UNSPORTSMANLIKE CONDUCT: OVERVIEW OF COMBAT/MALPRACTICE

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I. Overview of Malpractice

Texas has recognized legal malpractice as a cause of action for more than 150 years,[1] but legal malpractice claims were seldom seen prior to the 1990s. Thanks to the Texas Supreme Court's ruling in *Burrow v. Arce*,[2] this has now changed. In *Burrow*, the Texas Supreme Court held that an attorney who breaches his fiduciary duties to a client can be required to forfeit his fee, even where the client did not incur actual damages.[3] The legal landscape is now rife with legal malpractice suits, presenting a seemingly inevitable threat to family law practitioners. Given that legal malpractice claims are on the rise, it is now more crucial than ever that practitioners remain vigilant in their efforts to prevent and defend against such claims. Perhaps this is nowhere as evident as in the field of family law, where clients' tempestuous emotions pose a threat to even the most diligent of attorneys.

This outline dissects legal malpractice claims, defenses, and insurance, and highlights aspects of legal malpractice that particularly concern family law attorneys. Through this outline, it is our hope that each and every one of you becomes better equipped to stop malpractice claims in their tracks or, better yet, prevent malpractice claims from ever arising. Nonetheless, this article should in no way be construed as a substitute for professional guidance from a legal malpractice attorney and does not constitute legal advice or a legal opinion.

II. Causes of Action

The term "legal malpractice" actually encompasses several distinguishable causes of action. While the traditional cause of action used to hold attorneys liable for malpractice is based in principles of negligence, attorneys may also be held liable for violations of the Texas Deceptive Trade Practices Act ("DTPA"), breach of their fiduciary duties, and negligent misrepresentation.

A. Negligence

As with any negligence claim, a plaintiff in a negligence-based legal malpractice action must prove four elements: (1) a duty owed by the attorney to the

[1] *See Morrill v. Graham*, 27 Tex. 646 (1864).
[2] 997 S.W.2d 229 (Tex. 1999).
[3] *Id.*

plaintiff, (2) a breach of that duty, (3) the breach of that duty caused the plaintiff's injury, and (4) damages.[4]

Generally, a duty arises from the mere existence of an attorney-client relationship. Thus, all a plaintiff must establish to prove a duty existed is the existence of an attorney-client relationship between the plaintiff and attorney-defendant. This is often referred to as the "privity" requirement, which prevents most third parties from bringing suit for legal malpractice. Whether or not an attorney-client relationship exists is based upon objective manifestations, and not just the subjective beliefs of the client.[5] However, many attorneys are unaware that there are several exceptions to the privity requirement whereby a non-client can sue an attorney.[6] Several of these exceptions involve contingent fee arrangements and estate planning, and are not applicable to family law cases. As such, these exceptions will not be discussed in this article. Under the exception most relevant to family law, a non-client can sue an attorney for negligence despite the lack of an attorney-client relationship only where the attorney should have reasonably anticipated that the non-client would believe that the attorney represented the non-client and where the attorney failed to explicitly decline representation.[7]

Assuming the plaintiff establishes that a duty existed between the plaintiff and the attorney-defendant, the plaintiff must next establish a breach of that duty. To prove breach, the plaintiff must show that the attorney-defendant failed to comply with the requisite standard of care; i.e., that the attorney-defendant failed to conduct himself or herself in accordance with the conduct of an ordinarily prudent attorney.[8] There are two notable nuances to this requisite standard of care. First, the standard of care required of an attorney is determined from the geographic area in which the attorney practices.[9] This means that an attorney practicing in a large city such as Dallas is likely held to a higher standard of care than an attorney practicing in small-town Texas. Second, attorneys who hold themselves out as specialists in certain areas of the law, such as family law, are generally held to a higher standard of care

[4] *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989)
[5] *See LeBlanc v. Lange*, 365 S.W.3d 70 (Tex. App. Houston 1st Dist. 2011); *see also Lemaire v. Davis*, 79 S.W.3d 592 (Tex. App. Amarillo 2002).
[6] For more on the "excess carrier" exception, *see American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 484 (Tex. 1992).
For more on the "estate planning" exception, *see Smith v. O'Donnell*, 288 S.W.3d 417, 419 (Tex. 2009).
[7] *Burnap v. Linnartz*, 914 S.W.2d 142, 148-49 (Tex. App.—San Antonio 1995, writ denied).
[8] *See Cosgrove*, 774 S.W.2d at 665.
[9] *See Ballesteros v. Jones*, 985 S.W.2d 485, 494 (Tex. App.—San Antonio 1998, pet. denied).

concerning that area of law than a general practitioner.[10] This nuance is rather straightforward: as family law attorneys, we have a greater responsibility to diligently represent clients in family law matters than a general practitioner might.

After establishing duty and breach, the plaintiff must next establish causation. To establish causation, the plaintiff must prove that the attorney-defendant's breach of duty was both the cause in fact of the plaintiff's injury and that their injury was foreseeable to the attorney-defendant.[11] Texas courts define cause in fact to mean that the alleged malpractice was a "substantial factor" in producing the plaintiff's injury and, absent the alleged malpractice, the plaintiff would have sustained no harm.[12] It is important to note that the alleged malpractice must be a *substantial* factor in bringing about the injury, not just a "but for" cause of the injury.[13] In addition, the foreseeability element requires that the attorney-defendant anticipated or should have anticipated the risk of injury to the plaintiff.[14]

Mere surmise or suspicion is insufficient to meet the burden of proof on causation.[15] More often than not, courts require expert testimony to meet the burden of proof on causation where causation otherwise would not be obvious to an ordinary individual.[16] In addition, when the plaintiff's legal malpractice claim arises out of conduct occurring during litigation, the plaintiff often must prove that the underlying litigation would have succeeded had it not been for the attorney-defendant's alleged malpractice. This scenario is often referred to as trying a "case within a case," because the plaintiff must not only successfully litigate their legal malpractice claim, but must also prove that they would have been successful in the underlying case but for the defendant-attorney's alleged malpractice.[17] The plaintiff must also establish

[10] *See Rhodes v. Batilla*, 848 S.W.2d 833, 842 (Tex. App.—Houston [14th Dist.] 1993, writ denied.
[11] *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992); *McClure v. Allied Stores of Tex., Inc.*, 608 S.W.2d 901, 903 (Tex. 1980).
[12] *Travis*, 830 S.W.2d at 98; *McClure*, 608 S.W.2d at 903.
[13] *See General Motors Corp. v. Saenz on Behalf of Saenz*, 873 S.W.2d 353, 357 (Tex. 1993).
[14] *See, e.g., Univ. of Texas M.D. v. Baker*, 401 S.W.3d 246, 258 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).
[15] *See Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995), *abrogated on other grounds by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007).
[16] *Alexander v. Turtur & Assocs.*, 146 S.W.3d 113, 119 (Tex. 2004).
[17] *See Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948, 949 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.); *Schlosser v. Tropoli*, 609 S.W.2d 255 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e).

the amount of damages that the plaintiff would have been awarded in the underlying case had the alleged malpractice not occurred.[18]

In lieu of proving that the underlying litigation would have resulted in a particular judgment, the plaintiff may instead prove that the underlying litigation would have settled on terms more favorable than those actually obtained.[19] However, this requires the plaintiff to have all parties to the underlying litigation confirm that they would have settled on more favorable terms but for the attorney-defendant's alleged malpractice.[20] Few plaintiffs can meet such a high burden.

The final element required in a negligence-based legal malpractice action is damages. The plaintiff must prove the amount of foreseeable damages caused by the attorney-defendant's alleged malpractice. Damages can be either the amount the plaintiff would have been awarded in the underlying litigation or the amount they would have avoided paying in the underlying litigation, absent the alleged malpractice.[21] Mental anguish damages arising from pecuniary loss are not recoverable, but mental anguish damages arising from non-pecuniary loss may be, depending on the facts.[22] However, as the plaintiff's injury in a legal malpractice suit is virtually always economic, no cases have yet demonstrated what is required to be awarded mental anguish damages in a legal malpractice suit. Exemplary damages are recoverable if the plaintiff can prove by clear and convincing evidence that the injury resulted from the attorney-defendant's fraud, malice, or gross negligence.[23] Attorney's fees in the legal malpractice suit generally are not recoverable in negligence-based legal malpractice actions, but the plaintiff may recover additional attorney's fees incurred in the underlying litigation that would not have been incurred absent the alleged malpractice.[24]

[18] *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Dev. & Research Corp.*, 299 S.W.3d 106, 112 (Tex. 2009); *Jackson*, 515 S.W.2d at 949.
[19] *See Elizondo v. Krist*, 415 S.W.3d 259, 263 (Tex. 2013).
[20] *See Axcess Int'l, Inc. v. Baker Botts, L.L.P.*, 05-14-01151-CV, 2016 WL 1162208, at *5 (Tex. App.—Dallas Mar 24, 2016, pet. denied); *see also Taylor v. Alonso, Cersonsky & Garcia, P.C.*, 395 S.W.3d 178, 188 n.5 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *see also Elizondo*, 415 S.W.3d at 264.
[21] *See, e.g., Keck, Mahin & Cate v. National Union Fire Ins. Co.*, 20 S.W.3d 692, 703 (Tex. 2000); *Cosgrove*, 774 S.W.2d at 666.
[22] *Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999).
[23] Tex. Civ. Prac. & Rem. Code § 41.008
[24] *See Akin, Gump, Strauss, Hauer & Feld*, 299 S.W.3d at 119-124.

Several defenses are available to an attorney-defendant in a negligence-based legal malpractice suit, including the statute of limitations, attorney immunity, proportionate responsibility, the judicial error doctrine, and assignment.

i. Statute of Limitations

Texas has a two-year statute of limitations on negligence-based legal malpractice claims.[25] Even if a plaintiff attempts to characterize his or her legal malpractice claims as a breach of contract, the two-year statute of limitations remains.[26] A legal malpractice claim accrues at the time the attorney gives out unsound advice.[27] However, the statute of limitations may be tolled in either of two scenarios. The first scenario involves the "discovery rule." Under the discovery rule, a claim for legal malpractice does not accrue until the plaintiff discovers or should have discovered the injury giving rise to his or her legal malpractice claim.[28] The second scenario derives from the Texas Supreme Court's decision in *Hughes v. Mahaney & Higgins.* Under *Hughes*, a claim for legal malpractice that arises in the course of ongoing litigation does not accrue until the underlying litigation is completed and all appeals have been exhausted.[29]

ii. The "Attorney Immunity" Doctrine

Another defense to a legal malpractice claim, whether in negligence, DTPA, breach of fiduciary duties, or negligent misrepresentation, is dubbed the "attorney immunity" doctrine.[30] Under the attorney immunity doctrine, attorneys are immune from civil liability to non-clients for legal malpractice arising out of conduct occurring during the representation of a client.[31] As an affirmative defense, the attorney immunity doctrine merely requires an attorney-defendant to establish that the alleged malpractice occurred during his or her representation of a client.[32]

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[25] *See Streber v. Hunter*, 14 F. Supp. 2d 978, 985 (W.D. Tex. 1998); *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988); *Murphy v. Gruber*, 241 S.W.3d 689, 696-98 (Tex. App.—Dallas 2007, pet. denied); *Burnap*, 914 S.W.2d at 148.
[26] *Judwin Properties, Inc. v. Griggs & Harrison*, 911 S.W.2d 498 (Tex. App.—Houston [1st Dist.] 1995, no writ).
[27] *Murphy v. Campbell*, 964 S.W.2d 265, 271 (Tex. 1997).
[28] *See Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 119 (Tex. 2001); *KPMG Peat Warwick v. Harrison County Hous. Fin. Corp*, 988 S.W.2d 746, 749 (Tex. 1999).
[29] 821 S.W.2d 154, 157 (Tex. 1991); *Apex Towing Co.*, 41 S.W.3d at 119; *Murphy v. Mullin, Hoard & Brown, L.L.P.*, 168 S.W.3d 288, 291 (Tex. App.—Dallas 2005, no pet.).
[30] *See Sheller v. Corral Tran Singh, LLP*, 551 S.W.3d 357 (Tex. App.—Houston [14th Dist. 2018, pet. denied).
[31] *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015).
[32] *Id.* at 484.

For example, in *Cantey Hanger, LLP v. Byrd*, a party to the underlying divorce suit sued the opposing counsel, alleging that the law firm shifted certain tax liabilities to that party in contravention of the terms of the divorce decree.[33] Relying on the attorney immunity doctrine, the law firm countered that it did not represent the plaintiff in the underlying litigation and therefore could not be held liable.[34] The Supreme Court of Texas agreed with the law firm's attorney immunity defense and dismissed the plaintiff's claim.[35]

iii. Proportionate Responsibility

Another potential defense to a legal malpractice claim is "proportionate responsibility," sometimes better known as contributory negligence.[36] The proportionate responsibility defense applies whether the cause of action is for negligence, DTPA violations, breach of fiduciary duties, or negligent misrepresentation.[37] Under the proportionate responsibility statute, Texas bars a plaintiff who is more than 50% at fault from recovering for legal malpractice as well as other torts.[38] Even where the plaintiff is less than 50% at fault, Texas nonetheless reduces the plaintiff's recovery by a percentage equal to his or her proportionate fault.[39] Additionally, a defendant can avoid joint and several liability for their legal malpractice where that defendant's fault is 50% or less.[40]

iv. The "Judicial Error" Doctrine

The "judicial error" doctrine provides attorneys with another defense to negligence-based legal malpractice claims. Under the judicial error doctrine, an attorney-defendant can assert that a judicial error intervened, breaking the chain of causation and relieving him or her of liability for the plaintiff's injury.[41] However, if the judicial error was reasonably foreseeable, the chain of causation remains intact and the attorney-defendant remains on the hook for liability.[42] By its very nature, the judicial error doctrine applies to the issue of proximate cause; therefore, the judicial

[33] *Id*. at 479.
[34] *Id*.
[35] *Id*. at 486.
[36] Tex. Civ. Prac. & Rem. Code §§ 33.001-.017.
[37] Tex. Civ. Prac. & Rem. Code § 33.002.
[38] Tex. Civ. Prac. & Rem. Code § 33.001.
[39] Tex. Civ. Prac. & Rem. Code § 33.012(a).
[40] Tex. Civ. Prac. & Rem. Code § 33.013.
[41] *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016).
[42] *Id*.

error doctrine is only a defense to negligence-based legal malpractice claims, and not claims for DTPA violations, breach of fiduciary duties, or negligent misrepresentation.[43]

The Supreme Court of Texas recognized the judicial error doctrine in the landmark case, *Stanfield v. Neubaum*.[44] There, two clients filed suit against their former attorneys for legal malpractice, alleging the attorneys' failure to produce additional evidence in the underlying litigation resulted in an adverse judgment.[45] The attorneys asserted the judicial error doctrine, claiming that the trial court's error of law concerning an agency issue in the underlying litigation was a superseding cause of the plaintiffs' legal injury and the judgment would have been adverse regardless of their failure to introduce additional evidence at trial.[46] The Supreme Court of Texas agreed with the attorneys and recognized the judicial error doctrine as a viable defense to legal malpractice claims in Texas for the first time.[47]

v. Assignment

Lastly, Texas courts prohibit assignment of legal malpractice claims to third parties on public policy grounds.[48] This applies not only to negligence-based legal malpractice claims, but also claims rooted in the DTPA, breach of fiduciary duties, and negligent misrepresentation.[49] An attorney-defendant can assert assignment where applicable to require the court to dismiss the legal malpractice action. Although uncommon, this defense can be a formidable weapon in any family lawyer's arsenal.

B. Deceptive Trade Practices Act

Attorneys can also be sued for legal malpractice in the form of a violation of the Texas DTPA, Tex. Bus. & Comm. Code §§ 17.41-.63. In 1995, the Texas legislature restricted attorney liability by stipulating that the DTPA does not apply to professional services, "the essence of which is the providing of advice, judgment,

[43] *See Id.*
[44] *Id.*
[45] *Id.* at 92.
[46] *Id.*
[47] *Id.* at 104.
[48] *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref'd); *City of Garland v. Booth*, 895 S.W.2d 766, 769 (Tex. App.—Dallas 1995, writ denied).
[49] *City of Garland v. Booth*, 971 S.W.2d 631, 634 (Tex. App.—Dallas 1998, pet. denied).

opinion, or similar skill."[50] Furthermore, attorneys cannot be held liable for breach of an implied warranty for legal services.[51] However, attorneys may still be liable for misrepresentations that do not constitute advice, judgment, or opinion, or for unconscionable actions.[52] As the DTPA is an uncommon avenue for pursuing legal malpractice claims, this article touches on the DTPA in nothing more than a cursory fashion.

Like negligence-based legal malpractice claims, DTPA claims have a two-year statute of limitations.[53] Unlike negligence-based legal malpractice claims, however, this statute of limitations is not tolled during pending litigation.[54] The DTPA also does away with the privity requirement of negligence-based legal malpractice claims[55] and introduces its own "consumer" requirement as a somewhat broader limitation on non-client standing.[56] One last notable difference between negligence-based legal malpractice claims and claims for violations of the DTPA is that the DTPA lowers the standard for causation.[57] Under the DTPA, plaintiffs must only prove that the defendant-attorney's alleged malpractice was a "producing cause" of their injury.[58] Thus, removing the requirement of establishing *foreseeability* that negligence-based legal malpractice claims impose.[59]

The defenses of attorney immunity, proportionate responsibility, and assignment also apply to DTPA claims.[60]

C. Breach of Fiduciary Duty

Aggrieved clients may also bring legal malpractice actions against attorney-defendants for breach of their fiduciary duties, although what constitutes a breach of fiduciary duty in this context is not always clear. Texas courts have held at the very

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[50] Tex. Bus. & Comm. Code § 17.49(c).
[51] *Murphy v. Campbell*, 964 S.W.2d 265 (Tex. 1998).
[52] *See Id*; *see also Latham v. Castillo*, 972 S.W.2d 66, 68-69 (Tex. 1998).
[53] Tex. Bus. & Comm. Code § 17.565.
[54] *Underkofler v. Vanasek*, 53 S.W.3d 343 (Tex. 2001).
[55] *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 625 (Tex. App.—Houston [1st Dist.] 1993, writ denied).
[56] A consumer is one who "seeks or acquires by purchase or lease, any goods or services." Tex. Bus. & Comm. Code § 17.45(4).
[57] Tex. Bus. & Comm. Code § 17.50(a).
[58] *Id.*
[59] *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995), *abrogated on other grounds by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007).
[60] Tex. Civ. Prac. & Rem. Code § 33.002 (regarding proportionate responsibility); s*ee Sheller*, 551 S.W.3d at 357 (regarding the attorney immunity doctrine); *City of Garland*, 971 S.W.2d at 634 (regarding assignment).

least, self-dealing, such as entering into unfair transactions with a client, failing to deliver funds to a client, and unfairly and unilaterally modifying a fee arrangement during representation all give rise to a claim for breach of fiduciary duty.[61] Nonetheless, egregious conduct not involving self-dealing may still occasionally constitute a breach of fiduciary duty, especially where the conduct involves the attorney-defendant putting his or her interests before their client's interests.[62]

Unlike negligence-based legal malpractice, breach of fiduciary duty claims generally have a four-year statute of limitations.[63] Further, plaintiffs can seek a fee forfeiture in a breach of fiduciary duty action, regardless of whether they suffered actual damages or not.[64]

The defenses of attorney immunity, proportionate responsibility, and assignment also apply to Breach of Fiduciary Duty claims.[65]

D. Negligent Misrepresentation

The last significant potential malpractice cause of action applicable to the practice of family law is negligent misrepresentation. Negligent misrepresentation has no privity requirement and standing is not limited to clients only.[66] However, attorneys may still assert the attorney immunity doctrine, discussed above, as a defense against a negligent misrepresentation claim.[67] Texas has adopted the negligent misrepresentation definition set forth in the Restatement (Second) of Torts § 552:[68]

> *"One who, in the course of his business, profession or employment, or in any transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information,*

[61] *See Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied).
[62] *See, e.g., Capital City Church of Christ v. Novak*, 03-04-00750-CV, 2007 WL 1501095, at *1 (Tex. App.—Austin May 23, 2007, no pet.).
[63] Tex. Civ. Prac. & Rem. Code § 16.004(a)(5).
[64] *Burrow*, 997 S.W.2d at 240; *see Murphy*, 241 S.W.3d at 689.
[65] Tex. Civ. Prac. & Rem. Code § 33.002 (regarding proportionate responsibility); s*ee Sheller*, 551 S.W.3d at 357 (regarding the attorney immunity doctrine); *City of Garland*, 971 S.W.2d at 634 (regarding assignment).
[66] *McCamish, Martin, Brown & Loeffer v. F.E. Appling Interests*, 991 S.W.2d 787, 795 (Tex. 1999).
[67] *Id.*
[68] *Id.*

if he fails to exercise reasonable care or competence in obtaining or communicating the information."

To be held liable, the attorney-defendant must be both aware of the non-client and intend that the non-client rely on the misrepresentation, and the non-client must then justifiably rely on the misrepresentation.[69] Moreover, an attorney can use written disclaimers to avoid liability.[70]

Like negligence-based legal malpractice claims, Texas courts impose a two-year statute of limitations on negligent misrepresentation claims as well.[71] A claim for negligent misrepresentation accrues the plaintiff acts in reliance on the misrepresentation to his detriment.[72] Whether the discovery rule is applicable to toll the statute of limitations depends on whether the injury is the type of inherently undiscoverable claim to which the discovery rule applies.[73] In practice, Texas courts rarely find the discovery rule applicable to negligent misrepresentation claims.[74]

The defenses of attorney immunity, proportionate responsibility, and assignment would also appear to apply to Negligent Misrepresentation claims.[75]

III. Common Errors and Mistakes and How to Avoid Them[76]

According to the American Bar Association, more than half of all legal malpractice claims arise out of one of eight different categories of conduct: (1) failure to know or properly apply the law; (2) planning errors or procedural choices; (3) inadequate discovery or investigation; (4) drafting errors; (5) failure to obtain consent or to inform a client; (6) failure to calendar properly; (7) failure to know deadline; and (7) clerical errors.[77] Thus, by focusing on these eight categories of

[69] *Id.*
[70] *Id.*
[71] *See, e.g., Westview Drive Invs. V. Landmark Am. Ins.*, 522 S.W.3d 583, 597 (Tex. App.—Houston [14th Dist.] 2017, pet. denied); *see also Texas Am. Corp. v. Woodbridge Joint Venture*, 809 S.W.2d 299, 303 (Tex. App.—Fort Worth 1991, writ denied).
[72] *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514 (Tex. 1998).
[73] *See TIG Ins. Co. v. Aon Re, Inc.*, No Civ. A3104CV1307-B, 2005 WL 3742818, at *8 (N.D. Tex. Nov. 7, 2005).
[74] *See, e.g., Id*; *see also Hunton v. Guardian Life Ins. Co.*, 243 F. Supp. 2d 686, 703 n.28 (S.D. Tex. 2002).
[75] Tex. Civ. Prac. & Rem. Code § 33.002 (regarding proportionate responsibility); s*ee Sheller*, 551 S.W.3d at 357 (regarding the attorney immunity doctrine); *City of Garland,* 971 S.W.2d at 634 (regarding assignment).
[76] Special thanks to Coyt Randal "Randy" Johnston, Jr. for all of his help in preparation of this article.
[77] *Profile of Legal Malpractice Claims: 2012-2015,* (2016).

conduct, family law attorneys can cut their risk of liability for malpractice approximately in half.[78] Further, family law practitioners benefit from reliance on the Texas Family Code for most of their cases, and thus are less likely than general practitioners to fall victim to being sued for failure to know or properly apply the law.

An unsettling trend in family law in recent years, especially in large asset cases, revolves around expert witnesses.[79] Legal malpractice attorneys have noted an increase in legal malpractice claims arising out of family law attorneys' failure to designate competent expert witnesses and question them adequately. To avoid this risk, make sure to choose your expert witnesses wisely and adequately prepare questions for the expert witnesses in your cases. Failure to do so may result in you joining this recent trend of legal malpractice actions against family law attorneys.

In divorce cases that do not involve large estates, the cases most frequently seen relate to lawyers not keeping their clients timely informed of their case, failing to return their telephone calls, and failing to calendar deadlines correctly, causing deadlines to be missed.

The Texas Young Lawyers Association has prescribed a litany of additional tips on how to avoid committing malpractice, included below:[80]

At a minimum, comply with the applicable rules of ethics and professional conduct (Texas and ABA). These rules can be found at: www.legalethicstexas.com/ethics-resources/rules/texas-disciplinary-rules-of-professional-conduct.aspx www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html;

Know the law. Familiarize yourself with the law that applies to your client's issue and/or suit before you begin any representation;

Know the local rules. Almost every county has a set of local rules that apply to suits filed in that county. Generally, these can be found at the clerk's office or on the county website;

[78] *Id.*
[79] Kelly McClure & Coyt Randal "Randy" Johnston, Jr., *Interview with Coyt Randal Johnston, Jr.* (2019).
[80] *TYLA Pocket Guide: Grievance and Malpractice 101*.

Have your client sign a written fee agreement. Your fee agreement should clearly identify who the client is, the scope and terms of the representation, identify the work the lawyer will do on the case, and the fee arrangement;

Get a paid retainer up front. At the time the fee agreement is entered into, get a retainer up front. Set up an accounting system to remind you when the retainers get low and require your clients to replenish their retainers;

Control client expectations. Clearly communicate with your client in writing about what they should expect with regards to their case, any problems with the case, all available courses of action, the timeline of the case, fees that are involved in each action taken, and the effects of all decisions that are made;

Define and monitor goals and objectives. Define all goals and objectives in writing with your client when your representation begins and revisit these with your client as the case progresses to ensure that the actions you are taking are in line with the client's goals and objectives;

Determine the extent of the client's involvement in the case and involve the client in major decisions. Discuss the amount of involvement your client wants to have in the case and involve the client as requested. Discuss any major decisions that are made in the case with the client and document these communications in writing;

Document everything. Document all communications with your client and keep an organized file of all of your correspondence, pleadings and orders, and agreements that are made in the case. Keep a copy of the file for at least seven years from the date the case is finalized;

Establish a reliable calendaring system. Find a reliable way to calendar all of the important events that occur in your client's case and set your calendar up so that it provides you with reminders prior to an event occurring;

Meet deadlines. Calendar all of the deadlines in your client's case and communicate these to your client. Don't leave things to the last minute;

Return all calls and correspondence. Return all calls or correspondence from your client within forty-eight hours;

Be very cautious about suing a client for unpaid fees. Even if such a suit is warranted, it is usually met with a counterclaim for malpractice from your client;

Practice malpractice avoidance. Assign a lawyer in your office to be in charge of malpractice avoidance audits on cases;

Look out for issues. Look for warning signs in employees and fellow lawyers for substance abuse issues and if they have an issue, get them off any cases and into treatment;

If you reject business, turn it down in writing. Follow your instincts on whether to avoid taking a case. If you reject business, turn it down in writing and specifically explain that you are not going to be that person's lawyer. Then, send the potential client referrals for other lawyers that they can contact;

Be cautious about being general counsel or local counsel on any suits. The risk you take in being a general counsel or local counsel is seldom worth it. You are setting yourself up to be blamed for a poor decision made by someone else or a mistake that is made by someone you don't control;

Be cautious about providing courtesy representation. When performing courtesy representation, most lawyers don't treat these cases the same as a paying client and they tend to cut corners on their representation and the attention they give the case. This almost always gets you in trouble and can turn a good deed into a malpractice suit;

Do not guarantee results. You should never guarantee results you are not certain you can deliver. Things happen and you can never be certain what the outcome might be in a given case until the case is finalized;

Provide detailed time entries. Have a system of documenting all work that is done by you or your staff on every case. Provide these detailed time entries in the form of a billing statement to your clients each month;

Be cautious about multi-client representation. If you ever have a suit that involves the representation of multiple parties, obtain written consent from all of the parties and keep this in your file. Be cautious and pay close attention to how such

representation can (1) affect applicable privileges, and (2) lead to possible conflicts among joint clients;

Never let your non-legal staff practice law. Appropriately supervise your staff and ensure that they are not taking any actions that you are not aware of or overseeing;

Check conflicts thoroughly on any new employees or lawyers. Check conflicts thoroughly on any new employees or lawyers from other law firms. Many conflicts that may exist cannot be waived and cannot be remedied with a "Chinese Wall." Therefore, ensure that all of the conflicts are cleared before bringing on that new employee or lawyer;

Run a conflicts check on any potential new clients. When a potential new client calls to schedule an appointment, have a system in place that identifies the potential client, the adverse parties, and the potential adverse parties or third parties in the current or potential suit. Run this conflicts check before obtaining any confidential information;

Conduct necessary discovery needed to investigate every client's case. You cannot properly advise your clients on their legal remedies or possible outcomes without knowing what their case entails. Conduct the discovery that is necessary for you to turn an educated guess into educated advice;

Limit your trust accounts to $100,000. It is never wise to risk your client's money and your law license on the integrity of a bank;

If your client refuses to pay your bill, withdraw from representing the client and provide the appropriate notices to the client in writing. Document all efforts you have made and all notices you have sent to the client in writing and keep these in the file;

Form a professional corporation or limited liability partnership. In order to protect yourself and your assets from another lawyer's negligence in your firm, it is advisable to form a professional corporation or a limited liability partnership;

Carry good malpractice insurance and be familiar with the policy. Many malpractice claims may be resolved within your policy limits without exposing you

or your estate to the risks of malpractice. This will save you time and will prevent stress from the unknown; and

Keep a copy of your client's file. You should always keep a copy of your client's file for at least seven (7) years from the date your representation of them ends.[81]

By following these comprehensive tips from the Texas Young Lawyers Association, you can better insulate yourself from potential liability for legal malpractice.

IV. You Have Been Sued: Now What?

If you have followed these tips and still wind up in a legal malpractice suit, what should you do? First, call your legal malpractice insurance carrier and advise them of the pending suit. If you are not already aware, you want to find out your insurance policy's specific terms, whether you are covered, and to what extent you are covered. You also need to know whether your insurance carrier provides you with a legal malpractice attorney or requires you to seek out your own. This is typically called a duty to defend in the insurance policy. Many policies will provide legal counsel for you and knowing the specifics of your policy can relieve you of a lot of stress.

You also want to immediately refrain from communicating with the plaintiff-client, unless absolutely necessary. If you are still representing the client in ongoing litigation, communicate only what is necessary to satisfy your legal and ethical obligations as the attorney. Moreover, make plans to withdraw from the case as soon as practicable.

If your legal malpractice insurance carrier does not provide you with counsel, as some do not, it is time for you to begin searching. Find the top-rated malpractice attorneys in your area and schedule a consultation as soon as possible. Shop around and do not settle for the first attorney you find. Make sure the attorney you eventually retain has not only experience in the field, but he or she is also a good fit for your firm and particular situation. It may be tempting to represent yourself; after all, you

[81] *Id.*

are an attorney. However, this is never advised. As many attorneys can attest, self-representation is rarely a good idea.

Ensure that you document everything and retain all documents and correspondence in your client's file. Few actions will damage your case as significantly as being perceived as purging the client's file after they sued you for legal malpractice.

Follow the advice and instructions of your legal malpractice attorney to put yourself in the best position to avoid liability.

V. Malpractice Insurance

Legal malpractice insurance in Texas is unique in the insurance industry; it is not regulated as to form or rate by the Texas Department of Insurance.[82] This means that the terms of legal malpractice insurance in Texas vary widely from provider to provider, and from policy to policy. It is crucial that you are aware of the coverage afforded by your policy, because your actual policy terms may surprise you. For instance, as referenced above, some legal malpractice insurance policies include a duty to defend and will provide legal counsel, while others do not. Whether your policy does could significantly impact you by requiring you to expend additional effort seeking out a legal malpractice attorney.

What happens if you are sued for alleged malpractice that occurred prior to the beginning date on your policy? A "claims made" policy will cover you for any legal malpractice claims arising during the policy term, whether or not the alleged malpractice took place while coverage was in effect. This can be a make-or-break provision in your policy and can mean the difference between being covered for a million-dollar judgment and being personally liable for it. If your policy is not a "claims made" policy, you might effectively have no coverage at all, as the statute of limitations on legal malpractice claims allows a plaintiff to file suit long after the plaintiff's legal injury actually occurred. If your policy only covers you for claims based on conduct that occurred after the beginning date of the policy, you may be in trouble.

[82] Lawyers' Professional Liability, https://www.tdi.texas.gov/commercial/admitcar.html#lawyers.

When choosing legal malpractice insurance, the amount of claim coverage is one of the most salient terms to consider. It is often recommended to have claims coverage for 50% of the value of the largest community estates you handle on a regular basis.[83] This ensures that you are covered for the amount of your client's interest in the community estate should things go awry.

Lastly, you may be sued for legal malpractice years after retiring, leaving your firm, or changing careers. A diligent attorney needs to know whether or not he or she is still covered under the terms of their former policy if a claim is filed at a much later date. In many cases, you may be out of luck; however, if your former law firm is still in business and still holds the same legal malpractice insurance policy, you may be covered. For retired attorneys, if you are not covered by your firm's former policy, it is always a good idea to purchase a "tail policy" that covers you for legal malpractice claims arising after you leave private practice.

In some sense, the legal malpractice insurance industry in Texas is inconsistent among providers. Lack of government oversight results in few standard policy provisions and widely various terms. Before accepting your next case, you may want to reach out to your insurance carrier and inquire as to the terms of your firm's policy. Further, exercise your due diligence when shopping for legal malpractice insurance and inquire as to any specific policies or provisions that the insurance carrier may tailor specifically to you as a family law practitioner.

VI. Conclusion

There is no doubt that malpractice claims have become more frequent in recent years when compared to any other time in history. Claims are also increasing in amount. Malpractice claims are an ever-present, growing concern in the modern practice of law. Some studies predict that each attorney will face at least three legal malpractice claims during their career. Perhaps the most important advice that one can provide for avoiding legal malpractice claims is to refrain from representing bad clients.[84] However, that is often easier said than done. It is therefore paramount that the legal profession remains vigilant in upholding its upmost professional and ethical standards.

[83] Kelly McClure & Coyt Randal "Randy" Johnston, Jr., *Interview with Coyt Randal "Randy" Johnston, Jr.* (2019).
[84] *Id.*

The unique situation confronting family law practitioners, brought on by high stakes, turbulent emotions, and deeply personal disputes, presents a higher risk of malpractice allegations and a higher demand for excellence when compared to many other legal fields. By understanding the law surrounding legal malpractice and following the tips contained herein, it is our hope that we can reduce the overall number of legal malpractice claims brought against family law practitioners in Texas. The goal of every family law practitioner should be not to defeat and defend malpractice claims, but to practice in a manner as to not incur them at all.