LEGAL MALPRACTICE IN TEXAS

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After graduation from the University of Texas with honors, Mr. Weinberg attended S.M.U. School of Law in Dallas. He graduated in 1982 and passed the Texas Bar the same year. He began his practice with Baker & Botts before moving to a strictly litigation firm where he practiced with Henry Giessel and Charles Lyman.

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I. INTRODUCTION

This article is intended to be an overview of the various theories of liability and defense in claims against lawyers in Texas. It is intended to serve as a reference point for anyone involved in a professional liability case related to the practice of law. Perhaps more importantly, it can be used to assist professionals in the prevention of lawsuits.

The first section of this article provides an overview of the specific bases of legal liability including negligence, negligent misrepresentation, breach of fiduciary duty, breach of contract, deceptive trade practices, and fraud. The next section of this article covers defenses to these various claims, including defenses available at common-law, defenses recognized by the Texas Supreme Court, and defenses created by acts of the Texas Legislature. Finally, this article will conclude with an analysis of what to look for in your malpractice insurance policy, focusing on topics such as the nature of the various professional liability policies, deductibles, choice of counsel provisions, and provide tips on how to avoid malpractice claims altogether. Throughout the article, references to the Texas Pattern Jury Charge ("TPJ") are included as an example of the types of questions and instructions juries are given in Texas when determining whether legal professionals are liable for malpractice.[1]

II. MALPRACTICE ACTIONS

The literal translation of "malpractice" is "bad practice." Accordingly, a plaintiff in a malpractice suit seeks to impose liability on a lawyer professional for an alleged "bad practice." Legal malpractice includes the intentional and negligent conduct of lawyers in the course of providing services to their clients.[2] Liability actions can be based on tort, contract, or statute.[3] The law understands and presumes that there is a range of acceptable conduct for lawyers given the circumstances presented—thus the law does not impose liability merely because a bad result occurs.[4] However, it is important to remember that while a bad result alone does not create liability for a lawyer, it may well result in a lawsuit. What follows below is an overview of the types of claims made against lawyers in Texas.

A. Negligence

A claim of negligence against a lawyer includes the following elements: 1) a duty of care owed to the client by the lawyer; 2) a breach of that duty; 3) proximate causation; and 4) damages.[5] In a legal liability case, negligence is defined as the failure to use the ordinary care required by a lawyer under the same or similar circumstances.[6]

The Texas Pattern Jury Charge defines ordinary care as "that degree of care that would be used by a reasonably prudent person under the same or similar circumstances."[7] A lawyer has a duty imposed by law to act as a reasonably prudent "lawyer" (as opposed to a "person") under the circumstances. As the advisory notes to Texas Pattern Jury Charge Chapter 60 explain:

> Certain professions consist of members who hold themselves out as having superior knowledge, training, and skill. Such persons are held to a standard embodying this concept, a violation of which is called professional negligence or malpractice, which is expressed in terms of a similar professional acting or failing to act under the same or similar circumstances. . . .[8]

In legal liability cases premised on negligence, jurors are not "experts" regarding the ordinary care of a particular lawyer.[9] Therefore, when jurors are asked to decide legal negligence claims, they are guided by experts who provide testimony and opinions as to the duty of care owed by the members of a particular profession.[10] Legal liability cases are thus considered

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[1] The instructions are provided merely to serve as an example, and are in no way a guarantee of how a judge may instruct the jury in any specific case.

[2] *Citizens State Bank of Dickinson v. Shapiro*, 575 S.W.2d 375, 386 (Tex. Civ. App—Tyler 1978, writ ref'd n.r.e.).

[3] *Owens-Corning Fiberglass Corp. v. Schmidt*, 935 S.W.2d 520, 523 (Tex. App.—Beaumont 1996).

[4] *Jackson v. Axelrad*, 221 S.W.3d 650, 655 (Tex. 2007).

[5] *Great Atl. & Pac. Tea. Co. v. Evans*, 175 S.W.2d 249, 250–51 (Tex. 2009).

[6] *See, e.g., Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989) (attorneys); *Greenstein, Logans & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 185 (Tex. App.—Waco 1987, writ denied) (accountants); *Parkway Co. v. Woodruff*, 857 S.W.2d 903, 919 (Tex. App.—Houston [1st Dist] 1993) (engineers); *Jackson v. Axelrad*, 221 S.W.3d 650, 655 (Tex. 2007) (physicians).

[7] Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence and Intentional Personal Torts* PJC 2.1 (2008)

[8] *Id.* at PJC 60.1, n.1.

[9] *See, e.g., Bearce v. Bowers*, 587 S.W.2d 217, 218 (Tex. Civ. App.—Fort Worth 1979, no writ (explaining that it is necessary for a plaintiff to establish a physician's professional standard of care through a medical expert).

[10] *See id.*

"expert intensive" when compared to other types of cases.

1. Duty of Care & Breach of Duty

The first element which must be established by the plaintiff in a lawyer negligence case is that a duty of care was owed to the client by the lawyer. Before any duty can arise, some professional-client relationship must exist.[11] Unless the parties agree that the relationship exists, Judges in Texas will instruct the jury as a preliminary matter to answer the question of whether a professional-client relationship exists. The question to the jury may be presented as follows:

QUESTION 1

> At the time in question, was *[Plaintiff]* a client of *[Professional Defendant]* with respect to the matter in dispute?
> A *professional*-client relationship exists only if the *professional* has agreed, expressly or impliedly, to render *professional* services of a specified or general nature to the person claiming such relationship.[12]
> Answer "Yes" or "No."
> Answer: _____

In the lawyer negligence context, a duty to the client can arise in a number of ways. The parties can expressly or impliedly manifest an intention to establish a professional-client relationship.[13] Your contract with the client is a prime example of an express intention to establish such a relationship. A duty may also arise through an implied professional-client relationship.[14] Duties can even arise when no professional-client relationship exists.[15]

a. Who is the Client?

The first issue that must be analyzed in any lawyer negligence case is "to whom is a duty owed?" The second issue is "to what extent is that duty owed?" The answers to these questions are largely dependent on the substantive law governing legal professionals. The duty of a lawyer primarily arises under contract.[16] Prior to 2010, Texas was one of the most liberal jurisdictions in allowing claims by non-clients to proceed against professionals, relying on Section 552 of the Restatement (Second) of Torts and requiring only that the person complaining of a negligent misrepresentation be of the "class of persons" that would be expected to receive and rely on the professional's opinion.[17]

Recently, however, in *Grant Thornton LLP v. Prospect High Income Fund*, the Texas Supreme Court limited the scope of Section 552.[18] The Court explained that "a section 552 cause of action is available only when information is transferred . . . to a known party for a known purpose."[19] Under section 552, a "known party" is one who falls in a limited class of potential claimants, "for whose benefit and guidance [one] intends to supply the information or knows that the recipient intends to supply it."[20] This formulation limits liability to situations in which the professional who provides the information is "aware of the non-client and intends that the non-client rely on the information."[21]

For attorneys generally, "[t]he essential element of an attorney-client relationship is the engagement or consultation of a lawyer by a client for the purpose of obtaining legal services or advice."[22] Once formed, this relationship will generally terminate upon the completion of the purpose for the employment of the attorney.[23] Courts apply an objective standard to determine if there was indeed a meeting of the minds to create an attorney-client relationship.[24] While the client's subjective belief alone is not sufficient to establish an attorney-client relationship, if an attorney

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[11] *See GMAC v. Crenshaw, Dupree & Milam, L.L.P.*, 986 S.W.2d 632, 636 (Tex. App.—El Paso 1998, pet. denied); *Dickey v. Jansen*, 731 S.W.2d 581, 582 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

[12] Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products* PJC 61.3 (2010)

[13] *See Roberts v. Healey*, 991 S.W.2d 873, 880–81 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

[14] *See Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agrt.); *Parker v. Carnahan*, 772 S.W.2d 151, 157 (Tex. App.—Texarkana 1989, writ denied); *Burnap v. Linnartz*, 914 S.W.2d 142, 148–149 (Tex. App.—San Antonio 1995, no writ).

[15] *See, e.g.*, Negligent Misrepresentation, *infra* § II. F.

[16] *See Bernard Johnson, Inc. v. Continental Constructors, Inc*., 630 S.W.2d 365, 369 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

[17] *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 919–20 (Tex. 2010).

[18] 314 S.W.3d 913, 920 (Tex. 2010).

[19] *Id.*

[20] *Id.* (quoting Restatement (Second) of Torts § 552 (2)(a)).

[21] *Id.*

[22] *Heathcoat v. Santa Fe Int'l Corp*., 532 F.Supp. 961, 964 (E.D. Ark. 1982).

[23] *Stephenson v. LeBoeuf*, 16 S.W.3d 829, 836 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

[24] *Sutton v. McCormick*, 47 S.W.3d. 179, 182 (Tex. App.—Corpus Christi 2001, no pet.).

knows or should know that their actions may lead a reasonable individual to believe that the attorney is representing them, then the attorney has a duty to inform the individual that he or she is not in fact being represented.[25] "Belief" is construed from the perspective of a reasonable client in the circumstances and any ambiguities as to the nature or extent of the attorney-client relationship will be resolved in favor of the reasonable client.[26]

Liability for legal malpractice generally is limited by the rule of privity.[27] "Privity" is defined as private knowledge; joint knowledge with another of a private concern; cognizance implying a consent or concurrence.[28] The general rule is that an attorney is not liable in negligence to an individual for whom the attorney has not agreed to provide legal services.[29] An exception to the privity rule exists in instances where the attorney who provides information to a non-client is aware of the non-client **and** knows or should know that the non-client will rely on the information to make an economic decision.[30]

In 1996, the Supreme Court of Texas decided *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996). The Court held that the beneficiaries do not have a claim against the drafting attorney. In *Barcelo*, an attorney prepared an estate plan for a client. After the client's death, a probate court held that an *inter vivos* trust included in the plan was invalid and unenforceable as a matter of law. The beneficiaries sued the attorney for negligence and breach of contract. Consistent with prior Texas cases, the lower courts and the Supreme Court of Texas dismissed the beneficiaries' claims because the beneficiaries were not in privity with the attorney.

The court rejected the trend in other states to relax the privity barrier in the estate planning context. The court held that:

> the greater 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. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.[31]

The Court reasoned that allowing disappointed will and trust beneficiaries to sue would:

> subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. This potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries.[32]

(i) Estate Planning

Until recently, attorneys did not have to fear actions by injured beneficiaries because the defense of lack of privity could be successfully raised. The general rule was that the attorney did not owe a duty to an intended beneficiary because there was no privity between the attorney and the beneficiary. This strict privity approach, however, is rapidly being replaced by the view that some beneficiaries may proceed with their actions against the drafting attorney despite the lack of privity.

For example, when a personal representative brings an action against the drafting attorney for malpractice, the privity shield is of no defensive value because the client was in privity with the attorney and the personal representative is merely stepping into the client's position. The leading case demonstrating this principle is *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.* 192 S.W.3d 780 (Tex. 2006), in which the executors sued the attorneys who prepared the testator's will, asserting that the attorneys provided negligent advice and drafting services. The executors believed that the testator's estate incurred over $1.5 million in unnecessary federal estate taxes because of the malpractice. The briefs reveal that the main problem was that the testator did not form a family limited partnership or take other steps which could have led to a lowering of the estate's value.

Both the trial and appellate courts agreed that the executors had no standing to pursue the claim because of lack of privity. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 141 S.W.3d 706 (Tex. App.—San Antonio 2004). The appellate court explained that

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[25] *See Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agrt.); *Parker v. Carnahan*, 772 S.W.2d 151, 157 (Tex. App.—Texarkana 1989, writ denied; *Burnap v. Linnartz*, 914 S.W.2d 142, 148–149 (Tex. App.—San Antonio 1995, no writ).

[26] *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 453 (Tex. 2011), reh'g denied (Dec. 16, 2011).

[27] *McCamish, Martin, Etc. v. F.E. Appling*, 991 S.W.2d 787, 792 (Tex. 1999).)

[28] *Alexander v. State*, 803 S.W.2d 852, 855 (Tex. App.—Corpus Christi 1991, writ denied).

[29] *Id.*

[30] *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 920 (Tex. 2010).

[31] *Id.* at 578.

[32] *Id.*

privity was mandated by *Barcelo* and thus the court had no choice but to affirm the trial court's grant of a summary judgment in favor of the attorneys.

The Supreme Court of Texas reversed and 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." The court did not express an opinion as to whether the attorneys' conduct actually amounted to malpractice. Importantly, though, the Court did not overturn *Barcelo*. The court explained that an attorney owes no duty to a non-client, such as a will beneficiary or an intended will beneficiary, even if the individual is damaged by the attorney's malpractice.

Determining early on who the client is can help avoid lawsuits from third parties as the attorney can be clear with all parties involved who the attorney represents. A lack of clarity among the various parties can lead to duties not ordinarily found in the law. For example, the general rule in Texas is that an attorney hired by the executors or trustees to advise them in administering the estate or the trust represents the executors or trustees and not the beneficiaries.[33] However, the attorney for an executor or trustee could undertake to perform legal services as attorney for one or more beneficiaries, and if an attorney-client relationship was created, whether expressly or impliedly, then a duty would be created directly in favor of the beneficiary, and the beneficiary would have recourse against the attorney for damages resulting from negligent representation.[34]

Other issues can arise as to who exactly the client is in the context of estate planning for married couples and the potential conflicts of interest that may arise for such an attorney-client relationship. For example, where one of the spouses has a prior relationship with the drafting attorney, regardless of whether that relationship is personal or professional, there is a potential for conflict.[35]

Spouses may also have different ideas and expectations regarding the forms and limitations of support provided by their estate plan to the survivor of them, their children, grandchildren, and so forth. By including need-based or other restrictions on property, one spouse may believe that the other spouse will be "protected" while that spouse may view the limitations as unjustifiable, punitive, or manipulative. If one spouse has children from a prior relationship, that spouse may wish to restrict the interest of the non-parent spouse to the great dismay of the other spouse who would prefer to be the recipient of an outright bequest. No one distribution plan may be able to satisfy the desires of both spouses.

Significant conflict may arise if one spouse has a separate estate that is of substantially greater value than that of the other spouse, especially if the wealthier spouse wants to make a distribution which differs from the traditional plan where each spouse leaves everything to the survivor and upon the survivor's death to their descendants. The attorney may generate a great deal of conflict among all of the parties if, to act in the best interest of the not-so-wealthy spouse, the attorney provides information regarding that spouse's financial standing under the contemplated distribution, if the wealthy spouse were to die first.

These pitfalls can—and do—arise, and all attorneys would be well-served to indentify who the client is early in the representation process.

(ii) Insurance Defense:

In the insurance context, the Texas Supreme Court has recognized a special relationship exists between the insurance company and the insured, thus imposing an actionable duty of good faith and fair dealing on the part of the insurance company.. In *Arnold v. Nat'l County*, the Court held that a special relationship exists in the insurance context because of "the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims." 725 S.W.2d 165, 167 (Tex. 1987). The *Arnol*d Court noted that the insurance company has exclusive control over the evaluation, processing and denial of claims.

Well prior to issuing the *Arnold* decision, the Texas Supreme Court recognized that an attorney hired by an insurance carrier to represent an insured was involved in a "triangular" relationship with the insured and the carrier. *See Employers Casualty Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973). The *Tilley* court concluded that although paid and selected by the insurance carrier, the defense attorney owed to the insured "unqualified loyalty as if he had been originally employed by the insured." *Id.* Furthermore, if a conflict arises within such triangular relationship, the attorney owes a duty to immediately advise the insured of the conflict of interest. *Id.*

(iii) Employment Arena:

When an attorney for the corporation/entity meets with and/or presents for deposition an employee of the company/entity, the attorney should make sure that the employee knows who is actually being represented

[33] *See Moran*, 946 S.W.2d 381
[34] *Id.*
[35] *See* James R. Wade, *When Can A Lawyer Represent Both Husband and Wife in Estate Planning?,* PROB. & PROP., March/April 1987, at 13.

by the attorney—the company or the employee or both?[36]

(iv) Corporate/Joint Venture Formation/representation

When an attorney represents an LLC/Limited Partnership/Joint Venture, the lawyer should be aware of potential conflicts with regard to the various constitutent owners of the entity and thus shy away from representing a client in a matter adverse to another client.[37] Because of this, attorney neutrality may well be required in the event of a disagreement between LLC/LP/Joint Venture Partners.

(v) HOA/Condo Associations

In Texas, Home Owner Association (HOA) Board members do not owe a fiduciary duty to homeowners but post TUCA created Condominium Owner Association (COA) Board members do owe a fiduciary duty to condo unit owners. [38] Both HOA and COA Boards owe certain duties to the Association entity itself.[39] Likewise, attorneys representing these Associations must be aware that they represent the Association entity as a whole, rather than representing merely the current Association Board or an individual board member. While it is true that the Association can only act through its authorized representatives (namely, the Board),[40] who instruct counsel on their wishes, those wishes may not always coincide with the Board's duty that is owed to the Association as a whole.[41]

(vi) Bankrupty/Probate Impact

An attorney may enter a professional relationship with a friend or acquaintance. While the attorney and client may have an undocumented agreement not to pursue litigation, this agreement is not valid in the event of the client's death. Should the client die, the executor of his Estate (think angry spouse) may have the ability to sue on the late client's behalf.[42] Similarly, should the client's company or the client himself declare bankruptcy, the Bankruptcy Trustee takes ownership of any possible claim against the attorney, as well as inheriting the client's attorney-client privilege.[43]

b. Establishing the Standard of Care

The Texas Disciplinary Rules of Professional Conduct[44] provide standards of conduct for attorneys. The rules do not create a private cause of action but they can play a role in establishing the attorney's standard of care in a malpractice action.[45] The Rules define a lawyer's professional role within the context of court rules and statutes relating to matters of licensure, specific obligations of lawyers, and substantive and procedural law in general.

The Texas Rules of Civil Procedure adopted by the Texas Supreme Court (and the Texas Rules of Criminal Procedure adopted by the Texas Court of Criminal Appeals) can also form a basis for an attorney's standard of care. For example, Texas Rule of Civil Procedure 166(a) sets forth the deadline for the timely filing of a response to a motion for summary judgment.[46] Failure to meet these deadlines is considered below the standard of care by most litigation attorneys. Similar to the Texas Disciplinary Rules of Professional Conduct, the rules of procedure do not create a private cause of action, but they can play a role in establishing the attorney standard of care in a malpractice action.[47]

The potential malpractice liability of an attorney for negligence in estate planning is great since estate planning requires an especially high degree of competence.[48] Estate Planning and Probate professionals not only have to abide by the standards of conduct for attorneys generally, but also need to comply with the standards and rules of many areas of the law: wills, probate, trusts, taxation, insurance, property, domestic relations, etc. As one commentator

[36] *See, e.g., Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 349 & n.5 (1985) (the power to waive corporate attorney-client privilege lies with the Corporation's management and is frequently exercised by the corporation's management and/or officers).
[37] Model Rules of Professional Conduct (2001) at R. 1.7.
[38] Texas Uniform Condominium Act, Tex. Prop. Code Ann. § 82.103(a) (adopted 1994) (provides that each officer or member of a condominium unit owners' association is liable as a fiduciary to the unit owners for the board officers' or members' acts or omissions).
[39] Texas Business Organization Code § 22.221, and *See* CPRC 84 (volunteer immunity and requirements for board to maintain volunteer status).
[40] Texas Property Code § 209.0056.
[41] *See Generally Canyon Vista Property Owners Ass'n, Inc. v. Laubach,* 2014 WL 411646 (Tex.App. – Austin 2014) (laws of the association supercede interests of the board).
[42] Texas Probate Code § 233A.
[43] 11 U.S.C. § 541.
[44] Texas Gov't Code Ann. T. 2, Subt. G App. A, Art. 10, § 9 (Vernon 2012).
[45] *Id.* at § 9, Preamble ¶ 15; *See* Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc., 779 S.W.2d 474, 479 (Tex. App.—El Paso 1989, writ denied).
[46] Tex. R. Civ. P. 166a.
[47] *See Douglas v. Anson Fin., Inc.*, Civ. No. 2-05-283-CV, 2006 WL 820402 (Tex. App.—Fort Worth Mar. 30, 2006) (mem. op.).
[48] *See* David Becker, Broad Perspective in the Development of a Flexible Estate Plan, 63 IOWA L. REV. 751, 759 (1978) ("comparatively few lawyers recognize the expertise and particular talents essential to estate planning").

has stated, "Any lawyer who is not aware of the pitfalls in probate practice has been leading a Rip Van Winkle existence for the last twenty years."[49]

A breach of duty requires proof that the ordinary care of that profession was not exercised.[50] It is expected that a lawyer will exercise the degree of care and skill necessary for his or her discipline.[51] This rule recognizes a lawyer's special knowledge and ability as one of the relevant conditions necessary for the determination of what constitutes ordinary care for a particular profession.[52] Consider that bankruptcy, federal income tax, immigration, patent and other specialized areas controlled by Federal laws probably have a nationwide standard of care that is impacted by local custom. You may well have a lawyer from Kalamazoo establish the standard of care of a lawyer practicing in Lubbock.

B. Expert Witness Requirements

The standard of care required of a lawyer is a matter that must be established by an expert in the field. The jury needs "assistance" in determining the standard of care for professionals before they can determine whether that standard has been breached. In malpractice cases, an expert is called upon to establish the standard of care of an ordinarily prudent lawyer under the circumstances.[53] An expert witness must be qualified to provide an opinion in the relevant field under examination.[54] According to Rule 104(a) of the Texas Rules of Evidence, the qualification of an expert is a preliminary question to be decided by the trial court.[55]

1. Qualification of an Expert According to Rule 702 of the Texas Rules of Evidence, an expert witness is qualified by "knowledge, skill, experience, training, or education" and must have special knowledge about the particular situation in which he intends to provide testimony.[56] In *E.I. du Pont de Nemours and Co. v. Robinson*, the Texas Supreme Court held that Rule 702 requires that the expert's testimony be relevant to the issues in the case and based upon a reliable foundation.[57] *Robinson* was decided just after the seminal expert requirement decision of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[58] As a result of the *Robinson* decision, trial courts in Texas are now responsible for making preliminary determinations of whether the proffered expert testimony meets the *Robinson* standards.[59] Judges are to act as "gatekeepers" in determining the admissibility of expert testimony.[60]

There are many factors that a trial court may consider in making the threshold determination of admissibility under Rule 702. These factors include, but are not limited to:

> (1) the extent to which the theory has been or can be tested;
> (2) the extent to which the technique relies upon the subjective interpretation of the expert;
> (3) whether the theory has been subjected to peer review and/or publication;
> (4) the technique's potential rate of error;
> (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
> (6) the non-judicial uses which have been made of the theory or technique.[61]

In *Gammill v. Jack Williams Chevrolet, Inc.*, the Texas Supreme Court once again addressed expert qualification and reliability issues.[62] The Court noted that a party offering an expert's testimony bears the burden to prove that the expert witness is qualified and must demonstrate that the expert witness possesses special knowledge as to the matter in which he proposes to give an opinion.[63] The Court clarified that although an expert opinion must still meet the reliability and relevance requirements, the expert opinion need not necessarily satisfy the specific

[49] Robert E. Dahl, An Ounce of Prevention—Knowing the Impact of Legal Malpractice in the Preparation and Probate of Wills, DOCKET CALL 9, 9 (Summer 1981).
[50] *See e.g.*, *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989) (attorneys); *Greenstein, Logans & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 185 (Tex. App.—Waco 1987, writ denied) (accountants); *Parkway Co. v. Woodruff*, 857 S.W.2d 903, 919 (Tex. App.—Houston [1st Dist] 1993) (engineers); *Jackson v. Axelrad*, 221 S.W.3d 650, 655 (Tex. 2007) (physicians).
[51] *See Mobil Pipe Line Co. v. Goodwin*, 492 S.W.2d 608, 613 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref. n.r.e.).
[52] *See id.*
[53] *See. e.g., I.O.I. Systems, Inc. v. City of Cleveland*, 615 S.W.2d 786, 790 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).
[54] Tex. R. Evid. 702.
[55] Tex. R. Evid. 104(a).
[56] Tex. R. Evid. 702; *Broders v. Heise*, 924 S.W.2d 148, 152–53 (Tex. 1996).
[57] 923 S.W.2d 549 (Tex. 1995).
[58] 509 U.S. 579, 593 (1993).
[59] *Robinson*, 923 S.W.2d at 556.
[60] *Id.*
[61] *Id.* at 557.
[62] 972 S.W.2d 713 (Tex. 1998).
[63] *Id.* at 718.

factors in assessing reliability in *Robinson*.[64] The Court went on to note that the trial court should still ensure that the expert's opinion is consistent with applicable professional standards outside the courtroom, and that the opinion has a reliable basis in the knowledge and experience of the discipline.[65]

The *Robinson/Daubert* factors have been applied broadly to the field of professional liability. For example, in *Rogers v. Alexander* the court applied the *Robinson* factors and found that an accounting expert was qualified to provide expert testimony concerning damages related to the purchase of a home healthcare business.[66] The court looked at the expert's education, training and experience in accounting and auditing, as well as his exposure to business valuation and held that he was qualified to testify as an expert in damages in that case.[67] It is interesting to note that the expert testified that he did not hold himself out as an expert in valuation but that he advises clients on buying and selling prices, including what is the fair price to ask or pay.[68] Even so, the court also concluded that the accountant's experience, coupled with his thorough testimony about the methodology he employed, demonstrated that the opinions he drew from the underlying data were reliable and therefore allowed the accountant to testify.[69]

2. Same School of Practice Rule

The standard of care is generally established by the testimony of an expert from the same school of practice as the lawyer defendant.[70] This principle has come to be known as the "same school of practice rule." Under this rule, a defendant in a legal malpractice case is entitled to have their conduct analyzed by the standard of care relevant to their discipline.[71] The Texas Supreme Court, in *Porter v. Puryear*, held that the same school of practice rule is no longer a necessary requirement when the expert proffered is sufficiently familiar with the same area of practice as the defendant.[72] Therefore, it is not absolutely necessary for an expert to be in the same field of practice as the defendant as long as the subject of the expert's opinion is common to and equally recognized and developed in both schools of practice.[73]

3. Locality Rule

Under the "locality rule," the standard of care for a particular profession is based on the standard practice for that profession in the locality where the alleged injury took place.[74] An expert witness in a malpractice case is no longer required to be from the defendant's locality if he is familiar with the standard of care in the specific area.[75] The Texas Supreme Court has held that if there are universally accepted standards, the locality rule is inapplicable.[76] However, it may still be beneficial to obtain expert witnesses from the defendant's locality if only to bypass the possibility of a finding that testimony of an expert witness from outside the community is insufficient.[77]

C. Summary Judgment

The establishment or preclusion of summary judgment on a claim for negligence is dependent upon expert testimony.[78] While the testimony of an expert can support summary judgment, the testimony must be clear, direct, otherwise credible, and free from contradictions and inconsistencies.[79] If the expert witness presents evidence sufficient to support a motion for summary judgment, the opposing party must produce its own expert testimony to controvert the summary judgment proof.[80] Without controverting expert testimony, the opposing party can establish that no genuine issue of fact exists as to an essential element of the malpractice claim and the summary judgment motion may be granted.

D. Proximate Causation

In a legal malpractice action based on negligence, the client must prove that his or her injury was proximately caused by the lawyer's breach of duty.[81] The two elements of proximate causation are cause-in-

[64] *Id.* at 722–26.
[65] *Id.* at 725–26.
[66] *Rogers v. Alexander*, 244 S.W.3d 370 (Tex. App.—Dallas 2007, no pet.).
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *See Wilson v. Scott*, 412 S.W.2d 299, 301–02 (Tex. 1967).
[71] *See Christian v. Jeter*, 445 S.W.2d 51, 54 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.).
[72] 262 S.W.2d 933 (Tex. 1954).
[73] *Metot v. Danielson*, 780 S.W.2d 283, 287 (Tex. Civ. App.—Tyler 1989, writ denied).
[74] *Christian v. Jeter*, 445 S.W2d 51, 53–54 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.).
[75] *See Ballesteros v. Jones*, 985 S.W.2d 485, 494–95 (Tex. App.—San Antonio 1998, pet. denied).
[76] *See Webb v. Jorns*, 488 S.W.2d 407, 411 (Tex. 1972).
[77] *See Cook v. Irion*, 409 S.W.2d 475, 478 (Tex. Civ. App.—San Antonio 1966, no writ), disapproved on other grounds, 774 S.W.2d 662 (Tex. 1989).
[78] *See Hart v. Van Zandt*, 399 S.W.2d 791, 792 (Tex. 1966).
[79] *See* Tex. R. Civ. P. 166a (c); *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991).
[80] *Id.*; *Perez v. Cueto*, 908 S.W.2d 29, 31–32 (Tex. App.—Houston [14th Dist.] 1995, no writ).
[81] *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570, 575 (Tex. 1985).

fact and foreseeability.[82] Cause-in-fact requires that the alleged act be a substantial factor in bringing about the injury, and without which, no harm would have occurred.[83] Foreseeability requires that the lawyer, as a person of ordinary intelligence, would have anticipated the danger that their negligent act created for others.[84] Under foreseeability it is not a requirement that the lawyer anticipate the exact manner in which injury will occur.[85] Foreseeability is not measured by hindsight, but instead by what the actor knew or should have known at the time of the alleged negligence.[86] The Texas Pattern Jury Charge gives the following pattern instruction for proximate causation:

> Proximate cause," when used with respect to the conduct of *professional*, means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that *a professional* using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.[87]

In addition to establishing proximate cause, a plaintiff in a legal malpractice case must also prove that "but for" the defendant attorney's negligence, the plaintiff would have won the underlying case.[88] The plaintiff must prove that had he been successful in establishing liability against the original defendant in the underlying action, the judgment would have been collectible.[89]

When a convicted criminal sues a defense attorney for malpractice claiming "but for" the attorney's negligence, the defendant would not have been convicted, the Texas Supreme Court requires him to "prove" his innocence. *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497-98 (Tex. 1995).

In cases of alleged appellate malpractice, the Supreme Court has stated that the determination of causation is a question of law for judges to decide and not a mixed question of fact/law for a jury to decide. *See Millhouse v. Wiesenthal,* 775 S.W.2d 626, 626-27 (Tex. 1989).

Where the case would have been lost, albeit with lower damages, the Plaintiff must establish the "true value" of the case so that the jury can determine what harm was actually caused by the lawyer's negligence.[90] For example, in *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, the Texas Supreme Court held that if the value of the case with a competent defense would have equaled or exceeded an insurer's tendered settlement amount, then the insurer suffered no harm if the attorney mishandled the insured's defense.[91] Even if the insurer can prove that its settlement was excessive, it must also prove that the attorney mishandled the defense and that a judgment for the plaintiff in excess of the case's true value would have resulted from the attorney's malpractice.[92] If the insurer can first establish these two elements, the insurer may then recover as damages the difference between the true and inflated value, less any amount saved by the settlement.[93]

The Houston Court of Appeals, in *Daneshjou v. Bateman*, affirmed a lower court's application of the *Keck* formula which resulted in take-nothing judgment against a lawyer accused of negligence in defending the underlying lawsuit. 396 S.W.3d 112 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). The judgment rendered in the underlying suit was $8.2 million, which represented an "inflated value" of $300,000 more than what should have been the "true value" of $7.9 million in the absence of malpractice. Because the case settled for $4 millionwhich was less than the case's "true value", the court affirmed the lower court's take-nothing judgment entered in favor of the defendant attorney.

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[82] *Id.*

[83] *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 903 (Tex. 1980).

[84] *Nixon v. Mr. Property Management Co., Inc.*, 690 S.W.2d 546, 549–50 (Tex. 1985).

[85] *Southwest Forest Industries, Inc. v. Bauman*, 659 S.W.2d 702, 704 (Tex. App.—El Paso 1983, writ ref'd n.r.e.).

[86] *Timberwalk Apts. v. Cain*, 972 S.W.2d 749, 757 (Tex. 1998).

[87] Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products* PJC 60.1 (2010).

[88] *See Schaeffer v. O'Brien*, 39 S.W.3d 719, 721 (Tex. App.—Eastland 2001, pet. denied).

[89] *Id.*

[90] *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 703 (Tex. 2000).

[91] *Id.*

[92] *Id.*

[93] *Id.* This rationale was recently applied to legal malpractice claims in *Daneshjou v. Bateman* (396 S.W.3d 112). In *Daneshjou*, the trial court ruled that although the jury found the legal malpractice of the attorney caused $300,000 harm, resulting in a $7.9 million award against Daneshjou instead of what would have been "true value" of an $8.2 million award, because the parties settled after trial for $4 million, the "true value" of the case was $4 million and therefore the Plaintiff took nothing from the attorney.

E. Damages

Negligence without injury or damage is not compensable.[94] Injury can be established by showing physical injury, economic loss, or other detriment sustained by the plaintiff.[95] Because actual damage is one of the essential elements in a negligence claim, a plaintiff has the burden of proving the existence of damages.[96]

The Houston Court of Appeals, in *Coastal Conduit & Ditching v. Noram Energy*, held that purely economic damages are not available in a negligence action absent a claim for personal injury, property damage, or a contractual relationship.[97] The Texas Supreme Court has adopted an economic loss rule which precludes recovery of economic losses in negligence when the loss is the subject matter of a contract between the parties.[98]

F. Fraud & Misrepresentation

Claims arising from an alleged misrepresentation can arise under different theories, depending on whether the speaker knew of the statement's falsehood. The various theories are set out below:

1. Common-Law Fraud

Fraud includes the following elements: 1) a material representation was made; 2) it was false; 3) when the representation was made, the speaker knew it was false or the statement was made recklessly without any knowledge of its truth and as a positive assertion; 4) the speaker made the representation with the intent that it should be acted on by the other party; 5) the other party acted in reliance on the representation; and 6) the party thereby suffered injury.[99] All elements must be established before recovery will be permitted.[100]

A false material representation made knowingly or recklessly does not form the basis for actionable fraud alone. For a false statement to be actionable as fraud, the complaining party must have relied on it to his or her detriment.[101] In addition to having known of and actually relied on the representation, the plaintiff's reliance must have been justified.[102] If the plaintiff knew the representation was false, there can be no justifiable reliance.[103] Finally, recovery for fraud will not be permitted unless the fraud resulted in actual injury or damage to the person defrauded.[104] An injury occurs when legal liabilities or obligations are incurred which would not have been incurred but for the fraud.[105]

2. Statutory Fraud[106]

Fraud can also arise under statute. For example, Section 27.01 of the Texas Business and Commerce Code prohibits fraud in real estate and stock transactions.[107] Both false representations and false promises may constitute fraud under the statute.[108] It is important to note that even if the statute does not provide a remedy in a certain situation, or if more favorable damages could be recovered under common law, the plaintiff may proceed with a claim under common-law fraud.[109] However, statutory fraud usually offers recovery of damages not otherwise available under the common-law.[110] In addition to actual damages, a plaintiff can recover exemplary damages, reasonable and necessary attorney's fees, expert witness fees, costs for copies of depositions, and costs of court.[111]

3. Negligent Misrepresentation

If an injured party is unable to bring a case based on fraud, an action for negligent misrepresentation may be available.[112] Negligent misrepresentation differs from common-law fraud in that it does not require knowledge by the estate planning and probate of the falsity or reckless disregard of the truth.[113] Texas has adopted the Restatement (Second) of Torts

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[94] *Nabours v. Longview Sav. & Loan Ass'n*, 700 S.W.2d 901, 909 (Tex. 1985).
[95] *Id.*
[96] *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987).
[97] 29 S.W.3d 282, 285–290 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).
[98] *See Southwestern Bell Tel. Co. v. Delanney*, 809 S.W.2d 493, 494 (Tex. 1991).
[99] *De Santis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990).
[100] *Id.*
[101] *Johnson & Johnson Medical v. Sanchez*, 924 S.W.2d 925, 929–30 (Tex. 1995).
[102] *Coastal Corp. v. Atlantic Richfield Co.*, 852 S.W.2d 714, 720–21 (Tex. App.—Corpus Christi 1993, no writ).
[103] *Id.* at 720.
[104] *The M.D. Anderson Cancer Center v. Novak*, 52 S.W.3d 704, 707–08 (Tex. 2001).
[105] *Turner v. Houston Agr. Credit Corp.*, 601 S.W.2d 61, 64 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).
[106] Statutory fraud can also arise from a breach of fiduciary duty. *See* Breach of Fiduciary Duty, *infra* § II. H.
[107] Tex. Bus. & Com. Code Ann. § 27.01 (Vernon 2011).
[108] *Id.* at § 27.01(a)(1)–(2).
[109] *El Paso Development Company v. Ravel*, 339 S.W.2d 360, 364–65 (Tex. App.—El Paso 1960, writ ref'd n.r.e.).
[110] *See, e.g.*, Tex. Bus. & Com. Code Ann. § 27.01(b)–(e) (Vernon 2011).
[111] *Id.*
[112] *Great Am. Mortg. Investors v. Louisville Title*, 597 S.W.2d 425, 429–31 (Tex. Civ. App.—Fort Worth 1980 , writ ref'd n.r.e.).
[113] *Larsen v. Carlene Langford & Associates*, 41 S.W.3d 245, 250 (Tex. App.—Waco 2001, pet. denied).

§ 552 which defines the elements of negligent misrepresentation as: 1) a representation that is made by a defendant in the course of the defendant's business, profession, or employment, or in a transaction in which the defendant has a pecuniary interest; 2) in the course of that representation the defendant supplies false information for the guidance of others in their business; 3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and 4) the plaintiff suffers pecuniary loss by justifiably relying on the information.[114]

In 1999, the Supreme Court of Texas held in the case of *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999) that attorneys, just like other professionals, could incur liability for negligent misrepresentation. The court explained that:

> a negligent misrepresentation claim is not equivalent to a legal malpractice claim. . . . Under the tort of negligent misrepresentation, liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the nonclient based on the professional's manifest awareness of the nonclient's reliance on the misrepresentation and the professional's intention that the nonclient so rely. . . . Therefore, an attorney can be subject to a negligent misrepresentation claim in a case in which she is not subject to a legal malpractice claim. . . . The theory of negligent misrepresentation permits plaintiffs who are not parties to a contract for professional services to recover from the contracting professionals.[115]

The damages for negligent misrepresentation are not the same as damages under a fraud cause of action. A recovery for negligent misrepresentation is limited to the pecuniary loss suffered by the plaintiff as the result of reliance on the misrepresentation.[116] These damages include the difference between the value of what the plaintiff received in the transaction and the purchase price.[117] The plaintiff may also recover damages for other pecuniary loss suffered as a consequence of relying on the misrepresentation.[118] However, the plaintiff is not entitled to recover "benefit of the bargain" losses between the plaintiff and the defendant[119] or mental anguish damages.[120] Also, available damages do not include any lost profits resulting from the misrepresentation.[121]

The statute of limitations is different for negligent misrepresentation than for fraud. While a four-year statute of limitations applies to fraud, a two year statute applies to actions for negligent misrepresentation.[122] This is based on the rationale that negligent misrepresentation is more closely related to negligence than fraud, as negligent misrepresentation does not require knowledge or recklessness on the part of the person who makes the negligent misrepresentation.[123]

Negligent misrepresentation has emerged as an attractive theory of liability for non-clients asserting claims against estate planning and probate professionals because liability under Section 552 does not require privity of contract. Liability is based not on the breach of a duty that the lawyer owes to a client, but instead on an independent duty arising from the lawyer's awareness of a person's reliance on the misrepresentation and the intention that the person so rely.[124] That independent duty, however, still requires proof of the standard of care and breach of that duty.[125]

G. Breach of Contract

When a party fails to perform something that he or she has expressly or impliedly promised to perform, a breach of contract occurs.[126] When a party breaches a contract, the most common remedy is monetary damages. Monetary damages act as compensation for the loss actually caused by the breach.[127] There are two types of damages that are recoverable in a breach of contract action: direct damages and consequential

[114] *Federal Land Bank v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).
[115] *Id*. at 792.
[116] *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442–43 (Tex. 1991).
[117] *Id.*
[118] Restatement (Second) of Torts § 552 B (1).
[119] Restatement (Second) of Torts § B (2); *D.S.A., Inc. v. HISD*, 973 S.W.2d 662, 663–64 (Tex. 1998).
[120] *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).
[121] *Federal Land Bank v. Sloane*, 825 S.W.2d 439, 443 n.4 (Tex. 1991).
[122] *Milestone Properties, Inc. v. Federated Metals Corp.*, 867 S.W.2d 113, 119 (Tex. App.—Austin 1993, no writ).
[123] *Milestone Properties v Federated Metals*, 867 S.W.2d 113, 118–19 (Tex. App.–Austin 1993, no writ).
[124] *McCamish, Martin, Etc. v. F.E. Appling*, 991 S.W.2d 787, 792 (Tex. 1999).
[125] *Id.*
[126] *Methodist Hospitals v. Corporate Com.*, 806 S.W.2d 879, 882 (Tex. App.—Dallas 1991, writ. denied).
[127] *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991).

damages.[128] Direct damages serve as compensation for an injury directly caused by the breach. Consequential damages, on the other hand, compensate losses that come about indirectly from the breach.[129] As such, a consequential loss must be shown to have been a foreseeable result of a breach at the time the contract was made.[130]

Even though a litigant may assert a number of claims in a single lawsuit, he can only receive one damage award as compensation for the same harm.[131] Double recovery will not be permitted. In addition, exemplary damages are not recoverable in an action for breach of contract, even if the breach is intentional or malicious.[132] Attorney's fees, on the other hand, are recoverable in a breach of contract action. Fees necessarily incurred in the prosecution of the action are permitted by either the general attorney's fees statute,[133] or as expressly provided in the contract itself.

However, a Plaintiff cannot bring a negligence cause of action if the alleged breach of duty is merely a breach of contract.[134] "Tort obligations are in general obligations that are imposed by law—apart from and independent of promises made and therefore apart from the manifested intention of the parties—to avoid injury to others."[135] If the defendant's conduct—such as negligently burning down a house—would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim arises under tort principles.[136] Conversely, if the defendant's conduct—such as failing to publish an advertisement—would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim is breach of contract.[137]

In determining whether the plaintiff may recover on a tort theory, it is also instructive to examine the nature of the plaintiff's loss. When the only loss or damage is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract.[138] The acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone—a claim for negligence is inappropriate and will not be allowed by the court.[139]

H. Breach of Fiduciary Duty

A fiduciary is one who owes to another the duties of good faith, trust, confidence, and candor.[140] A fiduciary must place the interests of the beneficiary ahead of his or her own. A failure to act as a fiduciary may result in claims being brought against a lawyer for breach of fiduciary duty.

A lawyer owes a fiduciary duty to their client.[141] In addition, a fiduciary relationship may arise from formal, informal, or contractual relationships.[142] An informal fiduciary duty may arise from a moral, social, domestic, or purely personal relationship of trust and confidence.[143] The question to the jury on the existence of a non-formal fiduciary relationship may be presented as follows:

> QUESTION 1
> Did a relationship of trust and confidence exist between *Defendant* and *Plaintiff*?
> A relationship of trust and confidence existed if *Plaintiff* justifiably placed trust and confidence in *Defendant* to act in *Plaintiff*'s best interest. *Plaintiff*'s subjective trust and feelings alone do not justify transforming arm's-length dealings into a relationship of trust and confidence.[144]
> Answer "Yes" or "No."
> Answer: _____

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[128] *Baylor Univ. v. Sonnichsen,* 221 S.W.3d 632, 636 (Tex. 2007.
[129] *Id.*
[130] *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997).
[131] *Waite Hill Services v. World Class Metal*, 959 S.W.2d 182, 184–85 (Tex. 1998).
[132] *See Amoco Production Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981; *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986).
[133] *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (West 2012).
[134] *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494–95 (Tex. 1991).
[135] *Id.* (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 92 at 655 (5th Ed.1984)).
[136] *Id.*
[137] *Id.*
[138] *Id.* (citing PROSSER AND KEETON at 656; J. EDGAR, JR. & J. SALES, TEXAS TORTS AND REMEDIES § 1.03[4][b] at 1–36 (1990)).
[139] *Id.*
[140] *Vickery v. Vickery*, 999 S.W.2d 342, 358 (Tex. 1999).
[141] *Lundy v. Masson,* 260 S.W.3d 482, 501–02 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).
[142] *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 698 (Tex. App.—Fort Worth 2006, pet. denied).
[143] *Id.*
[144] Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 104.1 (2010).

Because a breach of duty is required for a claim of negligence, sometimes the same act can amount to a breach of fiduciary duty. To rise to the level of a breach of fiduciary duty, however, the act must have overtones of disloyalty, self-dealing, or other actions that constitute a "breach of trust".[145] Where the "gist of the complaint" is essentially that the lawyer fell below the standard of care, rather than acting disloyal or in bad faith, the courts allow the claim to proceed under a negligence theory, but not on breach of fiduciary duty grounds.[146]

A plaintiff may wish to proceed on a breach of fiduciary duty claim, rather than a negligence claim, because of the higher standards imposed on fiduciaries or because, in some instances, the burden of proof may shift to the defendant.[147] In such cases, the question to the jury may be presented as follows:

> QUESTION 1
> Did *Defendant* comply with *his* fiduciary duty to *Plaintiff*?
> *Because a relationship of trust and confidence existed between them*, *Defendant* owed P*laintiff* a fiduciary duty. To prove *he* complied with *his* duty, *Defendant* must show—
> a. the transaction[*s*] in question [*was/were*] fair and equitable to *Plaintiff*; and
> b. *Defendant* made reasonable use of the confidence that *Plaintiff* placed in *him*; and
> c. *Defendant* acted in the utmost good faith and exercised the most scrupulous honesty toward *Plaintiff*; and
> d. *Defendant* placed the interests of *Plaintiff* before *his* own, did not use the advantage of *his* position to gain any benefit for *himself* at the expense of *Plaintiff*, and did not place *himself* in any position where *his* self-interest might conflict with *his* obligations as a fiduciary; and
> e. *Defendant* fully and fairly disclosed all important information to *Plaintiff* concerning the transaction[*s*].[148]
> Answer "Yes" or "No."
> Answer: _____

I. Deceptive Trade Practices Act

The Deceptive Trade Practices Act (DTPA) creates a statutory cause of action for "consumers" who are damaged by false, misleading, or deceptive acts or practices, a misrepresentation of a material fact, a breach of an express or implied warranty, or an unconscionable action.[149] DTPA claims are common causes of actions with plaintiffs for several reasons. First, strict privity is not required for standing as a consumer under the DTPA.[150] Second, a producing cause, unlike proximate cause, is merely a contributing cause that produced the injuries complained of.[151] Finally, the DTPA permits recovery of up to three times damages, damages for mental anguish, and attorney's fees.[152]

1. Elements

In order for a DTPA action to succeed: 1) the plaintiff must be a consumer; 2) the defendant must have engaged in false, misleading, or deceptive acts; and 3) these acts must have been a producing cause of the consumer's damages.[153] The consumer must provide the defendant written notice of the claim at least sixty days before filing suit.[154] This notice must advise the defendant in reasonable detail of the consumer's specific complaint and the amount of damages and costs incurred.[155]

2. Prohibited Acts

A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish: (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is: (A) specifically enumerated in a subdivision of Subsection

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[145] *Id.*

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

[147] *See Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 104.2 (2010).

[148] Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 104.3 (2010).

[149] Tex. Bus. & Com. Code Ann. §§ 17.46(b), 17.50(a) (Vernon 2011).

[150] *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 815 (Tex. 1997).

[151] *Roberts v. Healey*, 991 S.W.2d 873, 878 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

[152] Tex. Bus. & Com. Code Ann. § 17.50(b)(1), (d) (Vernon 2002).

[153] *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995.

[154] Tex. Bus. & Com. Code Ann. § 17.505(a) (Vernon 2011).

[155] *Id.*

(b) of Section 17.46; and (B) relied on by a consumer to the consumer's detriment; (2) breach of an express or implied warranty; (3) any unconscionable action or course of action by any person; or (4) the use or employment by any person of an act or practice in violation of Chapter 541, Insurance Code.[156]

Section 17.50(a)(1) of the DTPA provides that a consumer may maintain an action based on the use or employment by any person of a false, misleading, or deceptive act or practice that is specifically enumerated in a subdivision of Section 17.46(b). Section 17.46(b) is a list of acts or practices which have been expressly declared unlawful. This so-called "laundry list" is made up of 27 acts or practices.[157]

The DTPA also provides that a consumer may maintain an action under the DTPA for any unconscionable action or course of action.[158] An action or course of action is unconscionable if, to the detriment of another person, it takes advantage of the lack of knowledge, ability, experience, or capacity of that person to a grossly unfair degree.[159]

The DTPA prohibits any act or practice in violation of Chapter 541 of the Texas Insurance Code.[160] Chapter 541 of the Texas Insurance Code provides that "a person may not engage in this state in a trade practice that is defined in this chapter as or determined under this chapter to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance."[161] The specific prohibited acts are defined in the Texas insurance Code, and include, among other things, prohibitions against defamation of an insurer[162], furnishing false financial statements[163], and engaging in unfair settlement practices.[164]

Finally, the DTPA provides an additional cause of action for breach of an express or implied warranty.[165] However, a warranty must be established independently of the DTPA to be enforced under the statute.[166] An express warranty can be established by the agreement of parties to a contract.[167] To recover for a breach of an express warranty, a plaintiff must be able to prove that 1) he is a consumer, 2) a warranty was made, 3) the warranty made was breached, and 4) injury was sustained as a result of the breach.[168] Under the Texas Pattern Jury Charge, the jury may be instructed that "[a]n express warranty is any affirmation of fact or promise made by *Defendant* that relates to the [*particular goods*] and becomes part of the basis of the bargain. It is not necessary that formal words such as 'warrant' or 'guarantee' be used or that there be a specific intent to make a warranty."[169]

An implied warranty is derived either from statute or common law.[170] The Uniform Commercial Code provides a statutory basis for implied warranties. For example, the UCC imposes a warranty on sellers that goods must be sold for the particular purpose in which they are used.[171] The common law is another source of implied warranties. For instance, the Texas Supreme Court has held that there is an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner.[172]

3. Defenses under the DTPA

A defendant has a complete defense to a DTPA cause of action if he can prove: (1) that he received notice from the consumer describing the nature of the consumer's specific complaint and the amount of the economic and mental anguish damages and expenses, including attorney's fees; and (2) within 60 days after receiving the notice the defendant tendered to the consumer the amount of damages claimed as well as the expenses, including attorney's fees, reasonably incurred by the consumer in asserting the claim.[173]

As of September 1, 1995, the use of the DTPA in actions against lawyers has become limited by the fact that it does not apply to claims for damages based on the rendering of a professional service. This includes the providing of advice, judgment, opinions, or similar professional skill.[174] However, DTPA actions against professionals are still valid in situations where there exists: (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion; (2) a failure to disclose information

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[156] Tex. Bus. & Com. Code Ann. § 17.50 (West 2012).
[157] *Id.* at §17.46(b).
[158] *Id.* at §17.50(a)(3).
[159] *Id.* at §17.45(5).
[160] Tex. Bus. & Com. Code Ann. § 17.50 (West 2012).
[161] Tex. Ins. Code Ann. § 541.003 (West 2012).
[162] *Id.* at § 541.053.
[163] *Id.* at § 541.055.
[164] *Id.* at § 541.060.
[165] Tex. Bus. & Com. Code Ann. § 17.50(a)(2) (West 2012).

[166] *La Sara Grain v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984).
[167] *See Brooks Tarlton, Gilbert, et al. v. U.S. Fire In.*, 832 F.2d 1358, 1373–74 (5th Cir. 1987).
[168] *McDade v. Texas Commerce Bank, Nat'l Ass'n*, 822 S.W.2d 713, 718 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
[169] Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 115.7 (2010).
[170] *La Sara Grain v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984).
[171] Tex. Bus. & Com. Code Ann. § 2.314(b)(3) (West 2012).
[172] *Humber v. Morton*, 426 S.W.2d 554, 556 (Tex. 1968).
[173] Tex. Bus. & Com. Code Ann. § 17.506(d) (West 2012).
[174] *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987).

concerning goods or services that was known at the time of the transaction if such failure was intended to induce the consumer into a transaction into which he would not have entered 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 a advice, judgment, or opinion.[175]

A defendant also has a complete defense to a DTPA cause of action if he can prove that he relied on: (1) written information relating to the particular goods or service in question obtained from official government records; (2) written information relating to the particular goods or service in question obtained from a source other than official government records; or (3) written information concerning a test required or prescribed by a government agency.[176] The defendant must also show that he gave reasonable and timely written notice to the plaintiff about that reliance before consummation of the transaction.[177] In order to assert this defense, the defendant must prove that the information was a producing cause of the alleged damage, that the information was false or inaccurate, and that he did not know, and could not reasonably have known, of the falsity and inaccuracy of the information.[178]

Another defense under the DTPA is that the plaintiff is not a consumer. A "consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.[179]

In *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.), the beneficiaries of a will sued the law firm under the Texas Deceptive Trade Practices Act. The law firm challenged the lower court's finding that the beneficiaries were consumers under the Act. To qualify as consumers, the beneficiaries must first "have sought or acquired the goods or services by purchase or lease, and second, the goods or services purchased must form the basis of the complaint."

The court held that the beneficiaries were not consumers. The court was "not persuaded that the Texas Legislature intended the Act to apply to causes of action by will beneficiaries against the attorneys hired by the executors of the estate." The beneficiaries were merely "incidental beneficiaries" of the contract between the law firm and the executors. This type of benefit is not enough to give the beneficiaries consumer status. The court supported its holding with public policy arguments:

> [i]f consumer status were conferred on estate beneficiaries, the existence of minor beneficiaries, residual beneficiaries, or others similarly situated could extend the period of time in which an action could be brought against attorneys hired by the executors for years after the representation ended and the estate was closed. We find the public interest in the finality of probate proceedings includes actions against attorneys who represent executors in the administration of the estate. A suit against an attorney would necessarily involve revisiting the original administration of the estate, and might very well affect the original distributions. Thus, public policy weighs against conferring consumer status on estate beneficiaries.[180]

Finally, a defendant may assert a claim against a plaintiff for "bad faith." On a finding by the court that an action under the DTPA was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.[181]

J. Aiding & Abetting Breach of Fiduciary Duty

Texas recognizes a cause of action for aiding and abetting a breach of fiduciary duty.[182] "To establish a claim for knowing participation in a breach of fiduciary duty, a plaintiff must assert: (1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the

[175] Tex. Bus. & Com. Code Ann. § 17.49(c) (West 2012).
[176] *Id.* at § 17.506(a).
[177] *Id.*
[178] *Id.* at § 17.5052(a), (b).
[179] *Id.* at §17.45(4).
[180] *Id.* at 408–09.
[181] *Id.* at § 17.50(c) (West 2012).
[182] *See, e.g., Kinzbach Tool Co. v. Corbett–Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942) (a defendant's knowing participation in a breach of fiduciary duty gives rise to a viable cause of action); *see also Cox Tex. Newspapers, L.P. v. Wootten*, 59 S.W.3d 717, 721 (Tex. App.—Austin 2001, pet. denied) (quoting *Kinzbach Tool Co.*, 160 S.W.2d at 514) ("It is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tort-feasor with the fiduciary and is liable as such."); *Kline v. O'Quinn*, 874 S.W.2d 776, 786 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

third party was aware that it was participating in the breach of that fiduciary relationship."[183]

K. Conspiracy

"A civil conspiracy is a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means."[184] The elements of civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result.[185] "Once a conspiracy is proven, each co-conspirator 'is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination.'"[186] "Under Texas law, civil conspiracy is a derivative tort. If a plaintiff fails to state a separate underlying claim on which the court may grant relief, then a claim for civil conspiracy necessarily fails."[187]

L. Fair Debt Collection Pratices Act (FDCPA)

Attorneys can be subject to the Fair Debt Collection Practices Act ("FDCPA"), a statute enacted to in 1977 to eliminate abusive, deceptive, and unfair debt collection practices. 15 U.S.C. §1692 et seq. The United States Supreme Court has held that the "defintion of 'debt collector' includes lawyers who regularly attempt to collect consumer debts." Heintz v. Jenkins, 514 U.S. 291, 292, 115 S.Ct.1489, 131 L.Ed.2d 395 (1995). That court has further ruled that lawyers covered under the act may have liability even if they made an error in interpreting the application of the FDCPA. *Jerman v. Carlisle*, 130 S.Ct. 1605, 593 (2010). Furthermore, the statute creates a private cause of action so a recovering plaintiff may recover attorney's fees in addition to actual and statutory damages. 15 U.S.C. §1692k(a)(3). Debt collection practices in Texas must comply with both the FDCPA and the Texas Debt Collection Act. Tex. Fin. Code Ann. § 392.

M. Intentional Torts

Though alleged less often, a Plaintiff can bring claims against an estate planning and probate for intentional torts. These claims include assault, battery, false imprisonment, intentional infliction of emotional distress, trespass to chattels, and conversion.[188] Intent, for purposes of tort claims, means that the actor desires to cause the consequences of his or her act, or that he or she believes that the consequences are substantially certain to result from it.[189]

III. DEFENSES TO CLAIMS

A. Statute of Limitations/Repose

Professional claims sounding in negligence and negligent misrepresentation are governed by the two-year statute of limitations.[190] DTPA actions must be commenced within two years after the date on which the deceptive act occurred, or within two years after the consumer discovered, or should have discovered, the occurrence.[191] Breach of contract and fraud actions are governed by a four-year statute of limitations. In 1999, the Legislature amended Section 16.004 of the Civil Practice and Remedies Code to add breach of fiduciary duty to the list of claims having a four-year limitations period.

There are instances where the applicable statute of limitations is delayed. One such instance is where the statute of limitations is delayed by the discovery rule. The discovery rule is the legal principle which, when applicable, provides that limitations run from the date the plaintiff discovers, or should have discovered in the exercise of reasonable care and diligence, the nature of the injury.[192] The discovery rule applies to a category of cases when the injury complained of is inherently undiscoverable and is objectively verifiable.[193] An injury is inherently undiscoverable if it is the type of injury that is not generally discoverable by the exercise of reasonable diligence.[194]

The discovery rule is particularly important in the case of legal malpractice, where Texas courts have held that such claims are inherently undiscoverable

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[183] *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir.2007).

[184] *Goldstein v. Mortenson*, 113 S.W.3d 769, 778–79 (Tex. App.—Austin 2003, no pet.) (citing *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983)); *see also Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1968) (quoting *Great Nat'l Life Ins. Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964)).

[185] *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996) (quoting *Massey*, 652 S.W.2d at 934).

[186] *Carroll v. Timmers Chevrolet*, 592 S.W.2d 922, 926 (Tex. 1979) (quoting *State v. Standard Oil Co.*, 107 S.W.2d 550, 559 (Tex. 1937)).

[187] *Meadows*, 492 F.3d at 640.

[188] *See* MICHOL O'CONNOR, O'CONNOR'S TEXAS CAUSES OF ACTION (2012).

[189] *Urdiales v. Concord Technologies Delaware, Inc.*, 120 S.W.3d 400 (Tex. App.—Houston [14th Dist.] 2003).

[190] Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (West 2012).

[191] Tex. Bus. & Com. Code Ann. § 17.565 (Vernon 2011).

[192] *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988).

[193] *Hay v. Shell Oil Co.*, 986 S.W.2d 772, 777 (Tex. App.—Corpus Christi 1999, pet. denied).

[194] *Id.*

until the attorney-client relationship has ended.[195] In practice, this puts a serious obligation on the attorney to fully communicate when the engagement has ended. An attorney, or any professional for that matter, would be well-advised to send a disengagement letter when the engagement ends to establish a date from which the statute of limitations starts to run.

Another instance where the applicable statute of limitations is delayed is "tolling." For example, the statute of limitations is tolled when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation.[196] In these cases, the statute of limitations on a malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded.[197]

Yet another instance where the statute of limitations is tolled relates to fraudulent concealment. Fraudulent concealment is a doctrine that bars a malpractice defendant from relying on a limitations defense.[198] According to this doctrine, a professional who fraudulently conceals the existence of a cause of action is estopped from relying on a limitations defense.[199]

B. Comparative Negligence

In Texas, the old rule was that if a plaintiff was even 1% negligent, the plaintiff would be barred from recovery.[200] This is known as "contributory negligence." However, Texas abandoned the old contributory negligence rule and shifted to a "comparative negligence" rule.[201] Under the comparative negligence rule, a plaintiff will be barred from recovery only if his or her percentage of responsibility is greater than fifty percent.[202] The instruction and question on comparative fault may be presented as follows:

> Assign percentages of responsibility only to those you found caused or contributed to cause the [occurrence] [injury] [occurrence or injury]. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to any one need not be the same percentage attributed to that one in answering another question.
>
> QUESTION 1
>
> For each person you found caused or contributed to cause the [occurrence] [injury] [occurrence or injury], find the percentage of responsibility attributable to each[203]:
>
> Plaintiff:_____
>
> Defendant:____
>
> Total:___100%__

Although a plaintiff may be entitled to recovery if his or her share of the negligence is less than 50%, the defendant is nonetheless entitled to a reduction of damages proportional to the percentage of responsibility attributed to the plaintiff.[204]

C. Responsible Third Party

As mentioned above, although a plaintiff may be entitled to recovery if his or her share of the negligence is less than 50%, the defendant is entitled to a reduction of damages proportional to the percentage of responsibility attributed to the plaintiff.[205] One way to reduce a defendant's liability is to designate a responsible third party. Section 33.004 of the Civil Practice and Remedies Code allows a defendant to designate a non-party to the lawsuit as a responsible third party in negligence actions.[206] Nothing compels a responsible third party to actually take part in the suit, leaving defendants to shift blame to the party who is not present in the courtroom to defend themselves—the so-called "empty chair defense."[207]

D. Res Judicata

Res judicata will bar the re-litigation of issues previously litigated in a previous action between the

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[195] *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988).
[196] *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 156–57 (Tex. 1991).
[197] *Id.*
[198] *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001).
[199] *Nichols v. Smith*, 507 S.W.2d 518, 519 (Tex. 1974).
[200] *Parrot v. Garcia*, 436 S.W.2d 897, 901 (Tex. 1969).
[201] *Burkes v. Koppers Co.*, 567 S.W.2d 540 (Tex. Civ. App.—Tyler 1978, no writ).
[202] *See* Tex. Civ. Prac. & Rem. Code Ann. § 33.001 (West 2012).
[203] Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products* PJC 61.6 (2010).
[204] *See* Tex. Civ. Prac. & Rem. Code Ann § 33.012 (West 2012).
[205] *See id.* at § 33.012.
[206] *See id.* at § 33.004.
[207] *Cruz ex rel. Cruz v. Paso Del Norte Health Found.*, 44 S.W.3d 622, 634 (Tex. App.—El Paso 2001, pet. denied).

same parties. For example, a claim for malpractice is a compulsory counterclaim to a claim for professional fees based on the same services.[208] Therefore, in a suit to collect professional fees, the client must assert any related malpractice claims because once judgment on the merits is rendered in the suit for fees, litigation on the malpractice issue is barred.[209]

E. Estoppel, Judicial Estoppel & Quasi-Estoppel

Estoppel is defined in general as conduct which causes the other party to materially alter his position in reliance on that conduct.[210] To invoke the doctrine of estoppel, all the necessary elements of estoppel must be present: (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations.[211]

One of the essential requisites of estoppel is a reasonable or justified reliance on the conduct or statements of the person sought to be estopped by the person seeking the benefit of the doctrine.[212] The purpose of estoppel is for the protection of those who have been misled by that which upon its face was fair. A person may not assert estoppel for the purpose of shielding himself from the results of his own dereliction of duty.[213]

Judicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation.[214] The doctrine is designed to protect the integrity of the judicial process by preventing a party from "playing fast and loose" with the courts to suit its own purposes.[215] Judicial estoppel most clearly applies where a party attempts to contradict its own sworn statements made in prior litigation.[216] "Where sworn statements are at issue, the doctrine serves to uphold the sanctity of the oath, safeguard the administration of justice, and preserve the public confidence in purity and efficiency of judicial proceedings."[217]

Judicial estoppel requires only that a party take an affirmative position which is successfully maintained in the earlier proceeding, and which is contrary to that which it now seeks to invoke.[218] The essential function and justification of judicial estoppel is to prevent the use of intentional self-contradiction as a means of obtaining an unfair advantage.[219] The primary purpose of the doctrine is not to protect litigants, but rather the integrity of the judiciary. Thus, judicial estoppel does not require reliance or prejudice before a party may invoke it.[220]

Quasi-estoppel may be available as a defense. Generally, the doctrine prevents a party from taking, to the disadvantage or injury of the other party, a position that is inconsistent with a position previously taken by the party.[221] The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.[222] Conduct that may give rise to a quasi-estoppel defense can include ratification, election, acquiescence, or acceptance of benefits.[223] Quasi-estoppel requires no showing of a false representation or detrimental reliance.[224]

F. Assignability of Claims

"Although assignments of causes of action are generally permissible, assignments of legal malpractice causes of action between the parties in the underlying litigation violate public policy."[225] This rule addresses a number of public policy concerns: (1) a market in malpractice claims may demean the legal profession; (2) a risk of collusion exists between the assignor and the assignee; (3) assignability of legal malpractice claims may deter attorneys from zealous

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[208] *Goggin v. Grimes*, 969 S.W.2d 135, 138 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *CLS Associates, Ltd. v. A__ B__*, 762 S.W.2d 221, 224 (Tex. App. -- Dallas 1988, no writ).

[209] *Goggins*, 969 S.W.2d at 138.

[210] *Inimitable Group, L.P. v. Westwood Group Dev. II, Ltd.*, 264 S.W.3d 892, 902–03 (Tex. App.—Fort Worth 2008, no pet.).

[211] *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515–16 (Tex. 1998).

[212] *Inimitable Group, L.P.*, 264 S.W.3d at 902–03.

[213] *Id.*

[214] *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988).

[215] *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982).

[216] *In re Ellington*, 151 B.R. 90, 97 (Bkrtcy. W.D. Tex.1993).

[217] *Andrews v. Diamond, Rash, Leslie & Smith*, 959 S.W.2d 646, 649–50 (Tex. App.—El Paso 1997, writ denied).

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000).

[222] *Id.*

[223] *Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd.*, 817 S.W.2d 160, 164 (Tex. App.—Houston [14th Dist.] 1991, no writ).

[224] *Id.*

[225] *City of Garland v. Booth*, 971 S.W.2d 631, 633 (Tex. App.—Dallas 1998, pet. denied).

advocacy on behalf of their clients; (4) an assignment may cause legal services to be less available, especially to clients with inadequate insurance or assets; and (5) an illogical reversal of roles is inherent in allowing a party to sue the adverse party's attorney.[226]

G. Ratification/Waiver

Ratification and waiver are two other possible defenses to a cause of action. Ratification and waiver are usually expressed through conduct that is inconsistent with an intention to rescind the contract or to recover damages.[227] For example, continuing to accept benefits under a contract, or delaying to assert rights after discovering fraud, may be conduct that constitutes ratification or waiver.[228] However, simply because a party had the right and opportunity to investigate prior to entering into an agreement does not mean that the party had full knowledge of the facts so as to support a ratification or waiver defense.[229]

H. Statute of Frauds

The statute of frauds provides certain agreements are unenforceable unless they are in writing and signed by the party to be charged or that person's legal representative.[230] These agreements include: a promise by an executor or administrator to answer out of his own estate for any debt or damage due from his testator or intestate; a promise by one person to answer for the debt, default, or miscarriage of another person; an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation; a contract for the sale of real estate; a lease of real estate for a term longer than one year; or an agreement which is not to be performed within one year from the date of making the agreement.[231] However, an agreement that falls within this statute is not void, but merely voidable.[232] In other words, the statute of frauds only renders an agreement unenforceable against an objecting party.[233] The statute of frauds is an affirmative defense that must be pleaded affirmatively by the party who relies on it to avoid contractual liability.[234] Failure to plead the statute of frauds results in waiver of the defense.[235]

The Texas Supreme Court has held that the statute of frauds bars a fraud claim when the plaintiff seeks to obtain benefit of the bargain damages.[236] The Court noted that if a plaintiff's fraud claim permitted recovery of benefit of the bargain damages, despite the unenforceability of the bargain under the statute of frauds, the statute of frauds would be deprived of any effect.[237]

I. Offer of Settlement

1. DTPA

Under the DTPA, a defendant who receives proper notice may tender an offer of settlement at any time during the period beginning on the date the notice is received and ending on the 60th day after that date.[238] An offer of settlement must include an offer to pay: (1) an amount of money or other consideration, reduced to its cash value, as settlement of the consumer's claim for damages; and (2) an amount of money to compensate the consumer for the consumer's reasonable and necessary attorney's fees incurred as of the date of the offer.[239]

A settlement offer that complies with this section that has been rejected by the consumer may be filed with the court with an affidavit certifying its rejection.[240] If the court finds that the amount tendered in the settlement offer is the same as, substantially the same as, or more than the damages found by the trier of fact, the consumer may not recover as damages any amount in excess of the lesser of (1) the amount of damages tendered in the settlement offer, or (2) the amount of damages found by the trier of fact.[241]

If the court finds that the amount tendered in the settlement offer to compensate the consumer for attorney's fees is the same as, substantially the same as, or more than the amount of reasonable and necessary attorney's fees incurred by the consumer as of the date of the offer, the consumer may not recover attorney's fees greater than the amount of fees tendered in the settlement offer.[242] However, these

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[226] *Id.* at 634.
[227] *PSB, Inc. v. LIT Indus. Texas Ltd. P'ship*, 216 S.W.3d 429, 433 (Tex. App.—Dallas 2006, no pet.).
[228] *Land Title Co. of Dallas, Inc. v. F. M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex. 1980).
[229] *Arroyo Shrimp Farm v. Hung Shrimp Farm*, 927 S.W.2d 146, 154 (Tex. App.—Corpus Christi 1996, no writ).
[230] Tex. Bus. & Com. Code Ann. § 26.01(a) (Vernon 2011).
[231] *Id.*
[232] *Troxel v. Bishop*, 201 S.W.3d 290, 300 (Tex. App.—Dallas 2006, no pet.).
[233] *Bass v. Bass*, 790 S.W.2d 113, 117 (Tex. App.—FortWorth 1990, no writ).
[234] Tex R. Civ. P. 167.
[235] *Praeger v. Wilson*, 721 S.W.2d 597, 602 (Tex. App.—FortWorth 1986, writ ref'd n.r.e.).
[236] *Haase v. Glazner*, 62 S.W.3d 795, 799–800 (Tex. 2001).
[237] *Id.*
[238] Tex. Bus. & Com. Code Ann. § 17.5052(a) (Vernon 2011).
[239] *Id.* at § 17.5052(d).
[240] *Id.*
[241] *Id.* at §§ 17.5052(f), (g).
[242] *Id.* at § 17.5052(h).

limitations on recovery will not apply if the court does not find that the amount tendered was substantially the same as or more than the damages found by the trier of fact. In this case, the court must award as damages the amount of economic damages and damages for mental anguish found by the trier of fact, and attorney's fees, subject to normal damages rules.[243]

2. TRCP ("Loser Pays")

Under the Texas Rule of Civil Procedure 167, certain litigation costs may be awarded against a party who rejects an offer made substantially in accordance with this rule to settle a claim for monetary damages.[244] A settlement offer under this rule may not be made until a defendant—a party against whom a claim for monetary damages is made—files a declaration invoking this rule.[245] When a defendant files such a declaration, an offer or offers may be made under this rule to settle only those claims by and against that defendant.[246] The declaration must be filed no later than 45 days before the case is set for conventional trial on the merits.[247] Once an offer of settlement has been accepted, it cannot later be withdrawn by the defendant.[248]

If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is significantly less favorable to the offeree than was the offer, the court must award the offeror litigation costs against the offeree from the time the offer was rejected to the time of judgment.[249] A judgment award on monetary claims is significantly less favorable than an offer to settle those claims if: (1) the offeree is a claimant and the judgment would be less than 80 percent of the offer; or (2) the offeree is a defendant and the judgment would be more than 120 percent of the offer.[250]

The litigation costs that may be recovered by a defendant under this rule include: (1) court costs; (2) reasonable deposition costs, in cases filed on or after September 1, 2011; (3) reasonable fees for not more than two testifying expert witnesses; and (4) reasonable attorney fees.[251] However, these costs must not exceed the total amount that the claimant recovers or would recover before adding an award of litigation costs under this rule in favor of the claimant or subtracting as an offset an award of litigation costs under this rule in favor of the defendant.[252] In short, if the plaintiff recovers nothing, the defendant cannot recover any attorney's fees or costs, even if the offer of settlement procedures are invoked.[253] The limitation on the award of fees to a percentage of the plaintiff's recovery makes Rule 167 riskier for defendants than plaintiffs in tort cases where the plaintiff would not ordinarily recover attorney's fees. Because the award of litigation costs is limited to a percentage of the plaintiff's recovery, the defendant is not entitled to an award under Rule 167 if he prevails and obtains a take-nothing judgment against the plaintiff.[254] The defendant, on the other hand, runs the risk of having to pay the plaintiff's costs (both legal and expert fees) when it otherwise would not have to do so.[255]

3. Offer of Judgment (Federal Court)

Under Federal Rule of Civil Procedure 68, at least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.[256] If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service.[257] The clerk must then enter judgment.[258] If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.[259]

J. Attorney Qualified Immunity

Generally the duties that arise from the attorney-client relationship are owed solely to the client and those in privity with the attorney, not to third persons such as adverse parties.[260] More specifically, "[u]nder

[243] *Id.* at § 17.5052(j).
[244] Tex. R. Civ. P. 167.1.
[245] Tex. R. Civ. P. 167.2.
[246] *Id.*
[247] *Id.*
[248] Tex R. Civ. P. 167.3.
[249] Tex R. Civ. P. 167.4.
[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] *See Amedisys v. Kingwood Home Health Care, LLC*, 2014 Tex. LEXIS 380 (Tex. 2014) (determining what constitutes offer and acceptance of a settlement under Rule 167).
[254] Tex R. Civ. P. 167.
[255] *Id.*
[256] Fed. R. Civ. P. 68.
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *See Brown v. Green*, 302 S.W.3d 1, 16 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (stating that "[a]n attorney only owes a duty of care to his clients and not to third parties, even if they may have been damaged by the attorney's representation of the client"); *White v. Bayless*, 32 S.W.3d 271, 275–76 (Tex. App.—San Antonio 2000, pet. denied) (affirming summary judgment because attorney owed no duty to adverse party); *Mitchell v. Chapman*, 10

Texas law, attorneys cannot be held liable for wrongful litigation conduct" toward third parties.[261] This rule of attorney protection exists because the third party has not retained the attorney, the attorney's services were not rendered to the third party, no privity of contract exists between the third party and the attorney, and the attorney's duties are owed only to the client.[262] Allowing claims against opposing counsel for litigation misconduct undercuts an attorney's duty to zealously represent his clients within the bounds of the law.[263]

In fulfilling this duty, an attorney has the right to pursue legal rights that he deems necessary and proper without being subject to liability.[264] If attorneys could be held liable to opposing parties for statements made or actions taken in the course of representing their clients they would be forced to balance their own potential exposure against their clients' best interests.[265]

Another reason that a non-client generally has no claim against an opposing lawyer for fraud during litigation is because a party cannot justifiably rely on the opposing party's lawyer representations or silence as a matter of law.[266] Generally speaking, reliance is not justified when the representation or non-disclosure takes place in an adversarial context.[267] As a result of these policy concerns, "[A]n attorney's conduct is not independently actionable by an opposing party to the suit if the conduct is part of the discharge of the lawyer's duties in representing his or her client."[268]

In *Sacks v. Zimmerman*, the 14th District Court of Appeals held that an invasion of privacy claim will not work to remove an attorney's immunity as it is not recognized as falling within fraudulent conduct. 401 S.W.3d 336, 342 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). The claim that the plaintiff's medical records were illegitimately obtained by opposing counsel were not only unsupported by evidence, but such a claim, taken as true, described "the type of conduct in which attorneys routinely engage when zealously defending their clients" and thus could not form the basis for fraudulent conduct. *Id.* In a more recent case, the same court reversed a JNOV, holding that attorney immunity will not apply to an attorney's conduct when he executed a Letter Agreement as the bank's agent, despite knowing that the bank had no intentions of performing. *Jjjj Walker v. Yollick*, 2014 Tex. App. LEXIS 6149 at *40 (Tex. App.—Houston [14th Dist.] 2014, no pet. history). The duty to not "intentionally or recklessly make false statements for the purpose of fraudulently inducing another to enter a contract," the court held, "is an independent duty that applies to lawyers and non-lawyers alike." *Id.* at *27.

K. Non-fracturing Rule

Texas law does not permit a plaintiff to divide or fracture her legal malpractice claims into additional causes of action."[269] In general, courts do not allow a case arising out of an attorney's alleged bad legal advice or improper representation to be split out into

S.W.3d 810, 811 (Tex. App.—Dallas 2000, pet. denied) (affirming summary judgment in favor of defendant in "a suit filed by an unsuccessful litigant against an opposing attorney," on grounds that relationship between lawyer and third party "was clearly adversarial" and lawyer "owed no legal duty" to the third party).

[261] *Renfroe v. Jones & Assocs.*, 947 S.W.2d 285, 288 (Tex. App.—Fort Worth 1997, writ denied); *see also Chu v. Hong*, 249 S.W.3d 441, 444 & n. 19 (Tex. 2008) (stating that court was "especially reticent to open the door" to claims against an opposing party's attorney and that "fraud actions cannot be brought against an opposing attorney in litigation as reliance in those circumstances is unreasonable"); *Alpert v. Grain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (attorney qualified immunity bars lawsuits against opposing counsel "even if the conduct is wrongful in the context of the underlying lawsuit").

[262] *Jurek v. Kivell*, 01-10-00040-CV, 2011 WL 1587375 (Tex. App.—Hous. [1st Dist.] Apr. 21, 2011, no pet.).

[263] *Alpert*, 178 S.W.3d at 405; *see also Bradt v. West*, 892 S.W.2d 56, 71–72 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (stating that public has interest in "loyal, faithful and aggressive representation by the legal profession").

[264] *Bradt*, 892 S.W.2d at 71.

[265] *Id.*; *see also Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 440 (Tex.App.—Houston [14th Dist.] 2000, pet. denied) (noting that attorney's concern of being sued "would favor tentative rather than zealous representation of the clients" and allowing such lawsuits "would dilute the vigor with which Texas attorneys represents their clients and would not be in the best interests of justice.").

[266] *See McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999).

[267] *Id.*

[268] *Alpert*, 178 S.W.3d at 406; *see also Chapman Children's Trust*, 32 S.W.3d at 441 (affirming summary judgment on fraud and conspiracy claims by opposing party because law firm's actions were undertaken in discharge of its duties to its client).

[269] *Kahlig v. Boyd*, 980 S.W.2d 685, 688–91 (Tex. App.—San Antonio 1998, pet. denied); *Smith v. Heard*, 980 S.W.2d 693, 697 (Tex. App.—San Antonio 1998, pet. denied); *Rodriguez v. Klein*, 960 S.W.2d 179, 184 (Tex. App.—Corpus Christi 1997, no pet.); *Am. Med. Elecs., Inc. v. Korn*, 819 S.W.2d 573, 576 (Tex. App.—Dallas 1991, writ denied); *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Bray v. Jordan*, 796 S.W.2d 296, 298 (Tex. App.—El Paso 1990, no writ).

separate claims for negligence, breach of contract, or fraud, because the "real issue remains one of whether the professional exercised that degree of care, skill, and diligence that professionals of ordinary skill and knowledge commonly possess and exercise."[270]

"[T]he plaintiff must do more than merely reassert the same claim for legal malpractice under an alternative label. The plaintiff must present a claim that goes beyond what traditionally has been characterized as legal malpractice."[271] Each cause of action is taken in turn to see whether this has been accomplished.

L. In Pari Delicto

The defense of *in pari delicto* requires Texas Courts, as a general rule, to decline to enforce illegal contracts when the contracting parties are equally blameworthy.[272] "The equitable defense of *in pari delicto*, which literally means, 'in equal fault,' is rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct."[273]

For example, Texas courts will neither aid in the enforcement of an illegal executory contract, nor relieve from an illegal contract, a party who has executed it.[274] As the Texas Supreme Court has observed:

> The general rule that denies relief to a party to an illegal contract is expressed in the maxim, In pari delicto potior est conditio defendantis. The rule is adopted, not for the benefit of either party and not to punish either of them, but for the benefit of the public.[275]

As a result, Texas courts leave the parties to such executed, unlawful contracts in the position in which they, by their voluntary acts, have placed themselves.[276] The *in pari delicto* rule applies not only to contract, but also to tort claims.[277]

M. Failure to Mitigate Damages

An injured person cannot recover damages that can be avoided by the care and treatment of an injury which an ordinarily prudent person would exercise in the same or similar circumstances.[278] Where evidence raises the issue, the jury should be appropriately instructed.[279] Under the Texas Pattern Jury Charge, the jury may be instructed to "not include in your answer any amount that you find *Plaintiff* could have avoided by the exercise of reasonable care."[280]

IV. MALPRACTICE INSURANCE POLICIES

Malpractice insurance policies are designed to protect professionals from personal liability for acts committed in the practice of their profession. Policies can shield professionals from liability arising out of any error, mistake or negligence occurring in the course of practice. Malpractice insurance policies may also protect professionals from liability arising out of actual malpractice.[281]

A. Types of Policies

"Occurrence" policies provide coverage for any acts or omissions that occur during the policy period, regardless of when the claim is made.[282] Thus, professionals with this type of coverage will be indemnified for any act that occurs during the specific policy period.[283] This type of coverage was more

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[270] *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2003, pet. denied) (citing *Averitt v. PriceWaterhouseCoopers L.L.P.*, 89 S.W.3d 330, 333 (Tex. App.—Fort Worth 2002, no pet.); *Sledge v. Alsup*, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ) ("Nothing is to be gained by fracturing a cause of action arising out of bad legal advice or improper representation into claims for negligence, breach of contract, fraud or some other name. If a lawyer's error or mistake is actionable, it should give rise to a cause of action for legal malpractice with one set of issues which inquire if the conduct or omission occurred, if that conduct or omission was malpractice and if so, subsequent issues on causation and damages.").

[271] *Duerr v. Brown*, 262 S.W.3d 63, 70 (Tex. App.—Houston [14th Dist.] 2008).

[272] *Geis v. Colina Del Rio, LP*, 362 S.W.3d 100, 106–08 (Tex. App.—San Antonio 2011, pet. denied).

[273] *Pinter v. Dahl*, 486 U.S. 622, 632 (1988).

[274] *Herrmann v. Lindsey*, 136 S.W.3d 286, 290 (Tex. App.—San Antonio 2004, no pet.).

[275] *Lewis v. Davis*, 199 S.W.2d 146, 151 (1947) (citations omitted).

[276] *Id.* at 291.

[277] *Krishnan v. Garza*, 570 S.W.2d 578, 582 (Tex. Civ. App.—Corpus Christi 1978).

[278] *Moulton v. Alamo Ambulance Service*, 414 S.W.2d 444, 446 (Tex. 1967).

[279] *Id.*

[280] Comm. On Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 115.7 (2010).

[281] *See* LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12, PROFESSIONAL LIABILITY INSURANCE (Matthew Bender).

[282] *Id.*

[283] *Id.*

popular in the past than it is today. Today, most malpractice policies are "claims-made policies."[284]

A claims-made policy indemnifies professionals against all claims made during the policy period, regardless of when the incidents that gave rise to the claims occurred.[285] However, this type of policy provides no protection to professionals for claims that are made after the policy expires.[286] Therefore, it is imperative for a professional to obtain coverage for delayed claims that may be filed after the professional switches practices, retires, becomes disabled, or dies. It is important for professionals to discuss the availability of extended discovery coverage (long-tail coverage) with their insurers.[287]

In addition to extended discovery coverage, professionals should also be aware of their policy's "retro date." As mentioned above, most policies are "claims-made" policies, meaning the relevant date of coverage is when the claim against the professional is made, not the date the alleged negligent act occurred. However, a "retro date" limits a policy's coverage to acts or omissions that occur after the retro date. Any alleged act or omission before the retro date is not covered, even if the claim is made within the coverage period of the policy.

For example, if the policy is entered into on January 1st, 2012, with a retro date of January 1, 2010, a claim of fraud brought on January 1, 2013 that arose from a representation allegedly made 3½ years earlier **would not** be covered by the existing policy. And if the extended discovery coverage of the professional's previous policy did not extend to January 1, 2013, the professional would be **without coverage** for the claim, even though the professional maintained continuous E & O coverage.

B. Liability Limitations

Malpractice policies generally provide two liability limits and a deductible amount to be paid by the professional (insured). The first liability limit is a limitation as to each claim. This limitation establishes the insurer's total liability for all damages arising out of the professional services, irrespective of the number of claims.[288] The second liability limit is the aggregate limit; this is the maximum liability of the insurer for all covered claims that occur during the policy period.[289]

Having a policy with defense costs inside the limit of liability (burning-limits policy) diminishes the coverage to pay damages on a dollar-for-dollar basis for each dollar paid for defense costs.[290] A policy with a separate defense limit does not diminish when litigation/defense costs are incurred.[291]

C. Consent to Settle

Under most malpractice policies, the insured's consent is required in order for a claim or suit to settle.[292] The reason for this is the fact that a settlement may adversely affect a professional's reputation. However, some malpractice policies carry consequences if an insured refuses to consent to a reasonable settlement. For instance, refusal to consent to a reasonable settlement may carry with it a possible limitation of the insurer's liability to the amount for which the case could have been settled.[293]

D. Reservation of Rights

When an insurer receives a claim, he must review it to determine whether or not it is covered under the insured's policy. If the claim is covered, the insurer must then make certain that the claim is defended.[294] If the policy provides for the insurer to control defense of the claim, the insurer needs to assign the claim to a defense counsel and notify the insured.[295] On the other hand, if the policy provides for the insured to control the defense of the claim, the insurer should notify the insured of its intention to have the claim defended.

Insurer's often issue "reservation of rights" letters in which the insurer will examine the allegations against its insured in terms of policy coverage and then indicate that it is reserving its rights to disclaim under specified provisions of the policy should certain

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[284] *See* LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12C, ATTORNEY'S LIABILITY INSURANCE (Matthew Bender).
[285] *Id.*
[286] *Id.*
[287] LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12 , MEDICAL MALPRACTICE LIABILITY INSURANCE (Matthew Bender).
[288] *Id.*
[289] *See* LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12 , MEDICAL MALPRACTICE LIABILITY INSURANCE, CHAPTER 12C, ATTORNEY'S LIABILITY INSURANCE (Matthew Bender); TEXAS TRANSACTION GUIDE, CHAPTER 59, INSURANCE GUIDE FOR COMMERCIAL ENTERPRISES (Matthew Bender).
[290] *SEE* LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12, PROFESSIONAL LIABILITY INSURANCE (Matthew Bender).
[291] *Id.*
[292] *Id.*
[293] *See* LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12, MEDICAL MALPRACTICE LIABILITY INSURANCE, CHAPTER 12C, ATTORNEY'S LIABILITY INSURANCE (Matthew Bender); TEXAS TRANSACTION GUIDE, CHAPTER 59, INSURANCE GUIDE FOR COMMERCIAL ENTERPRISES (Matthew Bender).
[294] *Id.*
[295] *Id.*

allegations be sustained. *Id.* To ensure a disclaimer of liability, reservation of rights letters attempt to cover every basis by which the insurer could later disclaim responsibility.[296] There is no set time limit for issuing reservation of rights letters, but courts usually require it to be done at the very outset of the case.[297]

E. Choice of Counsel

Many insurers seek to enter into defense agreements with the insured and defense counsel. This occurs most often when the insurer has the duty to defend the claim and therefore is entitled to control the defense under policy terms. For example, the defense agreement may specifically approve of the insured's choice of defense counsel, as well as defense counsel's billing rates and guidelines regarding payment of defense expenditures.[298]

V. TIPS FOR AVOIDING MALPRACTICE CLAIMS

1. Document everything!
   * If it's not written down, then it didn't happen.
   * Without documentation, it will be a swearing match with the client.
   * Professionals should document phone call returns.
   * Fee agreements should be written within the bounds of the profession.
2. Reduce your digital footprint.
3. Know who your client is and be alert to conflicts.
4. Treat clients with respect.
   * All letters and emails are Exhibit # 1.
   * If it's too good to be true, it probably is.
   * Spend 80% of your time on 20% of your business.
5. Don't blame something on a prior professional's negligence.
6. Don't change records.
7. Establish a document retention policy and stick with it.
8. Put client's interest ahead of your own profit motive.
9. Disclose, disclose some more, then document and confirm.
10. Think twice before you sue a client for fees.
11. Use an engagement letter.
12. Implement policies & procedures for catching mistakes early.

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[296] *See, e.g., American Employers' Ins. Co. v. Brock*, 215 S.W.2d 370 (Tex. Civ. App.—Dallas 1948, writ ref'd n.r.e.).

[297] *United States Cas. Co. v. Home Ins. Co.*, 192 A.2d 169 (N.J. 1963).

[298] *See* LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12 , MEDICAL MALPRACTICE LIABILITY INSURANCE, CHAPTER 12C, ATTORNEY'S LIABILITY INSURANCE (Matthew Bender).