



MALPRACTICE AVOIDANCE

Chad Baruch
Johnston Tobey Baruch, P.C.
chad@jtlaw.com
www.jtlaw.com

Anatomy of a Legal Malpractice Claim

- Duty
- Breach
- Proximate Cause
 - Foreseeability
 - But For
- Damages

DUTY

- Privity Rule – Generally only the client can sue the lawyer
- Assignments of legal malpractice claims are not permitted – *Zuniga v. Groce Locke & Hebdon* “Commercial marketing of legal malpractice claims by strangers would demean the legal profession.”

Malpractice Claims

- *Elizondo v. Krist*, 415 S.W.3d 259 (Tex. 2013).
- *Rogers v. Zanetti*, 518 S.W.3d 394 (Tex., 2017).
- Do not always need an expert on causation, when any reasonable juror can understand.
- Need not prove “case-within-a-case” where alleged malpractice does not implicate the merits of an underlying lawsuit.
- Use traditional “but-for” cause-in-fact analysis.
- Exceptional scrutiny of expert affidavits in these cases.

Malpractice

- *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016).
- Resolves long-running debate about judicial mistakes.
- What happens when you lose the lawsuit because the judge makes a bad ruling?
- Of course, you can always Monday-morning quarterback (and these clients did plenty of it).
- SCOTX says intervening cause where: (1) wrong, (2) not due to lawyers, and (3) the specific error could not reasonably be anticipated.

DAMAGES FOR LEGAL MALPRACTICE

- Damages must be proximately caused by the attorney's breach of the standard of care.
- Mental anguish damages may be recovered if they were an element of the claim that was lost, but not from mental anguish caused by the attorney's negligence. *Douglas v. Delp*, 987 S.W.2d 879 (Tex. 1999).
- Attorneys' fees may be recovered to the extent the fees were proximately caused by the defendant attorney's negligence. *Akin Gump Strauss Hauer & Feld, L.L.P. v. National Development and Research Corporation*, 299 S.W.3d 106 (Tex. 2009).

LIMITATIONS

- Legal malpractice – 2 years
- Breach of fiduciary duty – 4 years
- The Discovery Rule applies
- Litigation Tolling Rule applies to malpractice committed in the course of the prosecution or defense of a claim that results in litigation and limitations are tolled until the lawsuit is over.
- The Tolling Rule probably does not apply to transactional malpractice.

OTHER CLAIMS INCLUDING THE DTPA

- A lawyer may be sued under the DTPA for unconscionable conduct. *Latham v. Castillo* 972 S.W. 2d 66 (Tex. 1998).
- Professional services exclusion – advice, opinion or judgment.
- But all subject to the anti-fracturing rule.

Breach of Fiduciary Duty

- *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017).
- Lawyer settles case for church, siphons off proceeds from trust to personal use.
- Contract attorney learns after the fact, and misleads client about it.
- Church sues both for aiding and abetting/conspiracy, and for breach of fiduciary duty.
- No to damages claims; all happened after money was gone.
- Yes to equitable relief on breach of fiduciary duty. No damages required.
- Potent weapon: disgorge the fees. Often more potent than damages. Look at consumer lawyers....
- Beats the anti-fracturing rule under these circumstances!
- Don't turn a weak malpractice claim into a great BOFD claim.

Malpractice Claims Against Criminal Attorneys

- *Gray v. Skelton*, 595 S.W.3d 633 (Tex. 2020).
- Must obtain exoneration, and vacatur of conviction for ineffective assistance ain't it.
- Limitations is tolled under *Hughes* during post-conviction review (habeas).

Attorney Immunity

- *Cantey Hanger, LLP v. Boyd*, 467 S.W.3d 477 (Tex. 2015).
- Long-simmering debate among intermediate appellate courts over existence of a “crime/fraud exception” to attorney immunity.
- Increasing assertion of such claims against opposing counsel (example).
- Accusation of fraud by opposing counsel.
- Bright-line rule. Focus is on the kind, not the nature, of the lawyer’s conduct. Merely labeling conduct as fraud not enough. Not willing to allow development of the case.
- Limited to litigation.
- Exceptions: Fraudulent business with client; assaulting opposing counsel. Not the types of things lawyers routinely do in the course of representing clients.

Attorney Immunity in Texas

- Extremely broad, and can be used under Rule 91a.
- Only two facts: relationship and scope.
- Determined by type of conduct, not character.
- No exception for fraud, etc.
- Probable exception for federal criminal violation.
- Applies to transactional work too, so long as adversarial in nature.

Malpractice Declaration of Non-Liability

- *In re Houston Specialty Ins. Co.* (17-1060) (January 25, 2019)
- Cannot file declaratory-judgment action to obtain declaration of non-liability for legal malpractice.
- Client accuses TCCI of malpractice. TCCI files preemptive dec action.
- Couched in various ways, but all claims seek to preempt the malpractice claim.
- Impermissible declaration of tort non-liability.

Sanctions

- *In re Casey*, 589 S.W.3d 850 (Tex. 2019)
- Trial court sanctioned lawyer and ordered payment within ten days.
- SCOTX says payment must be deferred until entry of an appealable order (final judgment).
- Not always; premised on good-faith pleading that payment will impede resolution on merits by affecting ability to pursue the case (such as by affecting the lawyer's ability to continue representing the client).
- Once invoked, must either defer or make prompt fact findings that the sanction will not affect the ability to pursue the case.

Malpractice Avoidance

Rule No. 1

- Don't Ignore your Calendar
 - No.1 source of malpractice for trial lawyers is missed deadlines
 - Know the deadlines, BUT –
 - Do things when they serve your client's interests
 - Or do everything early



Malpractice Avoidance

Rule No. 2

- Know who your client is.
 - No.1 source of malpractice for transactional lawyers is conflict over who is the client.



AVOID CONFLICTS!

Lawyers owe their clients a fiduciary duty.

- Breach of fiduciary duty involves the integrity and fidelity of an attorney and focuses on whether an attorney obtained an improper benefit from representing the client.



Malpractice Avoidance

Rule No. 3


- One Client per lawsuit
 - No.2 source of malpractice for trial lawyers is conflict of interest.





Malpractice Avoidance

Rule No. 4

- Don't sue your client for fees.
 - Malpractice claim comes by return mail.
 - Bad malpractice claim can be a good counterclaim.
 - It is a compulsory counter claim.
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Don't sue your client for fees


- If you do anyway,
 - Guarantees another lawyer grades your paper
 - May waive insurance coverage
 - Costs you the deductible regardless
 - Often a case you neglected – at least on collections, right?

THINK ABOUT WHAT DOCTORS DO!

- Get signed consents.
- Don't give advice over the phone or at cocktail parties to non-patients.
- Don't sell malpractice liability for \$500.



Dealing With Difficult Lawyers

- Take a deep breath and stay calm!
 - Wait to respond-at least 1 hour if not longer.
 - Get advice.
 - Think about whether or not to get help from the Court.
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HAVE MALPRACTICE INSURANCE AND UNDERSTAND ITS TERMS!

- Every lawyer should carry insurance for professional mistakes.
- Understand the coverage provided
 - Most policies are “claims made” - claim must be asserted during the term of the policy.
 - “Tail coverage” covers you for acts done years ago, but asserted only now.
 - Most policies are “cannibalizing”.

Associates Can Get In Trouble Too!

- Our firm generally does not sue associate attorneys for malpractice.
- However, young lawyers are not excused from complying with rules of procedure, ethical rules and court orders.
- Judge Mazzant's Opinion
- Associate attorneys ranging in experience from 8-35 years held in contempt even though partners tried to protect them.

Associates Can Get in Trouble Too!

- “After three years of law school and eight to 35 years of practice, a lawyer should know that signing his or her name to a document has consequences. Given their experience, avidity, and ownership of the case, it is difficult to accept that these seasoned professionals simply followed orders.”

What Should Associates Do?

- Unclear from opinion if lawyer of any experience level can say they were just following orders.
- Ask questions—partner in charge is older and more experienced—there may be method to what seems like madness!
- Bring options—don't just say NO!
- Saying NO is better than having your name in the caselaw as someone who was held in contempt.

Malpractice Avoidance

Rule No. 5

- Own up to mistakes
 - Ethically required to do so.
 - Money is in the cover up.
 - Breach of fiduciary duty even when no malpractice – disgorgement!

What Do You Do If You Mess Up?

- Texas Rule 1.03 and ABA Model Rule 1.4
- A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

ABA Opinion 481–April 17, 2018

- Lawyer has a duty to inform a current client if the lawyer believes he or she may have *materially erred* in the client's representation.
- Errors are committed on a continuum—ranging from blowing the statute of limitations to errors that are minor or easily correctable with no risk of harm to client.
- Serious errors create a conflict of interest with client—Rule 1.06. Does not have to rise to the level of legal malpractice.

ABA Opinion 481

- Errors that fall between extremes must be analyzed in context of reasonably keeping the client informed.
- Error is material if:
 - A) reasonably likely to harm or prejudice a client;
or
 - B) the error would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

ABA Opinion 481

- Lawyer may consult with firm's general counsel, another lawyer, or the lawyer's professional liability insurer before informing the client of the material error.
- Such consultation should be prompt.
- When it is reasonable to do so, the lawyer may attempt to correct the error before informing the client while considering the time needed to correct the error and the lawyer's obligation to keep the client reasonably informed.



ABA Opinion 481

- The opinion does not impose a duty on a lawyer to inform a former client about a mistake.
- Ex-lawyer uses an agreement as a template for an agreement with a current client and sees a material mistake—no duty to inform former client.

Practical Advice

- My experience.
- Take a deep breath and don't do anything until you have gotten past the Oh _____ moment.
- Consult with a partner, senior attorney or mentor—that could put reporting obligations on them if an ethical issue is involved.
- Report it to your carrier.
- Send a letter and then meet with the client—err on the side of over-reporting.
- Have a plan to fix the problem!

UNDERSTAND CONFLICTS WHEN EITHER YOU OR A LEGAL ASSISTANT CHANGE FIRMS!

Lawyers

- *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295
 - “A Chinese Wall will not rebut the presumption of shared confidences when an attorney in private practice has actual knowledge of a former client’s confidences and he thereafter undertakes employment with a firm representing an adversary of the same client in that same suit.”

Imputed Disqualification

- *In the matter of: ProEducation International, Inc.*
587 F.3d 296 (5th Cir. 2009).
 - Under both the Texas Rules and the ABA Model Rules, the departing attorney should have an opportunity to demonstrate that he or she did not obtain confidential information regarding the former client.
 - If there is evidence showing that the attorney did not obtain confidential information, the imputed disqualification ends when the attorney leaves the first firm.

Legal Assistants

- *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831
 - The irrebuttable presumption of shared confidences between lawyer/client and lawyer/firm does not apply to a paralegal.
 - An effective Chinese Wall will protect against a disqualifying conflict.

Disqualification

- *In re Turner*, 542 S.W.3d 553 (Tex. 2017) (orig. proceeding).
- It's too late, baby, now it's too late"
- Law firm hires paralegal who worked on same matter for opposing party's firm months earlier. Firm did not know for a period of time. Took screening measures after finding out.
- Because she worked on the case, irrebuttable presumption got confidential information. Rebuttable presumption conveyed to new firm.
- Must show (1) instructed not to work on matter and (2) reasonable screening measures.
- Could not rebut here because did nothing for initial period of time.
- Takeaway: Be thorough in hiring legal staff from other firms!

Paralegals


- *In re: Columbia Valley Healthcare System, LP, 320 S.W. 3d 819 (Tex. 2010)*
 - Assistant must be instructed not to perform work on any matter on which he or she worked during prior employment.
 - Firm takes other reasonable steps to ensure that assistant does not work on matters that worked on at prior employment, absent client consent.



**UNDERSTAND THE SCOPE OF
CLIENT CONFIDENCES AND DON'T
REVEAL CONFIDENTIAL
INFORMATION!**



The Attorney-Client Privilege – Rule 5.03

- “A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.”
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CONFIDENTIAL INFORMATION

RULE 1.05

- Confidential information includes both privileged information and unprivileged client information. “Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence” ...
- “Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.”



Confidential Information

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



Confidential Information

- A lawyer shall not knowingly:
 - Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.
 - Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

*Douglas vs. Dyne McDermott
Petroleum Operations Co.,
144 F.3d 364 (5th Cir. 1998)*

- The duty of an attorney to maintain client confidences is superior to society's need to eradicate racial discrimination.
 - “Any betrayal of the client's confidences that breached the ethical duties of the attorney places that conduct outside Title VII's anti-retaliation protection.”
 - “We hold as a matter of law the conduct that breaches the ethical duties of the legal profession is unprotected under Title VII.”

In Re Goebel, 703 N.E.2d 1045 (Ind. 1998)

- Client A had threatened to harm the attorney and his family if he did not reveal Client B's address. Under this threat, the attorney revealed this information and Client A killed Client B's husband.
- "Protection of the client confidences is so sacred that an attorney cannot reveal them even under the threat of injury to himself or his family."
- The lawyer was disciplined for having made this disclosure.

Former Clients Too

SEALED PARTY v. SEALED PARTY, 2006
U.S. Dist. Lexis 28392 (S.D. Tex. 2006)

—Attorney breached his fiduciary duty by disclosing the client's confidential information under Rule 1.05. This duty continues even after attorney-client relationship ends.



Malpractice Avoidance


Rule No. 6

- Don't be greedy, refer business out.
 - No one can do everything well
 - And I need the referrals






A Few Freebies

- Don't stab and torture the managing partner of your firm (no, really, two lawyers did that).
 - Don't plant illegal drugs on a volunteer at your child's elementary school.
 - Don't overbill to pay for your wedding.
 - Don't forge judges' signatures on more than 100 orders.
 - Don't create a dummy corporation and send fake invoices to your employer for 14 years.
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A Few Freebies

- If you have to bring your weed to court, don't accidentally drop it on the counsel table.
 - Ditto for meth. Maybe more so.
 - If you get in a fight with your girlfriend, don't insist on a naked sword fight to resolve it.
 - Don't have your paralegal flirt with opposing counsel, buy him drinks, and then ask him for a ride, all in an effort to get him arrested for DWI in the middle of trial.
 - Don't cut and paste 20 pages of a hornbook for your brief in a case where you are court-appointed, and then bill several hours for doing so.
 - And finally . . .
- 



The Closing Rule

- Don't have sex with your client . . .
 - And bill her for it!
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CONCLUSION

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