HANDLING PROFESSIONAL LIABILITY CASES IN TEXAS

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I. Introduction

This article is an overview of the various theories of liability and defense in claims against professionals in Texas. It is intended to serve as a reference point for anyone involved in a professional liability case and, 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 professional liability including negligence, negligent misrepresentation, breach of fiduciary duty, breach of contract, and fraud, with a particular emphasis on negligence. The next section of this article briefly covers defenses to these various claims. 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 provides tips on how to avoid malpractice claims altogether.

II. Malpractice Actions

The literal translation of "malpractice" is "bad practice." Accordingly, a plaintiff in a malpractice suit seeks to impose liability on a professional for an alleged "bad practice." Professional malpractice includes the intentional and negligent conduct of professionals in the course of providing services to their clients.[1] Professional liability actions can be based on tort, contract, or statute.[2] The law understands and presumes that there is a range of acceptable conduct for professionals given the circumstances presented—thus the law does not impose liability merely because a bad result occurs.[3] However, it is important to remember that while a bad result alone does not create liability for a professional, it may well result in a lawsuit. What follows below is an overview of the types of claims made against professionals in Texas.

In a professional liability case negligence is defined as the failure to use the ordinary care required by the same kind of professional under the same or similar circumstances.

A. Negligence

In a professional liability case negligence is defined as the failure to use the ordinary care required by the same kind of professional under the same or similar circumstances.[4] Ordinary care is defined as "that degree of care that would be used by a reasonably prudent person under the same or similar circumstances."[5] However, a professional has a duty imposed by law to act as a reasonably prudent "professional" (as opposed to a "person") under the circumstances:

> 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. . . .[6]

In most professional liability cases premised on negligence the presumption is that the jurors are not "experts" regarding the ordinary care of a particular professional.[7] When jurors are asked to decide professional negligence claims they are frequently guided by experts who provide testimony and opinions as to the duty of care owed by the members of a particular profession.[8] Professional liability cases are thus considered "expert intensive" when compared to other types of cases.

1. Duty of Care

The first issue that must be analyzed in any professional 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 professionals. In Texas, professionals are required to be licensed and are generally subject to review by governing boards. These governing boards are empowered to make rules regulating the practice of the profession.

Ordinarily before a duty arises a professional-client relationship usually must exist.[9] In the professional 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.[10] Your contract with the client

is a prime example of an express intention to establish such a relationship. It is the contract that should set the boundaries of the express duties owed to the client. A duty may also arise through an implied professional-client relationship—such as when a professional advises a potential client over the phone without first expressing that the individual is not yet a client.[11] Duties can even arise when no professional-client relationship exists.[12]

2. Breach of Duty & Establishing the Standard of Care

Regardless of whether a claim is brought against a doctor, lawyer, accountant, engineer, architect, insurance agent, real estate broker or any other professional, a breach of duty requires proof that the ordinary care of that profession was not exercised.[13] Even though the standards of care may vary from profession to profession, it is expected that the professional will exercise the degree of care and skill necessary for his or her discipline.[14] This rule recognizes a professional's special knowledge and ability as one of the relevant conditions necessary for the determination of what constitutes ordinary care for a particular profession.[15]

3. Expert Witness Requirements

The standard of care required of a professional is usually a matter that must be established by an expert in the field. The jury often needs "assistance" in determining the standard of care for a certain profession 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 professional under the circumstances.[16]

a. Qualification of an Expert

An expert witness must be qualified to provide an opinion in the relevant field under examination.[17] According to the Texas Rules of Evidence, the qualification of an expert is a preliminary question to be decided by the trial court.[18] 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.[19] The Texas Supreme Court has held that Rule 702 requires that the expert's testimony be relevant to the issues in the case and based upon a reliable foundation.[20] As a result, trial courts in Texas are now responsible for making preliminary determinations of whether the proffered expert testimony meets the required standards.[21] Judges are to act as "gatekeepers" in determining the admissibility of expert testimony,[22] considering a variety of factors. 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.[23]

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.[24] 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.[25]

b. Same School of Practice & Locality Rules

The standard of care is generally established by the testimony of an expert from the same school of practice as the professional defendant.[26] This principle has come to be known as the "same school of practice rule." Under this rule, a defendant in a professional malpractice case is entitled to have their conduct analyzed by the standard of care relevant to their discipline.[27] 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.[28] 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.[29]

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.[30] 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.[31] The Texas Supreme Court has held that if there are universally accepted standards, the locality rule is inapplicable.[32] 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.[33]

c. Summary Judgment
The establishment or preclusion of summary judgment on a claim for negligence is dependent upon expert testimony.[34] While the testimony of an expert can support summary judgment, the testimony must be clear, direct, otherwise credible, and free from contradictions and inconsistencies.[35] 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.[36] 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.

4. Proximate Causation
In a professional malpractice action based on negligence, the client must prove that his or her injury was proximately caused by the professional's breach of duty.[37] The two elements of proximate causation are cause-in-fact and foreseeability.[38] 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.[39] Foreseeability requires that the professional, as a person of ordinary intelligence, would have anticipated the danger that their negligent act created for others.[40] However, it is not a requirement that the professional anticipate the exact manner in which injury will occur.[41] Foreseeability is not measured by hindsight, but instead by what the actor knew or should have known at the time of the alleged negligence.[42] 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.[43] 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.[44]

5. Damages
Negligence without injury or damage is not compensable.[45] Injury can be established by showing physical injury, economic loss, and other detriment sustained by the plaintiff.[46] Because actual damage is one of the essential elements in a negligence claim a plaintiff has the burden of proving the existence of damages.[47] In a legal malpractice case mental anguish damages may not be recovered when the mental anguish is a consequence of purely economic losses caused by an attorney's negligence.[48]

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.[49] 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.[50] Additionally, in medical malpractice actions, the Texas legislature has placed statutory limits on recoverable damages against a physician, health care provider, or health care institution.[51]

B. Other Causes of Action
1. Fraud & Misrepresentation
Claims arising from an alleged misrepresentation can arise under different theories, depending on whether the speaker knew of the statement's falsehood.

a. Common-Law Fraud
Common-Law 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.[52] All elements must be established before recovery will be permitted.[53]

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.[54] Additionally, the plaintiff's reliance must have been justified.[55] If the plaintiff knew the representation was false, there can be no justifiable reliance.[56] Finally, recovery for fraud will not be permitted unless the fraud resulted in actual injury or damage to the person defrauded.[57] An injury occurs when legal liabilities or obligations are incurred which would not have been incurred but for the fraud.[58]

b. Statutory Fraud
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.[59] Both false representations and false promises may constitute fraud under the statute.[60] 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.[61] However, statutory fraud usually offers recovery of damages not otherwise available under the common-law.[62] 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.[63]

c. Negligent Misrepresentation

If an injured party is unable to bring a case based on fraud, an action for negligent misrepresentation may be available.[64] Negligent misrepresentation differs from common-law fraud in that it does not require knowledge by the professional of the falsity or reckless disregard of the truth.[65] Texas has adopted the Restatement (Second) of Torts § 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.[66]

A recovery for negligent misrepresentation is limited to the pecuniary loss suffered by the plaintiff as the result of reliance on the misrepresentation,[67] including the difference between the value of what the plaintiff received in the transaction and the purchase price.[68] However, the plaintiff is not entitled to recover "benefit of the bargain" losses between the plaintiff and the defendant[69] or mental anguish damages.[70] Also, available damages do not include any lost profits resulting from the misrepresentation.[71]

Negligent misrepresentation has emerged as an attractive theory of liability for non-clients asserting claims against professionals because liability under Section 552 does not require privity of contract. Liability is based not on the breach of a duty that the professional owes to a client, but instead on an independent duty arising from the professional's awareness of a person's reliance on the misrepresentation and the intention that the person so rely.[72] That independent duty, however, still requires proof of the standard of care and breach of that duty.[73]

2. 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.[74] 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.[75] There are two types of damages that are recoverable in a breach of contract action: direct damages and consequential damages.[76] 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.[77] As such, a consequential loss must be shown to have been a foreseeable result of a breach at the time the contract was made.[78]

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.[79] 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.[80] Attorney's fees, on the other hand, are recoverable: fees necessarily incurred in the prosecution of the action are permitted by either the general attorney's fees statute,[81] or as expressly provided in the contract itself.

3. Breach of Fiduciary Duty

A fiduciary duty is the most rigorous civil duty recognized by law. The fiduciary owes the beneficiary the duties of loyalty and good faith; integrity of the strictest kind; fairness; honest dealing; and the duty of full disclosure.[82] Fiduciaries must do more than act fairly and in good faith—it has been stated that the duty encompasses the requirement to place the interest of the beneficiary ahead of the fiduciary's own interest.[83] Fiduciary duties can also encompass a requirement to preserve client confidences; to account; to follow instructions; to property manage/supervise trust funds; refrain from self dealing; and not to usurp opportunities.

a. Existence of Fiduciary Relationship

The law recognizes certain relationships impose fiduciary duties, for example: lawyer/client; trustee/beneficiary; and agent/principal. Other relationships can rise to the level of a fiduciary relationship as a matter of law depending on the services to be provided.[84] Fiduciary relationship may arise from formal, informal, or contractual relationships.[85] An informal fiduciary duty may arise from a moral, social, domestic, or purely personal relationship of trust and confidence.[86]

Attorneys, real estate agents and Certified Financial Planners are clearly recognized as having fiduciary duties to their clients. CPAs, on the other hand, do not always have such duties.[87] Stock brokers simply owe a duty to carry out a customer's orders, unless they cross the line to become "financial advisers" and thus are treated as fiduciaries.[88] Insurance agents owe a fiduciary duty to their insurers under agency contracts.[89] Associates at law firms owe a fiduciary duty to their employers not to personally profit at the expense

of the firm with regard to business.[90] Condominium board members are fiduciaries to each condo unit owner under the Texas Property Code.

b. Fiduciary Duty v. Negligence

Because a breach of duty is required for a claim of negligence, sometimes the same act can amount to a breach of fiduciary duty. 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.[91] 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".[92] Where the "gist of the complaint" is essentially that the professional 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.[93]

4. Intentional Torts

Though alleged less often, a plaintiff can bring claims against a professional for intentional torts. These claims include assault, battery, false imprisonment, intentional infliction of emotional distress, trespass to chattels, and conversion.[94] 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.[95]

III. Defenses to Claims

A wide range of defenses are available in malpractice actions, such as statute of limitations, comparative negligence, res judicata, estoppel, ratification, or economic loss rule. Special consideration must be given to instances where the applicable statute of limitations is delayed due to the discovery rule, tolling, or fraudulent concealment. The discovery rule is particularly important in the case of legal malpractice, where Texas courts have held that such claims are "inherently undiscoverable" until the attorney-client relationship has ended.[96] 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.

Additionally, certain professionals have statutory protections. For example, a plaintiff cannot sue an architect, engineer or surveyor without a certificate of merit—essentially an affidavit from same kind of professional stating how defendant was negligent—accompanying the petition.[97] Similarly, within a short time of bringing suit against a medical professional, a certificate of merit must be supplied or the case will be dismissed.[98]

Other professionals may be entitled to immunity. For example, under Texas law, attorneys cannot be held liable for wrongful litigation conduct toward third parties.[99] 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.[100] Allowing claims against opposing counsel for litigation misconduct undercuts an attorney's duty to zealously represent his clients within the bounds of the law.[101]

Third Party Defendants and Responsible Third Parties may be named for purposes of reducing a professionals overall percentage of responsibility for a loss.[102] If another person or entity can be blamed for part of the loss but they have no "money" they can be named as a Responsible Third Party for purposes of achieving a reduction in liability exposure for the professional.[103]

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.[104]

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.[105] Thus, professionals with this type of coverage will be indemnified for any act that occurs during the specific policy period.[106] This type of coverage was more popular in the past than it is today. Today, most malpractice policies are claims-made policies.[107]

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.[108] However, this type of policy provides no protection to professionals for claims that are made after the policy expires.[109] Therefore, it is imperative for a professional to obtain coverage for delayed claims that may be filed after the professional retires, becomes disabled, or dies. It is important for professionals to discuss

the availability of extended discovery coverage ("long-tail coverage") with their insurers.[110]

In addition to extended discovery coverage, professionals should also be aware of their policy's "retro date." 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.

B. Liability Limitations

Malpractice policies generally provide two liability limits and a deductible amount to be paid by the professional (insured). Generally, a deductible requires the insured to pay defense costs up until the deductible amount is satisfied and insurance coverage kicks in and/or require the insured to pay the deductible amount as part of any settlement.

The first liability limit is a limitation as to each claim and establishes the insurer's total liability for all damages arising out of the professional services, irrespective of the number of claims.[111] 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.[112]

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.[113] In other words, every dollar paid for defense costs reduces the amount of coverage available to pay damages or settlement. A policy with a separate defense limit does not diminish when litigation/defense costs are incurred.[114]

C. Consent to Settle

Under most malpractice policies, the insured's consent is required in order for a claim or suit to settle.[115] 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.[116]

D. 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.[117]

V. Tips for Avoiding Malpractice Claims

1. Document everything!
   * If it's not memorialized (written/electronic), then it didn't happen.
   * Without documentation, litigation will be a swearing match with the client.
   * Professionals should document phone call returns.
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.
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.
    * Fee agreements should be written within the bounds of the profession
12. Implement policies & procedures for catching mistakes early.

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

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

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

4 *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).

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

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

[7] *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).

[8] *See id.*

[9] *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.).

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

[11] *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).

[12] *See, e.g.*, Negligent Misrepresentation, *infra* § II. B.

[13] *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).

[14] *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.).

[15] *See id.*

[16] *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.).

[17] Tex. R. Evid. 702.

[18] Tex. R. Evid. 104(a).

[19] Tex. R. Evid. 702; *Broders v. Heise*, 924 S.W.2d 148, 152–53 (Tex. 1996).

[20] *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

[21] *Id.* at 556.

[22] *Id.*

[23] *Id.* at 557.

[24] *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998).

[25] *Id.* at 725–26.

[26] *See Wilson v. Scott*, 412 S.W.2d 299, 301–02 (Tex. 1967).

[27] *See Christian v. Jeter*, 445 S.W.2d 51, 54 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.).

[28] 262 S.W.2d 933 (Tex. 1954).

[29] *Metot v. Danielson*, 780 S.W.2d 283, 287 (Tex. Civ. App.—Tyler 1989, writ denied).

[30] *Chrisitan v. Jeter*, 445 S.W2d 51, 53–54 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.).

[31] *See Ballesteros v. Jones*, 985 S.W.2d 485, 494–95 (Tex. App.—San Antonio 1998, pet. denied).

[32] *See Webb v. Jorns*, 488 S.W.2d 407, 411 (Tex. 1972).

[33] *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).

[34] *See Hart v. Van Zandt*, 399 S.W.2d 791, 792 (Tex. 1966).

[35] *See* Tex. R. Civ. P. 166a(c); *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991).

[36] *Id.*; *Perez v. Cueto*, 908 S.W.2d 29, 31–32 (Tex. App.—Houston [14th Dist.] 1995, no writ).

[37] *Williams v. Steves Industries, Inc.*, 699 S.W.2d 570, 575 (Tex. 1985).

[38] *Id.*

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

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

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

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

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

[44] *Id.*

[45] *Nabours v. Longview Sav. & Loan Ass'n*, 700 S.W.2d 901, 909 (Tex. 1985).

[46] *Id.*

[47] *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987).

[48] *Douglas v. Delp*, 987 S.W.2d 879, 884–85 (Tex. 1999).

[49] 29 S.W.3d 282, 285–290 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.).

[50] *See Southwestern Bell Tel. Co. v. Delanney*, 809 S.W.2d 493, 494 (Tex. 1991).

[51] Tex. Civ. Prac. & Rem. Code Ann. § 74.301 (West 2012).

[52] *De Santis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990).

[53] *Id.*

[54] *Johnson & Johnson Medical v. Sanchez*, 924 S.W.2d 925, 929–30 (Tex. 1995).

[55] *Coastal Corp. v. Atlantic Richfield Co.*, 852 S.W.2d 714, 720–21 (Tex. App.—Corpus Christi 1993, no writ).

[56] *Id.* at 720.

[57] *The M.D. Anderson Cancer Center v. Novak*, 52 S.W.3d 704, 707–08 (Tex. 2001).

[58] *Turner v. Houston Agr. Credit Corp.*, 601 S.W.2d 61, 64 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

[59] Tex. Bus. & Com. Code Ann. § 27.01 (Vernon 2011).

[60] *Id.* at § 27.01(a)(1)–(2).

[61] *El Paso Development Company v. Ravel*, 339 S.W.2d 360, 364–65 (Tex. App.—El Paso 1960, writ ref'd n.r.e.).

[62] *See, e.g.,* Tex. Bus. & Com. Code Ann. § 27.01(b)–(e) (Vernon 2011).

[63] *Id.*

[64] *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.).

[65] *Larsen v. Carlene Langford & Associates*, 41 S.W.3d 245, 250 (Tex. App.—Waco 2001, pet. denied).

[66] *Federal Land Bank v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).
[67] *Id.* at 442–43.
[68] *Id.*
[69] Restatement (Second) of Torts § 552B (2); *D.S.A., Inc. v. HISD*, 973 S.W.2d 662, 663–64 (Tex. 1998).
[70] *Fed'l Land Bank*, 825 S.W.2d at 442.
[71] *Id.* at 443 n.4.
[72] *McCamish, Martin, Etc. v. F.E. Appling*, 991 S.W.2d 787, 792 (Tex. 1999).
[73] *Id.*
[74] *Methodist Hospitals v. Corporate Com.*, 806 S.W.2d 879, 882 (Tex. App.—Dallas 1991, writ. denied).
[75] *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991).
[76] *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007).
[77] *Id.*
[78] *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997).
[79] *Waite Hill Services v. World Class Metal*, 959 S.W.2d 182, 184–85 (Tex. 1998).
[80] *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).
[81] *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (West 2012).
[82] *Hartford Cas. Ins. v. Walker County Agency, Inc.* 808 S.W.2d 681, 688 (Tex. App.—Corpus Christi 1991, no writ).
[83] *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.* 823 S.W.2d 591, 594 (Tex. 1992).
[84] *Lundy v. Masson*, 260 S.W.3d 482, 501–02 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).
[85] *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 698 (Tex. App.—Fort Worth 2006, pet. denied).
[86] *Id.*
[87] *See Shoostari v. Sweeten*, 2003 Tex. App. LEXIS 7138 (Tex. App.—Corpus Christi, 2003); *Squyres v. Christian*, 253 S.W.2d 470, 471 (Tex.Civ.App—Ft. Worth 1952, writ ref'd n.r.e.).
[88] *Western Reserve Life Assur. Co. v. Graben* 233 S.W.3d 360 (Tex. App.—Ft. Worth, 2007).
[89] *Hartford Cas. Ins. Co. v. Walker Cty. Agency, Inc.*, 808 S.W.2d 681, 687-88 (Tex. App.—Corpus Christi 1991, no writ).
[90] *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 202 (Tex. 2002).
[91] *See Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 104.2 (2010).
[92] *Id.*
[93] *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002, no pet.).
[94] *See* MICHOL O'CONNOR, O'CONNOR'S TEXAS CAUSES OF ACTION (2012).
[95] *Urdiales v. Concord Technologies Delaware, Inc.*, 120 S.W.3d 400 (Tex. App.—Houston [14th Dist.] 2003).
[96] *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988).
[97] Tex. Civ. Prac. & Rem. Code. § 150.002(a)–(b).
[98] Tex. Civ. Prac. & Rem. Code. § 74.001 *et seq.*
[99] *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481–83 (Tex. 2015); *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").
[100] *Jurek v. Kivell*, 01-10-00040-CV, 2011 WL 1587375 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.).
[101] *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").
[102] *See* Tex. Civ. Prac. & Rem. Code § 33.012.
[103] *Id.*
[104] *See* LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12, PROFESSIONAL LIABILITY INSURANCE (Matthew Bender).
[105] *Id.*
[106] *Id.*
[107] *See* LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12C, ATTORNEY'S LIABILITY INSURANCE (Matthew Bender).
[108] *Id.*
[109] *Id.*
[110] LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12, MEDICAL MALPRACTICE LIABILITY INSURANCE (Matthew Bender).
[111] *Id.*
[112] *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).
[113] *See* LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12, PROFESSIONAL LIABILITY INSURANCE (Matthew Bender).
[114] *Id.*
[115] *Id.*
[116] *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).
[117] *See* LONG, THE LAW OF LIABILITY INSURANCE, CHAPTER 12, MEDICAL MALPRACTICE LIABILITY INSURANCE, CHAPTER 12C, ATTORNEY'S LIABILITY INSURANCE (Matthew Bender).