the plaintiff in another case, the plaintiff must prove and obtain findings as to the amount of damages that would have been recoverable and collectable if the other case had been properly prosecuted.” The issue in this case was whether or not the judgment in the underlying case was collectable from the Panda entities. The Supreme Court determined that evidence that the judgment would have been collectable on or after the date a judgment was first signed is relevant. Evidence that a defendant in the underlying lawsuit could have satisfied a judgment at times prior to the time a judgment is signed will not be relevant to and will not be probative of the judgment’s collectability unless it is shown that the defendant’s ability to satisfy a judgment was not diminished by the passage of time until the judgment was signed.

The Supreme Court next addressed what evidence of collectability is required. Proving the underlying defendant was solvent is one way to prove collectability when “solvent” means the underlying defendant owns sufficient property subject to legal process to satisfy all outstanding debts and have property remaining to satisfy some or all of the damages the malpractice plaintiff would have recovered. Further, evidence that damages awarded against the debtor in the underlying suit probably would have been paid, even though the debtor was not solvent, would be probative evidence that the damages were collectable. As a result, the amount that would have been collectable in regard to an underlying judgment—provided the judgment is not dormant or pre-empted—will be the greater of either (1) the fair market value of the underlying defendant’s net assets that would have been subject to legal process for satisfaction of the judgment as of the date the first judgment was signed or at some point thereafter, or (2) the amount that would have been paid on the judgment by the defendant or another, such as a guarantor or insurer. Collectability must be proved, it is not presumed.

The Supreme Court then analyzed the evidence proffered by the malpractice plaintiff, and found that it was insufficient to establish collectability. As a result, the Supreme Court did not reach the issue of whether there was evidence to support the jury findings as to the amount of NDR’s damages and whether the judgment in favor of NDR should have been reduced by the contingency Akin Gump would have collected had NDR prevailed in the *Panda* lawsuit.

Turning to the issue of the recoverability of attorney’s fees, the Supreme Court initially rejected Akin Gump’s contention that attorneys’ fees paid in an underlying suit can only be recovered through forfeiture for breach of fiduciary duty. The Supreme Court concluded the general rule as to the recovery of
attorney’s fees from an adverse party in litigation does not bar a malpractice plaintiff from claiming damages in the malpractice case for fees it paid its attorneys in the underlying suit. The Supreme Court went on to hold as follows:

“We see little difference between damages measured by the amount the malpractice plaintiff would have, but did not recover and collect in an underlying suit and damages measured by attorney’s fees it paid for representation in the underlying suit, if it was the defendant attorney’s negligence that proximately caused the fees. In both instances, the attorney’s negligence caused identifiable economic harm to the malpractice plaintiff. The better rule, and the rule we adopt, is that a malpractice plaintiff may recover damages for attorney’s fees paid in the underlying case to the extent the fees were proximately caused by the defendant attorney’s negligence.”

VII. HOW MUCH IS ENOUGH AND CONTINGENT FEE PROBLEM AREAS

Courts in recent years, including the Texas Supreme Court on at least two occasions, have construed several contingent fee agreements and struck down all or a portion of them. It is obviously important to make sure that your contingent fee agreements comply with Texas law to avoid the unpleasant prospect of litigating your fees with your clients.

1. In Hoover Slovacek, LLP v. Walton, 206 S.W. 3d 557 (Tex. 2006), the Texas Supreme Court initially struck the law firm’s entire contingent fee agreement, but on rehearing struck only a portion of it. The portion of the contingent fee agreement in controversy was as follows:

“You may terminate the Firm’s legal representation at any time….upon termination by You, agree to immediately pay the Firm the then present value of the Contingent Fee described [herein], plus all Costs then owed to the Firm, plus subsequent legal fees [incurred to transfer the representation to another firm and withdraw from litigation].”

After becoming dissatisfied with the law firm’s tactics in settlement negotiations, the client fired the law firm. The law firm then sent the client a bill for $1.7 million representing the law firm’s purported contingent fee based on a settlement offer made by the defendant in the lawsuit. At trial, the jury did not find either that the client discharged the lawyers for good cause or that the lawyer’s fee was unconscionable. The trial court entered judgment on the verdict which awarded the lawyers $900,000. The Court of Appeals reversed and rendered a take-nothing judgment for the client concluding that the lawyer’s fee agreement was unconscionable as a matter of law. Id. at 560.

The Texas Supreme Court upheld the Mandell standard holding that if an attorney hired on a contingency fee basis is discharged without cause before the representation is completed, the attorney may seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages the client subsequently recovers. Both remedies are subject to the prohibition against charging and collecting an unconscionable fee. Id. at 561. Whether a particular fee or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation is an issue for the fact finder. Id.

The Supreme Court found that the lawyer’s termination fee provision purported to contract around the Mandell remedies in three ways. First, it made no distinction between discharges occurring with or without cause. Second, it assessed the attorney’s fee as a percentage of the present value of the client’s claim at the time of discharge, discarding the quantum meruit and contingent fee measurements. Finally, it required the client to pay the lawyer the percentage fee immediately at the time of discharge. Id at 562. As a result, the Supreme Court held that the lawyer’s termination fee provision violated public policy and was unconscionable as a matter of law. The Supreme Court remanded the case to the Court of Appeals to determine whether or not there was sufficient evidence to find that the client’s termination of the law firm was for good cause. Id. at 566.

2. In Levine v. Bayne, Snell & Krause, Ltd., 40 S.W. 3d 92 (Tex. 2001), the Texas Supreme Court refused to construe a contingent fee contract as entitling the attorney to compensation exceeding the
client’s actual recovery. *Id* at 95. In the *Levine* case, the clients purchased a home containing foundation defects, and stopped making mortgage payments when the defects were discovered. *Id.* at 93. They agreed to pay their lawyer one-third of “any amount received by settlement or recovery.” *Id.* A jury awarded the clients $243,644 in damages, but offset the award against the balance due on their mortgage, resulting in a net recovery of $81,793. *Id.* The lawyer sued to collect $155,866, a fee equaling one-third of the gross recovery, plus pre- and post-judgment interest and expenses. *Id.* In refusing to interpret “any amount received” as permitting collection of a contingent fee exceeding the client’s net recovery, the Supreme Court emphasized that the lawyer is entitled to receive the contingent fee “only when and to the extent the client receives payment.” *Id.* at 94. (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35). A reasonable client does not expect that a lawyer engaged on a contingent fee will charge a fee equaling or, as in this case, exceeding 100 percent of the recovery. The Supreme Court stated that “lawyers almost always possess the more sophisticated understanding of fee arrangements. It is therefore appropriate to place the balance of the burden of fair dealing and the allotment of risks in the hand of the lawyers in regard to fee arrangements with the client.” *Id.* at 95.

3. In *Sanes v. Clark*, 25 S.W. 3d 800 (Tex. App. – Waco 2000, pet. denied), the Waco Court of Appeals voided a contingent fee agreement with the following language:

“I/we fully authorize my said attorney to bring suit, if necessary, and to prosecute the same to final judgment and to compromise and settle this claim, with or without suit, in any manner which they may deem necessary, including signing my/our names to finalize such settlement.” *Id.* at 805.

The Court held that this provision violated Rule 1.02(a)(2) of the Texas Disciplinary Rules of Professional Conduct, because an attorney is required to abide by a client’s decision regarding whether or not to accept a settlement offer. *Id.*

4. In a recent arbitration, *Chambers v. O’Quinn* (Tex. App. – Houston [1st Dist.] Oct. 1, 2009) Houston plaintiffs’ lawyer John O’Quinn was ordered to pay $35.7 million in damages to a class of 3,450 former breast implant clients who alleged his firm overcharged them for expenses. With interest and attorneys’ fees the award could require Mr. O’Quinn’s firm to pay as much as $58 million. The claimants in the arbitration alleged that Mr. O’Quinn’s firm wrongfully deducted “Breast Implant General Expenses”, which were comprised of the costs of taking depositions that were relevant to all of the suits and other common expenses. A charge of 1.5 percent of the settlement amount was deducted from each client’s settlement check.

The arbitration panel found that the fee agreements between Mr. O’Quinn’s firm and the class members did not allow for the deduction of General Breast Implant Expenses. As a result, the panel found that Mr. O’Quinn’s firm breached a fiduciary duty to the clients, because the Breast Implant General Expense account had run a surplus since 2000, the firm never audited the account and it never informed the class members of the surplus. As a result of the breach of fiduciary duty, the majority ordered a partial forfeiture of $25,000,000 of Mr. O’Quinn’s fees pursuant to the *Arce* decision. The panel only ordered a partial forfeiture of the fees, because it found that the class members may have benefited from the use of the Breast Implant General Expenses. Therefore forfeiture was ordered even though one of the arbitrators noted that “plaintiffs’ lawyers have been struggling for years” on how to handle general expenses in a mass tort case, and O’Quinn’s model for handling general expenses which called for a deduction of 1.5 percent from each settlement was “very close to perfect”. Obviously, very close to perfect is not good enough, and expenses have to be dealt with in a fair manner that is fully disclosed to the firm’s clients.

5. Lawyers sometimes charge nonrefundable retainers both in connection with complex contingent fee arrangements and with hourly billing arrangements. There can be problems with these arrangements as held in *Cluck v. Commission for Lawyer Discipline*, 214 S.W. 3d 736 (Tex. App. – Austin). In this case, the attorney agreed to represent a client in a divorce case and the attorney required that the client pay a nonrefundable retainer in the amount of $15,000. The retainer agreement provided that “lawyer fees are to be billed at $150 per hour, first against the nonrefundable fee, and then monthly thereafter. Additional non-refundable retainers as requested.” The contract states that “no part of the legal fee is to be refunded” should the case be
discontinued, or settled in any other matter.” *Id.* at 737. The client paid the initial $15,000 nonrefundable retainer, and then the case was put in abeyance when it appeared that the client might reconcile with her husband. Subsequently, the client requested the lawyer to resume work on the divorce, and the lawyer requested an additional $5,000 nonrefundable fee, and an increase in his hourly rate to $200 per hour. The client paid the additional nonrefundable fee and the lawyer resumed work on the case. Subsequently, the client terminated the lawyer because she was dissatisfied with the progress made by the lawyer on her case. She also demanded that the lawyer refund the portion of the $20,000 that had not been expended, but the lawyer refused. *Id.* at 738.

The court found that the $20,000 paid to the attorney was not a true retainer, because the fee had not been earned simply because it was designated as nonrefundable. *Id.* at 740. Advance fee payments must be held in a trust account until they are earned and the court found that the attorney violated Rule 1.14(a) of the Texas Disciplinary Rules of Professional Conduct, because he deposited an “advance fee payment”, which belonged at least in part to the client directly into his operating account. *Id.*

The court found that in accordance with opinion 431 by the Texas Committee on Professional Ethics that a nonrefundable retainer would be appropriate under the following circumstance:

> “If the lawyer can substantiate that other employment will probably be lost by obligating himself to represent the client, then the retainer fee should be deemed earned at the moment it is received. If a fee is not paid to secure the lawyer’s availability and to compensate him for lost opportunities, then it is a prepayment for services and not a true retainer. “A fee is not earned simply because it is designated as non-refundable. If the (true) retainer is not excessive, it will be deemed earned at the time it is received, and may be deposited in the attorney’s account.” *Id.* (Internal citations omitted)

The lesson to be learned from the *Cluck* case is to be careful about the use of non-refundable retainers, and to set them at a reasonable amount that is based upon the loss of other opportunities for the lawyer as a result of accepting representation of the client’s case.

6. In *Ballesteros vs. Jones*, 985 S.W.2d 485 (Tex. App. – San Antonio 1999), the court found that a contingent fee agreement in connection with a divorce of a common law marriage was valid and enforceable, distinguishing such a case from more traditional divorces, with the following language:

> “While rarely justified in divorce actions, contingent fee contracts may be appropriate in a situation such as this. If the marriage is not established, plaintiff may recover nothing, a situation differing sharply from a divorce case involving a ceremonial marriage in which each party will obtain a recovery of some sort.” 985 S.W.2d 485, 497

7. In *Eich v. Maceau*, 1996 an unpublished opinion (which has nevertheless received considerable publicity), the Colorado Court of Appeals upheld a trial court judgment in favor of a client who sued her lawyer asserting that a one-third contingent fee was excessive and unreasonable. The client was injured in an automobile accident caused by an uninsured, drunk driver. The client had $100,000 in uninsured motorist coverage and $70,000 in medical expenses. Not surprisingly, the insurance company tendered its policy limits on the uninsured motorist policy within a matter of months. The lawyer took one-third and distributed two-thirds to the client. The Colorado courts found the fee excessive, notwithstanding the fact that the lawyer had also unsuccessfully attempted to secure additional recovery from the uninsured motorist and from the night club where he got drunk.

8. Two Recent Ethics Opinions

In April, 2008, the Professional Ethics Committee for the State Bar of Texas issued Ethics Opinions numbers 581 and 582. In Opinion 581, the issue was framed as follows:

> “May a lawyer entering into an agreement to defend a client in litigation include in the engagement agreement with the client a provision that requires the client to pay defense expenses incurred by the lawyer if the lawyer is later joined as a defendant in the litigation?”
The lawyer previously had been engaged to defend clients in lawsuits brought by beneficiaries of estates. In some of these cases, the lawyer was joined as a defendant by the plaintiff beneficiaries based on allegations of fraud and conspiracy between the lawyer and the client to breach fiduciary duties. The lawyer contended that his joinder in those instances was merely a tactic to dissuade the lawyer from appearing as counsel for the defendants in the litigation. In the past, the lawyer had been forced to bear the costs of the lawyer’s defense. In the engagement letter, the lawyer sought to have the client bear the lawyer’s defense expenses in the event that the lawyer was sued by the beneficiaries.

After discussing the lawyer’s obligation to ensure that there was no conflict with the client at the outset of the representation, the Ethics Committee concluded that such a provision in an engagement letter would be permissible under the following circumstances:

“Under the Texas Disciplinary Rules of Professional Conduct, a lawyer-client engagement letter may include a provision under which the client agrees to pay the defense expenses incurred by the lawyer in the event of a joinder of the lawyer as a defendant in the client’s litigation provided that (1) the agreement does not prospectively limit in any way the lawyer’s liability to the client for malpractice and (2) the obligation for payment of the lawyer’s legal defense fees and the obligation to pay the fees billed by the lawyer for his work do not taken together constitute a compensation arrangement that would be unconscionable within the meaning of Rule 1.04(a).”

In Ethics Opinion 582, the lawyer sought to enter into a fee arrangement whereby if payment was not made to the lawyer within thirty days after the invoice went out, the lawyer could charge the client’s credit card for the amount of the invoice. The Ethics Committee initially confirmed that both it and the American Bar Association Standing Committee on Ethics and Professional Responsibility had previously ruled that using credit cards for the payment of legal fees was acceptable.

After warning about the dangers of unconscionability under Rule 1.04(a), the Ethics Committee found that there was nothing inherently illegal or unconscionable about the arrangement as stated. The Ethics Committee though stated that a different rule applies if the client disputes the fee. In that circumstance it would not be permissible for the credit card payment arrangement to negate the requirement that an attorney hold disputed funds separately until the dispute is resolved in accordance with Rule 1.14(c) of the Texas Disciplinary Rules of Professional Conduct. Therefore, in the event that a dispute exists, the lawyer may charge the client’s credit card for the disputed amount, but the lawyer may not place that amount in his operating account. The Ethics Committee concluded as follows:

“The Texas Disciplinary of Professional Conduct do not prohibit a lawyer’s charging a credit card for attorneys’ fees that have been earned by the lawyer provided the client consents and the client’s ability to challenge a disputed statement for legal fees is preserved.”

**CONCLUSION**

Below, in no particular order, are thoughts and suggestions to minimize the risk of a client suing over a fee dispute:

1. Honestly evaluate the risks of the case. If you have a client injured by an uninsured drunk driver, whose only recovery will be on her own uninsured motorist policy, send a demand letter and secure the client that money without charging a fee.

2. Be wary of “ratcheting contingencies,” when you control the ratchet. If you agree to a lower fee if a case is settled before suit is filed, use reasonable efforts to settle the case before suit is filed and confer with the client before filing suit, as opposed to simply ratcheting your fee up unilaterally.

3. Explain the conflicts of both contingency and hourly fees to the client. Tell the client it is usually in their best interest to pay an hourly fee and encourage them to do so if they can. Remember, the case you want on a contingent fee is the very one on which they should pay hourly: they should know that before signing a contract with you.
4. If you are going to charge more than the “industry standard” of one-third, be prepared to defend your fee, both to the client and a court, by reference to the factors set out in Rule 1.04 of the Texas Rules of Professional Conduct.

5. Never take more than the client. Settlements which provide for a contingent fee plus expenses can result in the lawyer getting more money from the settlement than the client. It just violates some gut-level instinct for the lawyer to get more money than the client out of a settlement and most juries agree.

6. At the time of closing, explain to your client that they have the right to challenge your fee as excessive. After all, your contract with the client is only enforceable if it is reasonable and you should tell the client so.

Attached hereto as Appendix No. 4 is a proposed retainer letter for those clients who engage you on an hourly basis.

VIII. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Paragraph 7 of the preamble to the Texas Disciplinary Rules of Professional Conduct state that they establish a “minimum standard of conduct, below which no lawyer can fall without being subject to disciplinary action.” Paragraph 8 observes, however, that neglect of the responsibilities in the rules compromises the public interest. Although paragraph 15 states that the rules do not undertake to define standards of civil liability, it is generally accepted that the rules are a part of the standard of care to which a lawyer is held, even if they describe only the “minimum standards of conduct.”

Paragraph 15 of the preamble states further that a violation of a rule will not automatically give rise to a private cause of action or create a presumption that a legal duty to a client has been breached. A simple review of the rules reveals the obvious truth of that statement: the rules deal with such diverse subjects as confidential communications, fees, conflicts of interest with present and former clients, minimizing delays of litigation, candor towards the tribunal, trial publicity, unauthorized practice of law and firm letterheads to mention only a few. While an inappropriate firm letterhead might warrant discipline by the bar, it would not give rise to a presumption that a client has been harmed thereby.

Rule 5.01 outlines responsibilities of a supervisory lawyer and exposes such lawyers to discipline for knowingly permitting violations by other lawyers within the law firm. Comment 6 to the Rule observes that a lawyer in a position of authority in a law firm

“should feel a moral compunction to make reasonable efforts to insure that the office, firm or agency has in effect appropriate procedural measures giving reasonable assurances that all lawyers in the office conform to these rules.”

Although not every violation of the rules gives rise to a presumption that a duty to a client has been violated, for which civil liability attaches, it is hard to imagine how a violation of Rule 1.01(b)(1) would not give rise to such a presumption:

“In representing a client, a lawyer shall not: neglect a legal matter entrusted to the lawyer.”

The combination of these two rules might create vicarious civil liability for a shareholder in a professional corporation for all acts of negligence of all other employees in that firm if the shareholder has not taken appropriate steps to insure that clients are protected from negligence and malpractice.

A lawyer being sued (or one contemplating the filing of a legal malpractice case against) should read O’Quinn v. State Bar of Texas, 763 S.W.2d 397 (Tex. 1988) to understand the application of the Rules to civil liability. In O’Quinn, the defendant in a disciplinary proceeding challenged the constitutionality of certain disciplinary rules which were part of the previous “Code of Professional Responsibility.” The State Bar defended this challenge to the constitutionality of the Disciplinary Rules on the theory that the Rules were not statutes and, therefore, beyond the court’s jurisdiction for purposes of determining constitutionality. The court ruled that the disciplinary rules “should be treated like statutes.” 763 S.W.2d at 399. There appears to be no difference in the current Texas Disciplinary Rules of Professional Conduct which would cause the court to reach a different result.

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct do not set the standard of care for a legal malpractice claim: they set a minimum standard of conduct only. Testimony and proof of violations of the
disciplinary rules, if present, is probably admissible in most legal malpractice cases.

IX. ADDITIONAL MISCELLANEOUS THOUGHTS AND MUSINGS

The Good Faith Rule. Until 1989, attorneys were protected by a "good faith" defense. Under this defense, an attorney could avoid liability for even an act contrary to the usual standard of professional conduct if the lawyer committed the act of malpractice in "good faith." The standard was a subjective one, focusing on the individual defendant lawyer, not on the normally prudent attorney.

The Texas Supreme Court, in Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989), abolished the subjective good faith defense. In Cosgrove, the lawyer filed suit days before limitations ran, but against the wrong party. The lawyer defended claiming that he had relied in good faith on information given by the client as to whom to sue. The jury found that the lawyer had not exercised ordinary care in investigating, but also found that his reliance on the client's information was in good faith. In striking down this defense, the court set a new, but familiar, "objective" standard for evaluating a lawyers' conduct: the conduct of a reasonably prudent attorney under the same or similar circumstances (the same standard used to judge other professionals).

Insurance Issues. Every lawyer should carry insurance for professional mistakes. To refuse to do so is to insult your client and exhibit a total lack of care for them, since we all know we make mistakes. How do we feel about those who refuse to carry car insurance? Clients will probably in the future shop for lawyers by asking about such insurance. Lawyer's liability insurance is not like all insurance, however. Know what your policy covers and what it does not.

"Tail coverage" is the rider to your policy that covers you for acts done years ago, but asserted only now. Without it, you are insured only for acts committed from the date of the policy forward. Virtually all policies are "Claims Made" policies, meaning they cover only those claims that are asserted during the term of the policy. Since few claims arise and are asserted during the term of one annual policy, failure to purchase tail coverage may be the equivalent of having no insurance.

Many policies are "cannibalizing" policies, reducing policy limits to resolve claims by the cost of defense. If you have such a policy, keep track of your defense costs, as they may prevent you from being able to settle after your limits have been reduced.

Proximate Cause Before a client and plaintiff’s lawyer assert a claim, they should have given consideration to the proximate cause issues of the claim: but for the malpractice, what would have happened. This is often referred to as the “case-within-a-case”: to prevail the plaintiff must establish that, in the absence of malpractice, the client would have had a better result. For this reason, not every act of malpractice is a malpractice case - just as every act of negligence behind the wheel of a car is not a negligence case.

Proof of the departure from the duty of care is done by expert witnesses. The proximate cause issue may, however, in some instance require more than expert testimony. Expert testimony that a certain witness would have helped the case may not be enough: often presentation of the claim will require the actual missing testimony. One of the current active strategies of defense counsel in legal malpractice cases is to allege that the Plaintiff is really asserting a “lost opportunity” case. In Kramer v. Lewisville Mem. Hospital, 858 S.W.2d 387 (Tex. 1993) the Texas Supreme Court ruled that a plaintiff could not recover if all he could establish was that he lost the opportunity for a cure or a better result in a medical malpractice case: the plaintiff had to actually establish that a better result would have attached. This holding has not yet been extended to legal malpractice cases, but is being asserted. Imagine, for example, a case in which a plaintiff in a product liability case complains that the plaintiff’s lawyer failed to preserve the product so that testing could be done on it to establish a defect. The loss of the product proves the negligence of the lawyer, but it may also prevent the client from recovering on his legal malpractice case because he cannot produce the product to show that a different result would have occurred in the absence of the loss of the product.

Appellate malpractice is a matter of law for the court to decide, not the jury. Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 (Tex. 1989). This would presumably include claims of failure to preserve error, since only a judge can say whether, but for that failure, a different result would have attached.

If the lawyer has more than one case for a client or insurance company, assertion of a claim usually will require the lawyer to withdraw immediately from all representation, not just from the one case on which a claim is asserted. Withdrawal may itself, however...
present problems, such as if a critical case is coming to trial. The lawyer will always be held to the highest standards by the court and the juries, so the prudent lawyer will always look out for the client’s best interest, even after the client has asserted a claim. Don’t hold files, or do anything to disadvantage the client; revenge is punished with punitive damages by juries.

**Law Office Issues.** Changing jobs and hiring help has become a big headache. In *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295 (Tex App— Dallas, 1988 orig. proceeding) the court eviscerated the proverbial Chinese Wall strategy, by which a firm sought to isolate a newly hired lawyer from certain cases that he had knowledge of at his prior firm, in order to avoid “vicarious disqualification.” The court held that “a Chinese wall will not rebut the presumption of shared confidences when an attorney in private practice has actual knowledge of a former client’s confidences and he thereafter undertakes employment with a firm representing an adversary of the same client in that same suit.” This is a particularly troublesome issue for lawyers leaving in-house counsel positions and for large firms, where the departing lawyer may be exposed to many more cases than he or she actually handles.

On October 30, 2009, a major decision in this area was rendered *In the Matter of: ProEducation International, Inc.*, 587 F.3d 296 (5th Cir. 2009). By way of background Kirk Kennedy, was an associate attorney in the law firm of Jackson Walker, L.L.P. from February 2003 to November 2004. Another Jackson Walker attorney, Lionel Schooler, had been representing MindPrint, Inc., a creditor in the bankruptcy proceeding of Pro Education International, Inc., since 1999. Kennedy had no knowledge of or involvement with MindPrint while at Jackson Walker. In September 2006, Kennedy entered an appearance on behalf of Dr. Mark D’Andrea, a creditor in the *Pro Education* proceeding. *Id* at 297. Upon motion by MindPrint, the bankruptcy court disqualified Kennedy based on an imputed conflict of interest but declined to impose monetary sanctions. The district court affirmed the bankruptcy court on both issues. *Id.*

The Fifth Circuit reversed the disqualification order. The Fifth Circuit outlined the standard for determining a disqualifying conflict of interest as follows:

“The Fifth Circuit’s approach to ethical issues has remained ‘sensitive to prevent conflicts of interest’. Under this approach, a district court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it. Yet, depriving a party of the right to be represented by the attorney of his or her choice is a penalty that must not be imposed without careful consideration. Because of the severity of disqualification, we do not apply disqualification rules ‘mechanically’ but we consider ‘all of the facts particular to the case...in the context of the relevant ethical criteria and with meticulous deference to the litigant’s rights.’ Stated plainly, this sanction ‘must not be imposed cavalierly.’” *Id.* at 299-300 (Internal citations omitted)

The Fifth Circuit went on to examine Texas Disciplinary Rule of Professional Conduct 1.09 and Model Rules of Professional Conduct Rule 1.9(b) and determined that both rules require that a departing lawyer must have actually acquired confidential information about the former firm’s client or personally represented the former client to remain under imputed disqualification. *Id.* at 301. Under Rule 1.09, Kennedy was conclusively disqualified by imputation from representing D’Andrea only while he remained at Jackson Walker. When Kennedy entered his affiliation with Jackson Walker without personally acquiring confidential information about MindPrint, his imputed disqualification also ended. *Id.* at 303. As a result, the bankruptcy court should have considered Kennedy’s evidence of his lack of involvement with MindPrint while at Jackson Walker. *Id.*

Under both the Texas Rules and the ABA Model Rules, Kennedy should have had the opportunity to demonstrate that he did not obtain confidential information regarding MindPrint during his time at Jackson Walker. Kennedy presented uncontradicted evidence that he was unaware of MindPrint’s existence—let along Schooler’s representation of MindPrint—during his affiliation with Jackson Walker. In light of this evidence, Kennedy successfully showed that his imputed disqualification ended when he left Jackson Walker; therefore, his representation of D’Andrea did not present a conflict of interest requiring his disqualification. *Id.* at 304.

The problem is somewhat simpler, but still present with support staff. In *Phoenix Founders, Inc. v.*
Marshall, 887 S.W.2d 831 (Tex. 1994), the court held that the irrebuttable presumption of shared confidences between lawyer/client and lawyer/firm do not apply to a paralegal. An effective Chinese wall will protect against a disqualifying conflict. Such a wall would presumably also be admissible as a defense to a malpractice claim against the lawyer losing the paralegal based on a presumption of inappropriate shared confidences. The Texas Supreme Court further discussed the requirements for a Chinese Wall. In re: American Home Products, Corp., 985 S.W. 2d 68 (Tex. 1998)

The Texas Supreme Court recently considered the issue of movement of support staff in In re: Columbia Valley Healthcare System, L.P., 320 S.W. 3d 819 (Tex. 2010). In this case, Yvonne and Alberto Leal hired Magallanes & Hinojosa, P.C. to represent them in a claim for medical malpractice against Columbia Valley Healthcare System. Columbia Valley sought to disqualify the Magallanes & Hinojosa law firm because of its employment of Margarita Rodriguez. Ms. Rodriguez had previously worked on the Leal case while employed by Columbia Valley’s counsel, William Gault, at Brin & Brin, P.C. Id. at 822. When Rodriguez left Brin & Brin, she signed a confidentiality agreement obligating her not to work on any matter that she had previously worked on for Brin & Brin. Id.

Approximately eleven months after leaving Brin & Brin, Rodriguez was hired by Magallanes as a legal assistant. Magallanes hired Rodriguez with knowledge that she had worked on the Leal case for Brin & Brin.

Magallanes orally instructed her not to work on any case on which she had prior involvement, specifically including the cases she had worked on at Brin & Brin. Id. at 823. The firm did not have any written screening policies in effect at the time of Rodriguez’s hiring. Despite being instructed not to work on the Leal file, Rodriguez did so on several occasions. Id.

The Supreme Court reiterated its holding in the Phoenix Founders decision that the irrebuttable presumption of having shared confidential information with members of the new firm can only be rebutted by a showing that:

1. The assistant was instructed not to perform work on any matter on which she worked during her prior employment, or regarding which the assistant has information related to her former employer’s representation; and
2. The firm took “other reasonable steps to ensure that the assistant does not work on matters on which the assistant worked during the prior employment, absent client consent.” Id. at 824.

The Supreme Court found that the Megallanes firm satisfied the first prong of the test by instructing Rodriguez not to work on the Leal case. However, the court found that the firm failed to take other reasonable steps to ensure that Rodriguez did not work on the Leal case. Id. at 828. The court went on to hold that to satisfy the second prong of the test, the firm needed to have at a minimum formal, institutional measures to screen the employee from the case. Id.

The court also held that despite any screening measures that are used, the presumption of shared confidences becomes conclusive if:

1. Information relating to the representation of an adverse client has in fact been disclosed,
2. Screening would be ineffective or the non-lawyer necessarily would be required to work on the other side of a matter that is the same as or substantially related to a matter on which the non-lawyer has previously worked, or
3. The non-lawyer has actually performed work, including clerical work, on the matter at the lawyer’s directive if the lawyer reasonably should know about the conflict of interest. Id.

X. HOT SPOTS, DANGER ZONES, RED FLAGS

General Counsel. Do you really want to be counsel on everything? Can you possibly discharge that obligation in a society as complex as ours? When something goes wrong, the client is going to ask, "Why didn't you stop us from doing that?" There is never an adequate answer if you're general counsel. It is usually the advice that you did not give that results in the claim.

Local Counsel. You are helping an out of town lawyer for minimal fee; he or she drops the ball and the client suffers. Who should the client sue? Did you get the client's approval for your limited role; permission to ignore or not check for the errors of your "co-counsel?" As local counsel, you put the full extent of your assets and your insurance at risk for no real upside in fees. The risk is seldom worth it.

Courtesy Representation. A good client asks you to represent both her and an associate in a deal/lawsuit.
In almost all of these situations, the "real" client calls the shots and the "courtesy" client is not even consulted. Decisions are made without informing the courtesy client. Once a bad result occurs, the courtesy client asks why she wasn't consulted and a claim follows. You are left to ask yourself how you got into this.

**Multi-client Representation.** This is the same as the courtesy representation, except you really intend to represent them all. If you have multiple clients in the same matter, prepare a letter for them to sign confirming that there are no conflicts, that they will inform you if a conflict occurs and consenting to the multi-representation. Include a recommendation that each get a separate lawyer. This letter will be Plaintiff’s Exhibit No.1, so don't be shy.

**Partial Representation.** When a client tells you about her business deal and her car wreck, you had better spell out that you are not undertaking the business deal representation. Otherwise, the client is justified in relying on you to handle all matters discussed with you.

**Minimal Efforts Representation.** Many times a client will ask that you assume representation but request that you not "run up a big fee." In effect, the client wants you to protect their interests fully, but at the same time limit your involvement (and your fees) on the case or business transaction. This type of "bargain basement lawyering" is ripe with problems when the lawyer exercises discretion and fails to do some act which results in the client being prejudiced.

**Business With Clients.** Don't do it, ever. A jury will believe that you were representing the "Deal" in all its legal aspects or you would not have been involved. The client will expect that you are looking out for all legal problems in the deal: that's why he consented to let you in on it. Your burden will be the same as general counsel: the unacceptable risk is that of being sued for advice that you did not give to prevent a problem. If anything happens (and it always does), no jury will view you favorably.

**Board of Directors.** If you must attend, attend in an advisory capacity and be prepared to give legal advice. Once again, the obligation that you assume is akin to general counsel. If you are tempted, talk to attorneys who sat on the boards of banks in Texas. (Find out if any of your associates are sitting on the board of their brother-in-law's corporation.)

**Non-Legal Staff.** Don't let your secretary practice law. Proof read everything. Follow up on instructions given and assume nothing.

**Warning Signs In Others.** If someone is overly depressed over debts or going through a divorce, give them time off. If someone is drinking too much, get them help. Don't turn over the firm's clients to someone that you have reason to believe (or even suspect) may be suffering from some disability. The protection from vicarious liability via a P.C. or a L.L.P. may go right out the window if you are held personally responsible for a failure to supervise your partners and associates.

**New employees, New lawyers.** Check conflicts thoroughly on all new personnel from other law firms, not just lawyers. These conflicts cannot be meaningfully waived and no "Chinese Wall" can isolate them.

**Discovery.** More cases are disposed of on discovery motions than by trial. Treat discovery with the respect it deserves: it can kill your reputation and your estate.

**Trust Accounts.** Limit them to $100,000. Don't risk clients' money on the integrity of a bank.

**Rejected Business.** Turn it down in writing. Send them to other lawyers. Discuss but don't render an opinion on limitations unless the issue is clear (which it often isn't).

**Fee & Engagement Agreements.** Always put them in writing. Accept no excuses. Spell out such things as whether your hourly rates will change during the course of the representation, interest on trust account balances, responsibility for expenses in contingent fee cases, payment of referral fees, right to withdraw for non-payment, use of a retainer, credit for retainer in contingent fee cases, and limited scope of representation. See Appendix 4.

**Clients not Paying.** Many lawyers still stop or delay work as a means of "encouraging" recalcitrant clients to bring their bill current. While you may withdraw for non-payment, you may not delay the performance of your duties. If the client won't pay, either fire the client (in writing) or do your best and ignore the non-payment aspect of the relationship.

**XI. PREVENTION AND AVOIDANCE**
There are some rather simple rules that will keep lawyers out of most of the situations that result in claims. The rules don't address all the risky relationships, but they do address the most common. Appendix 5 is my shorthand version of such rules. Listed below are also some additional suggestions that should give lawyers greater peace of mind in their practice.

Form a professional corporation or limited liability partnership. Some feel that the law is somewhat unclear on whether a P.C. will shield a non-negligent lawyer from the consequences of a negligent lawyer associated with the same firm. The statute seems to say that that is the intent, however. It is clearly advisable to set this lawful shield up to attempt to protect your assets from another's bad acts, even if it is later determined that the shield is not impenetrable.

Carry good insurance and read the policy. Absence of insurance shows a contempt for the client. Many claims can be resolved within your policy limits, sparing you the agony of exposing a lifetime of estate accumulation to the risk of malpractice. Read that policy. Comply with the notice requirements and do whatever is necessary to keep your coverage.

Set your fees reasonably and collect your fees in advance. A malpractice claim is an easy and automatic counterclaim in 93% of the suits filed for fees.

Assign a partner to be in charge of malpractice avoidance and reward him for his efforts on behalf of the firm. The lawyer who saves you a million dollars may be more valuable than the one who makes you the same sum. Good news may travel fast, but bad news is quicker than a hiccups and is much more quickly believed. The partner should do appropriate "firm audits" to check on such things as whether every case has a fee letter. Form letters should be reviewed from time to time to update them for new ideas and changes in the law.

Get your fellow lawyers who are substance abusers into the confidential State Bar Program, Texas Lawyers Assistance Program. Those involved with this program estimate that 15% to 20% of Texas lawyers are presently suffering from a current, non-treated chemical impairment. Be aware of the standard tests for alcoholism: you probably know or practice with an alcoholic. Imagine your testimony if a claim is made against such a lawyer. Would you expect a doctor to let a fellow doctor in the firm to continue to practice if it was known or even suspected that the doctor was an alcoholic? The same standard applies to lawyers.

Don't ignore that sixth sense, that gut feel for what you should do or what cases you should take. Virtually every claim comes from a situation where the lawyer's instincts, if followed, would have avoided the claim. Ignore those feelings often enough and you will always pay the price - it is the law of averages and there is no appellate court for that law.

Get involved in the community for the good of the community and not just to get clients. Remember that doctors started getting sued when they stopped making house calls. Put something back for free. Don't seek credit for it, just be a good person, like the plumber that coaches your son's baseball team.

Don't expect to be honored because you are a lawyer. That status is not one deserving of honor. It usually only means that you had a head start over some of your fellow citizens who had to go to work after high school and you did not know what to do after college or you couldn't get into medical school. Try on for size the words of Mr. Dixon. Mr. Dixon was selected as giving the best shoe shine in all of downtown Dallas by a downtown paper. When he was interviewed, he said that what a man does, does not bring honor to the man: the man brings honor to what he does. Mr. Dixon lives it and we all should as well. Instead of wondering why we are not more honored for our professional standing, we should work on bringing the honor to what we do.

XII. THE GRIEVANCE PROCESS

1. Overview Of The Grievance Process And Some Statistics

The Commission for Lawyer Discipline, which administers the grievance system for the State Bar of Texas issued an annual report for the fiscal year from June 1, 2009 through May 31, 2010. (the “2010 fiscal year”) In the 2010 fiscal year, there were 85,813 lawyers in the State of Texas and a total of 7,233 grievances filed. In the prior fiscal year, there were 83,713 lawyers in the State and 7,108 grievances that were filed.

An excellent overview of the attorney discipline process is contained in the Annual Report, an excerpt of which is attached hereto as Appendix No. 6. A chart showing the process of a grievance is contained on page 17 of Appendix No. 6.
For a grievance to be processed, it has to be classified as a complaint. A grievance will only be processed as a complaint if it alleges professional misconduct, since lawyers are subject to discipline under the grievance process only if they have violated the ethics rules (the Texas Disciplinary Rules of Professional Conduct).

If the grievance does not allege professional misconduct, it will be dismissed as an inquiry. Out of the grievances filed in fiscal year 2010, only 2,091 grievances were classified as complaints, and the other 5,142 grievances were dismissed as inquiries. Grievances are dismissed for various reasons, but include the following:

1. The grievance concerns the outcome of a case but does not specify a violation of an ethics rule;
2. The grievance does not involve a lawyer’s conduct in his or her professional capacity;
3. The grievance is filed too late;
4. The grievance is duplicative or identical to a previous filing;
5. The grievance concerns a lawyer who has been disbarred, resigned, or is deceased;
6. The grievance concerns a non-licensed attorney (handled by the Unauthorized Practice of Law Committee); and
7. The grievance is filed against a sitting judge (handled by the State Commission on Judicial Conduct).

If a grievance is classified as an inquiry, there is an appeal right to the Board of Disciplinary Appeals. In the 2010 fiscal year, there were 2,095 appeals by complainants from classification decisions, and only 232 classifications were reversed (a reversal rate of 11%).

If a grievance is classified as a complaint, it is then sent to the respondent lawyer who has 30 days from receipt to respond. Within 60 days of the response deadline, the Chief Disciplinary Counsel (the “CDC”), an arm of the State Bar of Texas, makes a just cause determination. If the CDC finds no just cause, the case is then presented to a Summary Disposition Panel (SDP) (District Grievance Committee) for a vote on whether to dismiss the complaint or to proceed. If the SDP votes to dismiss the complaint, there is no right of appeal. In the 2010 fiscal year, 1,604 cases were presented to SDP panels and the panels accepted the CDC’s recommendation to dismiss in 1,551 cases (an affirmance rate of 97%).

Assuming that the SDP finds just cause to proceed, then the respondent attorney has an election to make. He or she can elect to try the grievance before an evidentiary panel or in state district court. In the 2010 fiscal year, a total of 410 grievance trials were held before evidentiary panels, and only 43 in state district courts.

Evidentiary panel hearings are confidential and allow for a private reprimand, which is the least sanction available to be imposed. District court proceedings are public and the least sanction available is a public reprimand. In both types of proceedings, the parties are the Commission for Lawyer Discipline represented by the Chief Disciplinary Council, and the respondent lawyer. The Commission has the burden to prove the allegations of professional misconduct by a preponderance of the evidence.

If no professional misconduct is found, the case is dismissed. If professional misconduct is found, a separate hearing may be held to determine the appropriate discipline. In evidentiary panel proceedings, the panel may also find that the respondent lawyer suffers from a disability and forwards its finding to the Board of Disciplinary Appeals.

During the 2010 fiscal year, the CDC tried 417 cases before Grievance Committee evidentiary panels, district courts, and the Board of Disciplinary Appeals, and disposed of more than 1,600 cases before the SDP’s.

2. The Private Reprimand Sanction

As set forth above, a private reprimand is only available in a case tried before an evidentiary panel of the Grievance Committee. This sanction is not available in a case heard before a district court. A private reprimand is not published in connection with the specific lawyer and is not released upon inquiries from the public. This sanction does remain a part of the lawyer’s disciplinary history and may be considered in any subsequent disciplinary proceeding.
The Texas Legislature and Commission for Lawyer Discipline have established limitations on the use of private reprimands as follows:

1. A private reprimand is not available if a private reprimand has been imposed upon the respondent lawyer within the preceding five-year period for a violation of the same disciplinary rule; or

2. The respondent has previously received two or more private reprimands, whether or not for violations of the same disciplinary rule within the preceding ten years; or

3. The misconduct includes theft, misapplication of fiduciary property, or the failure to return, after demand, a clearly unearned fee; or

4. The misconduct has resulted in a substantial injury to the client, the public, the legal system or the profession; or

5. There is a likelihood of future misconduct by the respondent lawyer; or

6. The misconduct was an intentional violation of the ethics rules.

3. Confidentiality In The Grievance Process

Rule 2.16 of the Rules of Disciplinary Procedure provides in material part as follows:

“2.16 Confidentiality

“(a) Disciplinary proceedings are strictly confidential and not subject to disclosure, except by court order or as otherwise provided in this rule 2.16.

“(b) The pendency, subject matter and status of a disciplinary proceeding may be disclosed by a complainant, respondent or chief disciplinary counsel if the respondent has waived confidentiality or the disciplinary proceeding is based upon a conviction for a serious crime.

“(c) While disciplinary proceedings are confidential, facts and evidence that are discoverable elsewhere are not made confidential merely because they are discussed or introduced in the course of a disciplinary proceeding.

“(d) The deliberations and voting of an evidentiary panel are strictly confidential and not subject to discovery. No person is competent to testify as to such deliberations and voting.

“(3) If the evidentiary panel finds that professional misconduct has occurred and imposes any sanction other than a private reprimand, all information, documents, statements and other information coming to the attention of the evidentiary panel shall be, upon request, made public. However, the chief disciplinary counsel may not disclose work product or privileged attorney-client communications without the consent of the client.”

A decision by the local Grievance Committee may be appealed by the Commission or the respondent lawyer to the Board of Disciplinary Appeals. An appeal from a state grievance committee remains confidential. An appeal from the Board of Disciplinary Appeals may be made to the Texas Supreme Court. That proceeding is not confidential.

XIII. THE ATTORNEY CLIENT PRIVILEGE AND RULE 1.05 OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

1. The Attorney-Client Privilege

The attorney-client privilege is codified in Rule 503 of the Texas Rules of Evidence as follows:

“(b) Rules of Privilege
(1) General rule of privilege.
A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

(2) **Special rule of privilege in criminal cases.** In criminal cases, a client has a privilege to prevent the lawyer or lawyer’s representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer’s representative by reason of the attorney-client relationship.

…

(c) **Who May Claim the Privilege.** The privilege may be claimed by the client, the client’s guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer’s representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) **Exceptions.** There is no privilege under this rule.

(1) **Furtherance of crime or fraud.** If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud:

(2) **Claimants through some deceased client.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transactions;

(3) **Breach of duty by a lawyer or client.** As to a communication relevant to an issue or breach of duty by a lawyer to the client or by a client to the lawyer;

(4) **Document attested by a lawyer.** As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) **Joint clients.** As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.”

A recent case discussing the formation of the attorney-client relationship is *Mixon v. State*, 224 S.W.3d 206 (Tex.Crim.App. 2007). In this case Mixon was accused by the State of murder. Mixon met with attorney Peter Heckler for the purpose of hiring Heckler to defend him from the murder charge. Heckler initially agreed to serve as Mixon’s attorney, but determined that the handgun used in the crime might actually have belonged to Heckler. As a result, Mixon employed other counsel to defend him at trial. After Mixon was convicted, Heckler was sworn in as a witness in the criminal phase of the trial. The trial judge ruled that the attorney-client privilege applied to most of Heckler’s potential testimony, but Heckler was ordered to testify as to whether or not Mixon had asked him to get rid of the gun. *Id.* at 207-208.

On appeal, the State argued that the attorney-client privilege did not apply to any of Heckler’s conversations with Mixon. The Court of Criminal
Appeals disagreed with this contention and held that any information acquired by the lawyer in the interviews or looking toward such employment is privileged and cannot be disclosed, even if the client does not actually employ the lawyer. *Id.* To adopt any other policy would have a chilling effect on a defendant’s willingness to be candid with the lawyer whose services he or she seeks to obtain. *Id.* at 211.

2. **Confidential Information – Rule 1.05**

Even broader than the information covered by the attorney-client privilege set forth in Rule 5.03 of the Texas Rules of Evidence is confidential information as described in Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. That rule is set forth as follows:

“Rule 1.05 Confidentiality of Information

(a) **Confidential information includes both privileged information and unprivileged client information.** Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or (ii) anyone else, other than the client, the client’s representatives, or the member, associates, or employees of the lawyer’s law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may **reveal confidential information:**

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client’s representatives, or the members, associates, and employees of the lawyer’s firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer’s associates based upon conduct involving the client or the representation of the client.

(7) **When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.**

(8) To the extent revelation
reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.

(d) A lawyer also may reveal unprivileged client information.

(1) When impliedly authorized to do so in order to carry out the representation.
(2) When the lawyer has reason to believe it is necessary to do so in order to:
(i) carry out the representation effectively;
(ii) defend the lawyer on the lawyer’s employees or associates against a claim of wrongful conduct;
(iii) respond to allegations in any proceeding concerning the lawyer’s representation of the client, or
(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing 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, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

3. The Lawyer’s Dilemma If the Client Intends to Commit a Criminal or Fraudulent Act.

Lawyers have been put to a difficult dilemma as to whether or not to disclose the client’s intentions to commit either a criminal or a fraudulent act. The comments to Rule 1.05 distinguish between instances where the lawyer has a discretionary right to make a disclosure adverse to the client from those situations where the lawyer has the obligation to make a disclosure adverse to the client. The comments to the rule are set forth below:

“Discretionary Disclosure Adverse to Client

9. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client’s information usually unprivileged information even though the client’s purpose is wrongful. On the other hand, a client who knows or believes that a lawyer is required or permitted to disclose a client’s wrongful purposes may be inhibited from revealing facts which would enable the lawyer to counsel effectively against wrongful action. Rule 1.05 thus involves balancing the interests of one group of potential victims against those of another. The criteria provided by the Rule are discussed below.

10. Rule 5.03(d)(1) Texas Rules of Civil Evidence (Tx.R.Civ.Evid.), and Rule 5.03(d)(1), Texas Rules of Criminal Evidence (Tx.R.Crim.Evid.), indicate the underlying public policy of furnishing no protection to client information where the client seeks or uses the services of the lawyer to aid in the commission of a crime or fraud. That public policy governs the dictates of Rule 1.05. Where the client is planning or engaging in criminal or fraudulent conduct or where the culpability of the lawyer’s conduct is involved, full protection of client information is not justified.

11. Several other situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.02(c). As noted in the Comment to that Rule there can be situations where the lawyer may have to reveal information relating to the representation in order to avoid
assisting a client’s criminal or fraudulent conduct, and sub-paragraph (c)(4) permits doing so. A lawyer’s duty under Rule 3.03(a) not to use false or fabricated evidence is a special instance of the duty prescribed in Rule 1.02(c) to avoid assisting a client in criminal or fraudulent conduct, and sub-paragraph (c)(4) permits revealing information necessary to comply with Rule 3.03(a) or (b). The same is true of compliance with Rule 4.01. See also paragraph (f).

12. Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.02(c), because to counsel or assist criminal or fraudulent conduct requires knowing that the conduct is of that character. Since the lawyer’s services were made an instrument of the client’s crime or fraud, the lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer’s participation was culpable. Sub-paragraph (c)(6) and (8) give the lawyer professional discretion to reveal both unprivileged and privileged information in order to serve those interests. See paragraph (g). In view of Tex. R.Civ.Evid. Rule 5.03(d)(1), and Tex.R.Crim.Evid 5.03(d)(1), however, rarely will such information be privileged.

13. Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. The lawyer’s knowledge of the client’s purpose may enable the lawyer to prevent commission of the prospective crime or fraud. When the threatened injury is grave, the lawyer’s interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information. As stated in sub-paragraph (c)(7), the lawyer has professional discretion based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client’s commission of any criminal or fraudulent act. In some situations of this sort, disclosure is mandatory. See paragraph (E) and Comments 18-20.

The lawyer’s exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer’s relationship with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction, and factors that may extenuate the client’s conduct in question. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

18. Rule 1.05(e) and (f) place upon a lawyer professional obligations in certain situations to make disclosure in order to prevent involvement by the lawyer in a client’s crime or frauds. Except when death or serious bodily harm is likely to result, a lawyer’s obligation is to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action; see Rule 1.02(d) and (e).

19. Because it is very difficult for a lawyer to know when a client’s criminal or fraudulent purpose actually will be carried out, the...
lawyer is required by paragraph (e) to act only if the lawyer has information clearly establishing the likelihood of such acts and consequences. If the information shows clearly that the client’s contemplated crime or fraud is likely to result in death or serious injury, the lawyer must seek to avoid those lamentable results by revealing information necessary to prevent the criminal or fraudulent act. When the threatened crime or fraud is likely to have the less serious result of substantial injury to the financial interests or property of another, the lawyer is not required to reveal preventive information but may do so in conformity to paragraph (e)(7).

20. Although a violation of paragraph (e) will subject a lawyer to disciplinary action, the lawyer’s decisions whether or how to act should not constitute grounds for discipline unless the lawyer’s conduct in the light of those decisions was unreasonable under all existing circumstances as they reasonably appeared to the lawyer. This construction necessarily follows from the fact that paragraph (e) bases the lawyer’s affirmative duty to act on how the situation reasonably appears to the lawyer, while that imposed by paragraph (f) arises only when a lawyer knows that the lawyer’s services have been misused by the client. See also Rule 3.03(b).

Withdrawal.

21. If the lawyer’s services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.15(a)(1). After withdrawal, a lawyer’s conduct continues to be governed by Rule 1.05. However, the lawyer’s duties of disclosure under paragraph (E) of the Rule, insofar as such duties are mandatory, do not survive the end of the relationship even though disclosure remains permissible under paragraphs (6), (7), and (8) if the further requirements of such paragraph are met. Neither this Rule nor Rule 1.15 prevents the lawyer from giving notice of the fact of withdrawal, and no rule forbids the lawyer to withdraw or disaffirm any opinion, document, affirmation, or the like.

4. Case Law Under Rule 1.05

A lawyer’s responsibility to preserve confidences of his client (both privileged and unprivileged) is at the very heart of the attorney-client relationship. As Justice Nathan Hecht observed in, In Re George 28 S.W.3d 511 (Tex. 2000):

“Client confidences are not the same as attorney work product. A client confidence is any secret disclosed by a client to a lawyer. Tex. Disciplinary R. Prof. Conduct 1.05(a). It need have nothing to do with a prior representation, or even with the law. It may be the name of a company targeted for takeover, or the price a client would pay for real estate. It may be a client’s plans for marriage, for divorce, or for children. Even the most important client confidence may be no more than a name, a number, a list, a diagram, a password, or a plan. It may be as terrible as an admission of crime, as delicate as a family secret, as fleeting as an idea.” Id. at 523. (Emphasis added.)

The duty of an attorney to maintain client confidences is, for example, superior to society’s need to eradicate racial discrimination. In Douglas vs. Dyne McDermott Petroleum Operations, Co., 144 F.3d 364 (5th Cir. 1998), an in-house attorney for Dyne McDermott revealed to the Department of Energy certain confidential information, learned as a result of
her position as in-house counsel. The information suggested unlawful racial discrimination by her employer-client. See Id. at 367. The attorney was fired and then filed suit claiming that her termination was in retaliation for her answers about the unlawful racial discrimination in violation of Title VII of the Civil Rights Act. Reversing the trial court’s judgment in favor of the attorney, the Fifth Circuit declared that,

“Any betrayal of the client’s confidences that breaches the ethical duties of the attorney places that conduct outside Title VII’s [anti-retaliation] protection.” Id. at 376.

Explaining its holding, the court confirmed that,

“When an attorney’s Title VII right to oppose her employer-client’s allegedly discriminatory practices by disclosing confidential information contrary to the ethical obligations of the profession is balanced against her employer-client’s right to ethical representation and the profession’s interest in assuring the ethical conduct of its members, the employer’s and the profession’s interest must prevail.” (Emphasis added.) Id.

The court reached this result even after recognizing that the rights to combat unlawful racial discrimination guaranteed under Title VII are “extremely important.” Id. The loyalty an attorney owes to her client is, however, even more important:

“Given the obligations to which an attorney agrees when she joins the profession and when she accepts employment, and the importance of the duties of confidentiality and loyalty to the employer-client and the integrity of the profession, we hold as a matter of law that conduct that breaches the ethical duties of the legal profession is unprotected under Title VII.” (Emphasis added.) Id.

Information that an attorney gains through client confidences cannot be used against a client in a judicial proceeding, even if it demonstrates dishonesty or fraud on the part of the client. In Re Rindlisbacher, 225 B.R.180 (Bankruptcy 1998), the bankruptcy court dismissed an attorney’s Complaint to deny his former client a discharge (so the attorney could pursue collection of unpaid fees). The attorney’s complaint was based upon information learned through client confidences. The information that the attorney brought to the attention of the court was that his client had lied to the bankruptcy court about whether he had received certain rental income. The bankruptcy court dismissed the attorney’s complaint, observing that:

“An attorney has the duty to preserve the confidences of the client at every peril to himself and to assert the privilege for the client even after the attorney-client relationship ends.” Emphasis added. Id. at 184.

A case that clearly defines the lawyer’s obligation to preserve confidences is In Re Goebel, 703 N.E. 2d 1045 (Ind. 1998). In a disciplinary action, the Indiana Supreme Court confirmed that the protection of client confidences is so sacred that an attorney cannot reveal them even under the threat of injury to himself or his family. Client “A” had threatened to harm the attorney and his family if he did not reveal Client “B’s” address. In response to this threat of personal injury, the attorney revealed information which enabled client “A” to locate client “B” (where Client “A” killed Client “B’s” husband). Even after recognizing that the attorney had revealed the information only in response to the threat of bodily harm to himself and his family, the court determined that the revelation by the lawyer was in violation of his duty to his client to maintain confidences, and disciplined the lawyer. The information that the attorney revealed was only an address.

A recent case defining the broad scope of Rule 1.05 is Sealed Party v. Sealed Party, 2006 U.S.Dist.Lexis 28392 (S.D. Tex. 2006). In this case, an Attorney
representing a Client entered into a confidential settlement on behalf of Client in its claims against Company. Arguably, in violation of the confidentiality provisions of the settlement agreement, the Attorney issued a press release containing the following information:

1. The identification of the Attorney and the fact that he had filed a state court lawsuit in Texas against the Company on behalf of the Client;

2. The claims asserted against the Company with factual allegations in support;

3. The fact that the parties settled the state court lawsuit; and

4. The Attorney’s impressions of the Client’s views about his prior relationship with the Company, the filing of the state court lawsuit, and the state court lawsuit settlement. *Id.* at *56-57.

After the issuance of the press release, the Company sued the Client for violation of the confidentiality provisions. The Client was eventually dropped from this lawsuit, but incurred attorney’s fees and costs in defending it. The Client thereafter sued the Attorney for breach of his fiduciary duty as a result of his issuance of the press release.

Initially, the court held that the Attorney at the time that he issued the press release still owed a fiduciary duty to the Client, despite the fact that the attorney-client relationship had terminated. The court also concluded that the Attorney breached his fiduciary duty to the Client. *Id.* at *20.

The court also concluded that under Texas law, an attorney has a fiduciary obligation to not reveal to third parties confidential information received from a client, or obtained by reason of the representation of that client, and that obligation survives termination of the attorney-client relationship in the absence of permission from the former client to make the disclosure. *Id.* at *25. In discussing confidential information under Rule 1.05, the court concluded that all of the information in the press release was confidential. There was also no provision of Rule 1.05 that permitted the disclosure contained in the press release under the circumstances presented. *Id.* at *35. The court reiterated that “an attorney’s duty of confidentiality is broader than just client communications, and extends to all confidential information, whether privileged or unprivileged, and whether learned directly from the client or from another source.” *Id.* at *36-37.

In deciding an issue of first impression, the court held that for fiduciary duty purposes, client-related information that originally was “confidential information” under Texas Rule 1.05 may not be revealed at the attorney’s option once the information has been included in court pleadings. *Id.* at *39. The court based its holding on the fact that nowhere in Rule 1.05 or elsewhere in the Texas Rules is it suggested that client information loses its status as “confidential” vis a vis the former attorney merely because the information has been disclosed in court pleadings. *Id.* at *40. In support of this holding, the court states:

“Texas Rule 1.05 grants the attorney discretion to determine what is necessary to carry out or to further the goals of the representation, but it reflects careful judgments that attempt to balance fairly and sensibly the rights of clients and former clients against the rights and needs of attorneys. The scope of circumstances under Texas Rule 1.05 at which an attorney may ‘reveal’ client and former client confidential information demonstrates the rule drafters’ intent to place generally the interest of clients and former clients above the personal interests of the attorney when the client seeks to reveal the information outside the attorney’s representation of the client. *Id.* at *46. … Where the representation has concluded, the attorney has more leeway: He may ‘use’ the information (but, again, not ‘reveal’ it to others) without restriction if the use does not harm the former client. *Id.* at *47. …

This case, however, does not involve the attorneys’ attempted ‘use’ of the client’s confidential information. Rather, the attorney ‘revealed’ the client’s unprivileged information publicly and widely in the press release for purposes unrelated to the client’s goals.” *Id.* at *48-49.”

The court therefore concluded that an attorney
generally owes a former client a continuing duty to not reveal to third parties confidential client information without the client’s express or implicit permission. This duty encompasses privileged and unprivileged information obtained from the client or acquired as a result of the representation. *Id.* at *56.*

The court found that the attorney’s disclosure in the press release of the settlement and private client opinions (numbers 3 and 4) violated the attorney’s continuing fiduciary duty of confidentiality owed to the client under Texas law. *Id.* at *62.* The attorney argued in response that he did not breach his fiduciary duty to the client because the information in the press release was contained in the publicly-available pleadings and therefore was “generally known.” The court denied that defense because the fact that information is in the public record does not necessarily make the information “generally known”, and in any event, the press release contained certain facts not publicly available. *Id.*

Although the attorney was found to have breached his fiduciary duty to the client, the attorney prevailed in the lawsuit because the client did not show that he proximately suffered damages as a result.

5. Public Policy Issues

1. Rules 5.03 and 1.05 are clearly tilted in favor of non-disclosure of client confidences. Is this appropriate, and do the Rules adequately safeguard the public’s interest?

2. Do the Rules provide attorneys with sufficient protection in the event that it is clear that a client is going to use the attorney-client privilege to assist in committing a crime?
THE ETHICAL ATTORNEY: AVOIDING MALPRACTICE AND HONORING THE LAW

By: Robert L. Tobey
Johnston ♦ Tobey, P.C.
www.johnstontobey.com
I. AVOID CONFLICTS!

A. Lawyers owe their clients a fiduciary duty.

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.
I. AVOID CONFLICTS!

Examples – subordinating the client’s interest to the attorney’s, retaining the client’s funds, engaging in self dealing, improperly using client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends.

The case law distinguishing legal malpractice for breach of fiduciary duty is muddled.
I. AVOID CONFLICTS!

B. The Remedy of Fee Forfeiture


— Forfeiture of fees is appropriate without regard to whether the breach of fiduciary duty resulted in damage to the client.

— It is the agent’s disloyalty, not any resulting harm that violates the fiduciary relationship.
I. AVOID CONFLICTS!

Factual disputes must be decided by a jury:

— Whether or when the misconduct complained of occurred.
— The attorney’s mental state at the time.
— The existence or extent of any harm to the client.
I. AVOID CONFLICTS!

The Court determines:

— Whether the attorney’s conduct was a clear and serious breach of duty to his client.

— Whether any of the attorney’s compensation should be forfeited.

— If so, what amount.
I. AVOID CONFLICTS!

C. How to Avoid Conflicts That Give Rise to Malpractice and Breach of Fiduciary Duty Claims!

- You owe a duty to each client, so each client should have a separate lawyer!
- Never ask a client to waive a conflict!
- Never ignore a conflict!
- Don’t defend your work in Court!
D. Engagement Letters Are Essential!

- Clearly list all persons and entities to be represented.
- Clearly define the scope of representation.
- Define whether hourly rates will change during the course of the representation, how expenses will be handled, the right to withdraw for non-payment and the use of retainers.
**E. Multi-client representation letters**

Attorneys are confronted with multiple individual clients, partnership interests, trusts and other entities.

- The client should confirm that there are no conflicts.
- The client will inform you if a conflict occurs.
- Each client should consent to joint representation.
- Recommend that each client get a separate lawyer.
- This letter will be Plaintiff’s Exhibit “1”, so get it right!
F. Other Multi-Client Issues

Rule 1.06 – the “transactional client” rule.
—The lawyer does not represent the parties, but rather represents the transaction, such as the preparation of a partnership agreement.

Rule 1.07 – the “intermediary rule.”

Both Rules 1.06 and 1.07 require strict compliance.
Treat clients like guests: You don’t just let anybody into your house, so don’t take just anyone with money as a client.

Think about what could go wrong with the representation. You do that for your clients, so use this same skill in deciding whether or not to represent a client.
III. DON’T BE GREEDY OR DESPERATE!

Greed and desperation make you ignore your instincts.
— Take cases you should reject.
— Ask for fees you do not deserve.
— Ignore conflicts that should stop you cold.
IV. PAPER IS PATIENT, SO GET IT IN WRITING!

- Fee Agreements.
- Multiple client representation letters.
- Agreements to limit the scope of representation.
- Offers of settlement from the other side.
- Recommendations against taking certain actions.
- Rejecting potential clients—statute of limitations.
- Writings will protect you from the foibles of human memory.
V. THINK ABOUT WHAT DOCTORS DO!

- Get signed consents.
- Don’t give advice over the phone or at cocktail parties to non-patients.
VI. BE WARY OF NON-CLIENTS WHO MAY SUE!

Under certain circumstances a lawyer may be required to inform a non-client that he or she is a “non-client” and is not being represented. *Parker v. Carnahan*, 772 S.W. 2d 151

Was the lawyer aware or should the lawyer have been aware that the lawyer’s conduct would lead a reasonable person to believe that the reasonable person was being represented by the attorney?
Negligent Misrepresentation

McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 998 S.W.2d 787 (Tex. 1999)

“A negligent misrepresentation claim is not the equivalent of a legal malpractice claim and is not barred by the privity rule.”

“Limited to situations in which the attorney who provides the information is aware of the non-client and intends that the non-client rely on the information.”

- Borrower’s attorney prepares a title opinion involving oil and gas interests based on which the Bank loaned money.
- Attorney relied on information provided by his client.
- Bank discovers at foreclosure that the collateral was not as represented in the title opinion.
- A claim against the lawyer for negligent misrepresentation is permitted.
VII. UNDERSTAND MALPRACTICE CLAIMS AND WHAT YOU CAN BE SUED FOR!
A. Anatomy of a Legal Malpractice Claim

- Duty
- Breach
- Proximate Cause
- Damages

Foreseeability
But For
Privity Rule – Generally only the client can sue the lawyer

Assignments of legal malpractice claims are not permitted – *Zuniga v. Groce Locke & Hebdon*

“Commercial marketing of legal malpractice claims by strangers would demean the legal profession.”
C. DAMAGES FOR LEGAL MALPRACTICE

Damages must be proximately caused by the attorney’s breach of the standard of care.

Mental anguish damages may be recovered if they were an element of the claim that was lost, but not from mental anguish caused by the attorney’s negligence. *Douglas v. Delp*, 987 S.W.2d 879 (Tex. 1999).

Attorneys’ fees may be recovered to the extent the fees were proximately caused by the defendant attorney’s negligence. *Akin Gump Strauss Hauer & Feld, L.L.P. v. National Development and Research Corporation*, 299 S.W.3d 106 (Tex. 2009).
D. LIMITATIONS

- Legal malpractice – 2 years
- Breach of fiduciary duty – 4 years
- The Discovery Rule applies
- Litigation Tolling Rule applies to malpractice committed in the course of the prosecution or defense of a claim that results in litigation and limitations are tolled until the lawsuit is over.
- The Tolling Rule probably does not apply to transactional malpractice.
A lawyer may be sued under the DTPA for unconscionable conduct. *Latham v. Castillo* 972 S.W. 2d 66 (Tex. 1998).

Professional services exclusion – advice, opinion or judgment.

Professor Alderman argues that this exclusion does not change a claim against a professional under the DTPA.
VIII. HAVE MALPRACTICE INSURANCE AND UNDERSTAND ITS TERMS!

Every lawyer should carry insurance for professional mistakes.

Understand the coverage provided

— Most policies are “claims made” - claim must be asserted during the term of the policy.

— “Tail coverage” covers you for acts done years ago, but asserted only now.

— Most policies are “cannibalizing”.
IX. UNDERSTAND THE SCOPE OF CLIENT CONFIDENCES AND DON’T REVEAL CONFIDENTIAL INFORMATION!
A. The Attorney-Client Privilege – Rule 5.03

“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.”
MIXON v. STATE, 224 S.W.3d 206 (Tex.Crim.App. 2007)

—Formation of the attorney-client relationship.
B. CONFIDENTIAL INFORMATION – RULE 1.05

Confidential information includes both privileged information and unprivileged client information. “Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence”...

“Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.”
A lawyer shall not knowingly:

- Reveal **confidential information of a client or a former client** to anyone else, other than the client, the client’s representatives, or attorneys and employees in the lawyer’s law firm.
A lawyer shall not knowingly:

- Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

- Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
C. A LAWYER MAY REVEAL CONFIDENTIAL INFORMATION:

- When the client consents after consultation.
- When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.
C. A LAWYER MAY REVEAL CONFIDENTIAL INFORMATION:

To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct involving the client or the representation of a client.
C. A LAWYER MAY REVEAL CONFIDENTIAL INFORMATION:

When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

To the extent revelation reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.
D. RULE 3.03
A lawyer shall not knowingly fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act.
If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.
E. Particular Cases

*IN RE: GEORGE, 28 S.W.3D 511 (TEX. 2000)*

A client confidence is any secret disclosure by a client to a lawyer.

—It may be as terrible as an admission of a crime, as delicate as a family secret, as fleeting as an idea.
The duty of an attorney to maintain client confidences is superior to society’s need to eradicate racial discrimination.

— “Any betrayal of the client’s confidences that breached the ethical duties of the attorney places that conduct outside Title VII’s anti-retaliation protection.”

— “We hold as a matter of law the conduct that breaches the ethical duties of the legal profession is unprotected under Title VII.”
In Re Rindlisbacher, 225 B.R.180
(Bankr. C.D. Cal. 1998)

The attorney sought collection of unpaid fees based upon information learned through client confidences, including the fact that the client had lied to the bankruptcy court about whether the client had received rental income.

“An attorney has the duty to preserve the confidences of the client at every peril to himself and to assert the privilege for the client even after the attorney-client relationship ends.”
Client A had threatened to harm the attorney and his family if he did not reveal Client B’s address. Under this threat, the attorney revealed this information and Client A killed Client B’s husband.

“Protection of the client confidences is so sacred that an attorney cannot reveal them even under the threat of injury to himself or his family.”

The lawyer was disciplined for having made this disclosure.
—Attorney breached his fiduciary duty by disclosing the client’s confidential information under Rule 1.05. This duty continues even after attorney-client relationship ends.
X. UNDERSTAND CONFLICTS WHEN EITHER YOU OR A LEGAL ASSISTANT CHANGE FIRMS!

A. Lawyers

_Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295_

— “A Chinese Wall will not rebut the presumption of shared confidences when an attorney in private practice has actual knowledge of a former client’s confidences and he thereafter undertakes employment with a firm representing an adversary of the same client in that same suit.”
In the matter of: ProEducation International, Inc. 587 F.3d 296 (5th Cir. 2009).

— Under both the Texas Rules and the ABA Model Rules, the departing attorney should have an opportunity to demonstrate that he or she did not obtain confidential information regarding the former client.

— If there is evidence showing that the attorney did not obtain confidential information, the imputed disqualification ends when the attorney leaves the first firm.
B. Legal Assistants

*Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831*

— The irrebuttable presumption of shared confidences between lawyer/client and lawyer/firm does not apply to a paralegal.

— An effective Chinese Wall will protect against a disqualifying conflict.
In re: Columbia Valley Healthcare System, LP, 320 S.W. 3d 819 (Tex. 2010)

—Assistant must be instructed not to perform work on any matter on which he or she worked during prior employment.

—Firm takes other reasonable steps to ensure that assistant does not work on matters that worked on at prior employment, absent client consent.
XI. CONCLUSION

- Read the rules!!!
- Do not be a party in the next reported decision!!!
### APPENDIX I

1) **Claims by Area of Practice**

1. Personal Injury - Plaintiff .......................................................... 20%
2. Real Estate .................................................................................. 16%
3. Family Law ................................................................................. 10%
4. Personal Injury - Defense ............................................................... 10%
5. Estate and Probate ........................................................................ 9%
6. Collection and Bankruptcy ............................................................ 8%
7. Corporate and Business Organization ........................................... 6%
8. Other* .......................................................................................... 21%

(*includes criminal law, business transactions, workers compensation, securities law and other areas, none of which accounted for more than 5% each)

2) **Claims by Size of Firm:**

1. Sole Practitioner ........................................................................... 33%
2. 2 to 5 Lawyers ............................................................................. 33%
3. 6 to 10 Lawyers ........................................................................... 9%
4. 11 to 39 Lawyers ......................................................................... 10%
5. 40 to 99 Lawyers ......................................................................... 4%
6. 100 or more Lawyers ................................................................. 11%

3) **Claims by Type of Error Alleged:**

1. **Substantive Errors:**
   A. Failure to know law ..................................................................... 10.98%
   B. Inadequate investigation ............................................................. 10.37%
   C. Planning error ........................................................................... 7.72%
   D. Failure to know deadline ............................................................ 7.09%
   E. Conflict of interest ..................................................................... 6.28%
   F. Record research ........................................................................ 2.54%
   G. Tax consequences ..................................................................... 1.26%
   H. Math error ................................................................................ 1.04%

   Total .............................................................................................. 47.28%

2. **Administrative Errors:**

   A. Procrastination .......................................................................... 9.43%
   B. Failure to calendar ..................................................................... 5.19%
   C. Clerical error ........................................................................... 4.74%
   D. Failure to react to calendar ......................................................... 4.35%
   E. Failure to file ............................................................................ 4.28%
   F. Lost file .................................................................................... 0.37%

   Total .............................................................................................. 28.35%
3. Client Relation Errors:
   A. Follow instructions ........................................................................... 6.72%
   B. Client consent ..................................................................................... 5.75%
   C. Improper withdrawal ........................................................................... 2.10%

   Total ........................................................................................................ 14.57%

4. Intentional wrongs:
   A. Malicious prosecutions ........................................................................ 3.59%
   B. Fraud ................................................................................................... 3.35%
   C. Libel ..................................................................................................... 1.59%
   D. Civil rights .......................................................................................... 1.26%

   Total ........................................................................................................ 9.79%

4) Disposition of Claims:
   1. No Suit, No Payment ............................................................................ 61%
   2. No Suit, Payment .................................................................................. 15%
   3. Suit, Payment ...................................................................................... 12%
   4. Suit, Judgment ..................................................................................... 10%
   5. Suit, Judgment, Payment ..................................................................... 02%

   (All figures exclusive of costs of defense)

Ewins, Kathleen Marie and Jane Nosbisch, Profile of Legal Malpractice Claims, A.B.A. (April, 2005)
March 5, 2012

____________________
____________________
____________________

Re: ___________________

Gentlemen:

This will confirm that you have retained this Firm to represent you and the Plaintiffs in connection with the above-referenced matter. You will initially be billed in .25 (1/4) hour increments for services performed. All clients are jointly and severally liable for our fees and expenses. Attorneys work on numerous files during a day and some lack of precision is inherent in billing on time, but the time charged to your file will always represent a good faith estimate of the actual time spent.

As a condition of our accepting this representation, you have agreed to pay a retainer of $____________, which shall be considered as earned in its entirety upon receipt. This retainer will be deposited into our operating account and will be applied to and credited against fees as they are earned and/or incurred each month. Your obligation to pay additional attorney's fees for our representation in this matter will not begin until our fees have exceeded the $__________ retainer. The firm reserves the right to require a trust account retainer in the future if it is deemed necessary to protect the firm adequately against mounting bills.

You are responsible for payment or reimbursement of expenses incurred in this representation. These include, but are not be limited to, court costs, expert witness and investigator fees, deposition fees, photocopy charges, delivery charges, long distance telephone charges, unusual secretarial overtime, travel expense, etc. It is our usual practice to send to clients, for direct payment by them, invoices from third parties. You are required to pay such invoices promptly upon receipt. The firm may from time to time, but will not be required to, advance expenses on your behalf, after which it will be your obligation to reimburse the firm.
The Firm bills on a monthly basis, and will provide you with a statement setting forth, in reasonable detail, all advances for expenses, and a reasonable description of services rendered by the Firm. Our billing cycle is from the 15th to the 15th. It has been our experience that extreme detail in fee statements is not to the client’s advantage, as fee statements occasionally end up in the hands of the adversary during litigation. We are of course available at any time to discuss your statements in any detail you wish. The Firm requires payment within fifteen (15) days from receipt of your invoice.

While we do not anticipate the need, we must reserve the right to withdraw from this representation if: (i) a determination is made that a conflict of interest has arisen as a result of representation of you; (ii) you insist that the Firm engage in conduct contrary to the best judgment or advice of the firm; or (iii) you fail to meet your obligations under this Agreement.

During the course of discussion with you about this matter, we may have provided estimates of the fees and expenses that will be required at certain stages of this representation. It is our Firm's policy to advise clients that such estimates are just that, and that future fees and expenses are ultimately a function of many conditions over which we may have little or no control, such as the extent to which the opposition files pretrial motions and engages in discovery. One reason we submit bills on a monthly basis shortly after the services are rendered is so you will promptly know what level of fees and expenses you are incurring. If you believe the costs are mounting too rapidly, please contact us immediately so we can assist you in evaluating whether and how they might be curtailed in the future. When we do not hear from you, we will assume that you approve of the overall level of activity in this case on your behalf.

You have told us that you are aware of no conflict between or among any of the Plaintiff group which would preclude our representing the Plaintiffs as a group. You have also said that you do not foresee any such conflict in the future. Our representation is undertaken in express reliance upon those assurances.

This will confirm your promise to notify us immediately if at any time in the future you perceive a conflict with any party represented by this firm. You further promise immediately to seek other counsel to represent you and to relieve this firm immediately of any further representation of you. If such a situation does develop, you have agreed not to disclose to us any confidential information which would create a conflict of interest for us with regard to the firm's other clients.

We will endeavor to inform each client personally on important aspects of the representation which deals solely with the individual client. It is our understanding that we will have discharged all our obligations in this regard to all clients if we inform ______________. and ______________ accepts responsibility to keep the other clients informed.
In connection with our obligations to discharge lawful directions from our clients, it is understood that we will take directions from _________________ as the designated representative of all the clients; we shall be justified in implementing his directions on behalf of each individual client unless and until notified otherwise in writing.

Lastly, we reserve the right to withdraw from continued representation of any one of you at our sole discretion if we determine for reasons sufficient to us that continued representation is inadvisable or undesirable. Should that decision be made, you herewith agree and consent to our withdrawal from your representation; you further herewith agree and consent to our continued representation of others in the group, to the extent allowed by applicable laws and rules governing the conduct of attorneys, the selection of such continued representation also to be at our sole discretion.

We recognize that there is sometimes considerable cost savings in joint representation. To the extent permitted by applicable law, we are happy to afford you such savings. Joint representation of multiple clients is not, however, without its disadvantages and risks for both the attorneys and the clients. If the terms and conditions of the proposed joint representation as described in this letter are acceptable to you, please countersign this letter where indicated below. Prior to signing the letter, however, you should understand that the firm is unwilling to undertake the representation of multiple clients on any basis other than those described in this letter.

We are honored to represent you in this matter, and appreciate the confidence you have shown in our Firm. Of course, you understand that no promises or guarantees as to the outcome of the case could be or have been made.

This agreement shall be construed in accordance with the laws of the State of Texas and all obligations of the parties are performable in Dallas County, Texas. The agreement shall be binding upon, and inure to the benefit of, the parties and their respective heirs, executors, administrators, legal representatives, successors and assigns.

In case any one or more of the provisions contained in this agreement shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision, and this agreement shall be construed as if such invalid, illegal or unenforceable provision does not exist.

This agreement constitutes the only agreement of the parties and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter.
If this letter accurately reflects our agreement concerning our Firm's representation of you in this matter, please sign in the place indicated below on the enclosed copy of this letter and return it to our offices. A copy of this letter is also enclosed to be retained for your files. By signing this letter, you are authorizing our Firm to obtain any records relevant to our representation of you in this matter and you represent that you have disclosed and will disclose all relevant information to aid us in this representation.

This agreement may be executed in multiple counterparts.

Please do not hesitate to call me if you have questions about any of the above. We appreciate the opportunity to represent you, and look forward to working with you on this matter.

Very truly yours,

Coyt Randal Johnston
March 5, 2012

____________________

Re: Potential Legal Malpractice Claims against ______________

Dear:

This letter will confirm your request for our law firm to provide legal representation to you in the investigation and prosecution of the above-referenced potential claim.

Notice of Decline to Represent Claimant
In ______________ Claim

1. Decline of Representation

Although our law firm would like to help you, we have concluded that we will not be able to provide legal representation to you in the above-referenced claim. We cannot agree to represent you in this claim because ______ claims are complex, time-consuming, expensive and ______ we are of the opinion that we could not cost-effectively investigate and meet the legal burden of proof on your behalf in the prosecution of your particular legal malpractice claim, given the demands of our current docket.

You should not infer from our decision declining to represent you that your claim does not have merit. We are making no opinion or representation concerning the merits of your claim, whether you should pursue a claim, nor whether you will prevail if a civil lawsuit is filed on your claim.

2. Statutes of Limitations and Statutory Pre-suit Notice of Claim

The law imposes strict time limitations called statutes of limitation on everyone asserting legal claims against other persons and/or entities, and the length of those deadlines varies according to the nature and circumstance of the claim. In the State of Texas, claims for ______ are governed by a ____ year statute of limitation which, in some instances,
begins to run as soon as____________________. You have not hired us to advise you on when limitations will run in your case and, accordingly, we express no opinion on that subject. You should, however, assume that time is of the essence and proceed as quickly as possible to retain an attorney to file suit on your claims.

A failure to file suit within the applicable statute of limitations (as may be extended by equitable doctrines) may result in the court refusing to allow you to present your claim at all. It is, therefore, important that you act immediately to ensure that your claim is not barred by the passage.

Because we are not undertaking to represent you, we are not expressing an opinion on the length of the statute(s) of limitations period(s), any statutory notice deadline(s), and/or other deadlines which may be applicable to your above-referenced claim.

3. Contact Another Attorney

You should, immediately contact another attorney, who is qualified and experienced in ___________ law and litigation, to provide you with legal advice and representation in your above-referenced claim. Important legal rights and remedies may be lost if you do not promptly pursue your above-referenced claim.

4. Conclusion

In view of our decision, we are not taking any action to protect your interests in the above-referenced claim. Therefore, we will not be responsible for informing or advising you about any changes or developments under Texas law or any other law which will or may be applicable to the claim and/or claims discussed in this letter. Also, we are not undertaking any efforts to protect any statute(s) of limitations, statutory notice(s) of claim, or any other critical or important dates or deadlines on behalf of you in the claim.

And we are closing our law firm’s file relating to the above-referenced claim on a permanent basis. We are also returning the documents which you forwarded to us for our review.

If you have any questions about the contents of this letter, please feel free to call me and I will be pleased to respond to your inquiries.

Sincerely,
Re:

Dear Mr. ________________:

This will confirm that you have retained this Firm to represent you in connection with the above-referenced matter. The persons or entities responsible for the payment of our fees and expenses are as follows: ***

Pursuant to our standard procedure, you will be billed in .25 (1/4) hour increments for services performed. Attorneys work on numerous files during a day and some lack of precision is inherent in billing on time, but the time charged to your file will always represent a good faith estimate of the actual time spent. In addition, it is possible for hourly rates to change during the course of representation if the representation lasts for a long time. No change in hourly rates will be made on your file, however, without first giving you advance notice of such changes. Attached hereto is a memorandum with the current hourly rates in effect at the firm for this representation.

You are responsible for payment or reimbursement of expenses incurred in this representation. These include, but are not be limited to, court costs, expert witness and investigator fees, deposition fees, photocopy charges, delivery charges, long distance telephone charges, unusual secretarial overtime, travel expense, etc. It is our usual practice to send to clients, for direct payment by them, invoices from third parties. You are required to pay such invoices promptly upon receipt. The firm may from time to time, but will not be required to, advance expenses on your behalf, after which it will be your obligation to reimburse the firm.

The Firm bills on a monthly basis, and will provide you with a statement setting forth, in reasonable detail, all advances for expenses, and a reasonable description of services rendered by the Firm. Our billing cycle is from the 15th to the 15th. It has been our experience that extreme detail in fee statements is not to the client's advantage, as fee statements occasionally end up in the hands of
the adversary during litigation. We are of course available at any time to discuss your statements in any detail you wish. The Firm requires payment within fifteen (15) days from receipt of your invoice.

As an initial retainer deposit against fees and expenses, you have agreed to make a deposit of $__________ into our trust account. This deposit will be held in trust, and will be applied to fees and expenses as they are earned and/or incurred each month. Your payment each month will be deposited into trust to keep the retainer at the constant amount of $_________. The firm reserves the right to require a larger retainer in the future if it is deemed necessary to protect the firm adequately against mounting bills.

During the course of discussion with you about this matter, we may have provided estimates of the fees and expenses that will be required at certain stages of this representation. It is our Firm's policy to advise clients that such estimates are just that, and that future fees and expenses are ultimately a function of many conditions over which we may have little or no control, such as the extent to which the opposition files pretrial motions and engages in discovery. One reason that we submit bills on a monthly basis shortly after the services are rendered is so you will promptly know what level of fees and expenses you are incurring. If you believe the costs are mounting too rapidly, please contact us immediately so we can assist you in evaluating whether and how they might be curtailed in the future. When we do not hear from you, we will assume that you approve of the overall level of activity in this case on your behalf.

While we do not anticipate the need, we must reserve the right to withdraw from this representation if: (i) a determination is made that a conflict of interest has arisen as a result of representation of you; (ii) you insist that the Firm engage in conduct contrary to the best judgment or advice of the firm; or (iii) you fail to meet your obligations under this Agreement.

We are honored to represent you in this matter, and appreciate the confidence you have shown in our Firm. Of course, you understand that no promises or guarantees as to the outcome of the case could be or have been made.

This agreement shall be construed in accordance with the laws of the State of Texas and all obligations of the parties are performable in Dallas County, Texas. The agreement shall be binding upon, and inure to the benefit of, the parties and their respective heirs, executors, administrators, legal representatives, successors and assigns.

In case any one or more of the provisions contained in this agreement shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision, and this agreement shall be construed as if such invalid, illegal or unenforceable provision does not exist.
This agreement constitutes the only agreement of the parties and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter.

If this letter accurately reflects our agreement concerning our Firm's representation of you in this matter, please sign in the place indicated below on the enclosed copy of this letter and return it to our offices. A copy of this letter is also enclosed for your files. By signing this letter, you are authorizing our Firm to obtain any records relevant to our representation of you in this matter and you represent that you have disclosed and will disclose all relevant information to aid us in this representation.

This agreement may be executed in multiple counterparts.

Please do not hesitate to call me if you have questions about any of the above. We appreciate the opportunity to represent you, and look forward to working with you on this matter.

Very truly yours,

AGREED AND APPROVED:

___________________________
[CLIENT]

Date:________________
APPENDIX 5
11 RULES OF MALPRACTICE AVOIDANCE

1. One riot, one ranger. Each client should have a separate lawyer. Multi-client representation is ripe with malpractice opportunities.

2. Make yourself at home. Run your practice like it was in your home. Treat clients like guests. You don't let just anyone with money in your home, so don't take just anyone with money as a client.

4. Just what the doctor ordered. Physicians have some pretty good avoidance practices. Ask yourself what a doctor would do: get signed consents, don't give advise over the phone to non-patients, etc.

5. Paper is patient. Put it in writing! Fee agreements, agreements to limit the scope of representation, offers of settlement from the other side, recommendations against certain actions, and many more communications should be in writing and preserved against the foibles of human memory.

6. Know the rules. Read them regularly. Read the updates. Read cases interpreting the rules. Just meeting deadlines will avoid most malpractice.

7. Play by the rules. Inappropriate behavior is always rewarded somewhere.

8. Know your place. It is as lawyer, not as joint venturer. Represent them but don't do business with them.

9. Just because you're paranoid doesn't mean they aren't really after you - think prevention. What could go wrong in this representation? You do it for clients, so use those same skills for your own practice.

10. Don't be greedy. Greed makes you ignore your instincts, take cases you should reject, ask for fees you don't deserve and ignore conflicts that should stop you cold.