

EVALUATING AND HANDLING THE LEGAL MALPRACTICE CASE

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I. INTRODUCTION

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

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

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

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 Most of the changes in the law were initially the result of more cases being filed and old, outdated legal principles being challenged anew: these changes in the law, however, once made, quickly converted from effect to cause, and began motivating the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

II. WHO CAN SUE A LAWYER

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

A. Formation of the Attorney-Client Relationship.

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

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

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

B. Non-clients Who May Use a Lawyer

A determination that a person is not a client, does

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

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

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

further to state that the Court’s holding should not be interpreted as to “suggest that a client’s rights against his attorney may be assigned.” *Id.* at 486.

C. Assignments of Legal Malpractice Claims

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

Recognizing that the issue had been left open by the *Canal* decision, the court observed that the “commercial marketing of legal malpractice causes of action by strangers...would demean the legal profession” *Id.* at 316. The court went on to state that

“Most legal malpractice assignments seem to be driven by forces other than the ordinary commercial market. In most of the reported cases, the motive for the assignment was the plaintiff’s inability to collect a judgment from an insolvent...defendant.” *Id.* at 316.

The court seemed to consider a case where a plaintiff took an assignment to satisfy an otherwise uncorrectable judgment as being much more offensive than claims which are assigned as part of the “ordinary commercial market.” To justify its conclusion that assignability of legal malpractice cases would not be allowed, the court observed that the *Zuniga* suit was precisely such a “transparent device,” to collect a judgment from an insured defendant. Allowing such suits to proceed would, according to the court,

“Make lawyers reluctant -- and perhaps unwilling -- to represent defendants with inadequate insurance and assets.” *Id.* at 317.

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

the defense attorney.

“For the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth.” *Id.* at 318.

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

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

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

The Dallas Court of Appeals has dealt with the

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

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

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

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

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

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

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

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

Tate then filed suit against Goins alleging legal malpractice. After Goins obtained summary judgment, the Court of Appeals reversed it holding that in accordance with *Mallios*, Tate was entitled to pursue his legal malpractice claim in his own name. As was the case with the concurring opinion in *Mallios*, the Dallas Court of Appeals expressed doubt about the validity of the assignment of the legal malpractice

cause of action from Tate to Sidco. Since the court found that Tate rather than Sidco was the real party in interest in the legal malpractice case, it allowed the suit to continue. *Id.* at 637

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

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

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

D. The Privity Rule

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

owes no duty to parties intended to be beneficiaries under an estate plan.

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

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

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

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

There has been, however, a slight departure from

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

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

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

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

The case arose from the settlement of a lawsuit between a real estate developer and a bank in which there were accusations of lender liability by the developer and default on a note by the bank. To insure that the settlement was binding in the event of a bank failure (which the developer feared was imminent), the developer insisted that the bank and the lawyers for the bank affirmatively represent that the settlement had been approved by the Board of Directors of the Bank, a condition precedent to binding the FDIC. The lawyer for the bank made the representation, but he was wrong. Prior to settlement, the Board of Directors of the bank (which included a shareholder in the law firm), adopted a resolution consenting to voluntary supervision by the Texas Savings and Loan Commissioner. The effect of this resolution was to transfer power to settle lawsuits to the representative of the Commissioner. The court analyzes the tort of negligent misrepresentation as described in the Restatement (Second) of Torts and lists all of the other professionals to whom this tort has been applied. Recognizing that liability for negligent

misrepresentation is not based upon breach of any duty owed to a client, the court held that lawyers could be liable for negligent misrepresentation:

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

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

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

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

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

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

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

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

“Plaintiffs who have been convicted of a criminal offense may negate the sole

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

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

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

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

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

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

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

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

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

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

E. Cracks in the Privy Rule?

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

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

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

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

fairly receptive to the notion that lawyers are capable of malice and have little regard for the truth.

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

The lawyers' privilege/immunity is limited to "communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding," in which the lawyer was participating as counsel on behalf of the client. In addition, the statements must bear some relationship to the proceeding. *Russell v. Clark*, 620 S.W.2d at 868-869 (Tex.App. – Dallas 1981, writ ref'd, n.r.e.); *Restatement of Torts (Second)*, § 586 (1977).

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

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

The court in the *Russell* decision acknowledged that the immunity/privilege enjoyed by attorneys, "must not be extended to an attorney *cart blanche*." *Russell*, at 868. To enjoy the

immunity, the attorney's statements must "bear some relationship to a judicial proceeding in which the attorney is employed and must be in furtherance of that representation."

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

Shelter is occasionally sought behind the defense of "opinion." In *Gertz vs. Robert Welch, Inc.*, 418 U.S. 223 (1974), the U.S. Supreme Court stated: "however pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-340. At first blush, this would appear to cloak many otherwise slanderous statements with immunity ("It is my opinion that John Doe is a thief".) In *Milkovich vs. Lorain Journal Co.*, 497 U.S. 1 1990, the court explained that in the *Gertz* case, it did not intend to "create a wholesale defamation exception for anything that might be labeled 'opinion'". That concept is also found in *El Paso Times, Inc. vs. Kerr*, 706 S.W.2d 797, 799 (Tex. App. – El Paso 1986 writ refused n.r.e.) when the court stated that, "even a statement of opinion will not be protected if it is couched in such a way to imply that the author possesses undisclosed facts." Reaching a similar result is *Shearson Lehman Hutton vs. Tucker*, 806 S.W.2d 914 @ 920 (Tex. App. – Corpus Christi 1991, writ dismissed w.o.j.); "An opinion may be actionable in a defamation case if the statement contains an implied assertion of fact." Bottom line: phrasing an unflattering objection as an opinion may offer little protection from liability.

For each of the cited cases, there are others addressing the same issues with different language and occasionally different results. The somewhat confusing state of the law, when combined with (1)

lawyers' desire for publicity, (2) incendiary emotions generated by litigation, and (3) media eager to convert otherwise private court proceedings into public spectacles, guarantees that some lawyers will be sued. Attorneys have been put in situations where representation of the client would include conveying their clients' position to the press. Immunity should and probably does extend to those situations. The determination of exactly when the lawyer's duties include communicating to the press is still unclear. A California court has perhaps offered the most accurate description of the current state of the law:

"No inhibitions are imposed on the rhetoric an attorney may use in official court papers, pleadings and arguments. However, attorneys who wish to litigate their cases in the press do so at their own risk – that is to say, protected by the First Amendment...and all principals which protect speech and expression generally, but **without the mantel of absolute immunity.**" *Rotham v. Jackson*, 57 Cal R. 2nd 284, 294 (Cal. Court of Appeals 1996). (Emphasis added.)

Although the case did not directly deal with who can sue a lawyer, *State Farm Mutual vs. Traver*, 980 S.W.2d 625 (Tex. 1998), did address a related question: Who can the client sue other than the lawyer for the lawyer's malpractice? The answer is, not the insurance company that hired the lawyer. Over the dissent of Justice Gonzales and Justice Abbott, the majority held that,

"An insurer is not vicariously liable for the malpractice of an independent attorney it selects to defend an insured." *Id.* at 625, 626.

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

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

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

The concurring and dissenting opinion of Judge Abbott observes that,

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

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

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

In *Belt v. Oppenheimer, Blend, Harrison & Tate*, 192 S.W.3d 780 (Tex. 1006), the Supreme Court held that there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners. In this case, David Terk hired the attorneys to prepare his will. After his death, Mr. Terk's two daughters became the joint, independent executors of their father's estate. The Terks sued the attorneys for legal malpractice in their capacity as executors of the estate, alleging that the attorneys were negligent in drafting their father's will and then advising him on asset management. They claimed that the estate incurred over \$1,500,000.00 in tax liability that could have been avoided by competent estate planning. *Id.* at 782 While upholding the rule set out in *Barcelo* that beneficiaries

of an estate could not sue the testator's estate planning attorney for legal malpractice, the Supreme Court held that a legal malpractice claim survives the decedent to the decedent's estate so that the estate has a justiciable interest in the controversy sufficient to confer standing. *Id.* at 786.

CONCLUSION

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

III. WHEN TO SUE A LAWYER

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

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

In 1992, the court, in a series of three cases again altered the rules and standards of limitations in malpractice cases against lawyers. In *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, (Tex. 1992), the court ruled that, on claims against lawyers for negligence in the prosecuting or defending of claims, limitations would not start to run until all appeals were over. The rule was reaffirmed in the second case, *Aduddell v. Parkhill*, 821 S.W.2d 158 (Tex. 1992). The third case, *Gulf Coast Investment Corp. v. Brown*, 821

S.W.2d 159 (Tex. 1992), extended the rule to cases involving non-judicial foreclosure, where the lawyer was not technically prosecuting or defending a claim in court. Many believe that this rule should be applied to all cases where the "viability of the second cause of action depends on the outcome of the first." *Hughes*, 821 S.W.2d, at 157.

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

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

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

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

In *Murphy v. Campbell*, 964 S.W.2d 265 (Tex.

1998), the Texas Supreme Court was confronted with an accounting malpractice case. On first blush, this case appears to deal only with limitations for accounting malpractice (subject to the discovery rule, but not the *Hughes* tolling rule during pendency of underlying litigation).

In *dicta*, however, confusion arose as to whether the court modified the *Hughes* decision so as to impose a new condition for tolling.

The court explained the *Hughes* decision as follows:

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

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

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

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

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

The Supreme Court instructed courts to simply apply

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

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

1. The law of limitations is still evolving;
2. Generic application of general principles may result in the wrong answer to limitations questions, as limitations becomes more and more fact intensive; and
3. Lawyers can be sued for failing to tell a client when limitations will bar their claims (causing them to delay) and for giving them the wrong answer on when limitations bars their claims (causing them to cease to pursue a claim).

CONCLUSION

The applicable standard of care today seems to be that lawyers owe a duty to advise prospective clients on the subject of limitations, whether they accept the case or not. It is a matter of utmost importance to a plaintiff, yet, the subject is often addressed with boiler plate discussions of the law that are inaccurate and, even if accurate, and usually offer little assistance to the client in understanding this important issue of the law. Attached hereto as Appendix Number 2 is a proposed insert for letters to clients rejecting cases. It can and should be improved upon, based upon experience and the developing law of limitations.

IV. WHAT CAN THE CLIENT RECOVER

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

“when a plaintiff’s mental anguish is a consequence of economic losses caused by the attorney’s negligence, the plaintiff may not recover damages

for that mental anguish.”

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

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

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

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

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

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

The Supreme Court went on to say:

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

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

“The gravity and timing of the violation, its willfulness, its effect on the value of the lawyer’s work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.”

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

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

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

V. HOW MUCH IS ENOUGH

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

fee excessive, notwithstanding the fact that the lawyer had also unsuccessfully attempted to secure additional recovery from the uninsured motorist and from the night club where he got drunk.

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

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

CONCLUSION

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

1. Honestly evaluate the risks of the case. If you have a client injured by an uninsured drunk driver, whose only recovery will be on her own uninsured motorist policy, send a demand letter and secure the client that money without charging a fee.
2. Be wary of “ratcheting contingencies,” when you control the ratchet. If you agree to a lower fee if a case is settled before suit is filed, use reasonable efforts to settle the case before suit is filed and confer with the client before filing suit, as opposed to simply ratcheting your fee up unilaterally.
3. Explain the conflicts of both contingency and hourly fees to the client. Tell the client it is usually in their best interest to pay an hourly fee and encourage them to do so if they can. Remember, the case you want on a contingent fee is the very one on which they should pay hourly: they should know that before signing a contract with you.
4. If you are going to charge more than the “industry standard” of one-third, be prepared to defend your fee, both to the client and a court, by reference to the factors set out in Rule 1.04 of the Texas Rules of Professional Conduct.
5. Never take more than the client. Settlements

which provide for a contingent fee plus expenses can result in the lawyer getting more money from the settlement than the client. It just violates some gut level instinct for the lawyer to get more money than the client out of a settlement and most juries agree.

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

Attached hereto as Appendix Number 3 is a proposed retainer letter for those clients who engage you on an hourly basis.

VI. WHO TO REPRESENT

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

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

Even if there is no conflict between multiple clients at the start of representation, conflicts are almost always guaranteed to occur during the course of the representation. Imagine, for example, a scenario under which one of your clients insist on pursuing a weak objection to production of personal financial information, or past history of psychiatric treatment, even after the judge has ordered it produced. Your ethical obligation to the recalcitrant client is to pursue his lawful objectives, even through mandamus, even

though the probability of success may be minuscule. That pursuit may, however, cause other clients to lose a valuable trial setting, lose credibility with the judge, or otherwise be procedurally or technically disadvantaged.

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

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

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

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

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

CONCLUSION

If you are considering representing more than one

client in the same dispute, read Rules 1.06 and 1.07 with their respective comments, several times before you decide: after reading them, decline the representation. Attached hereto as Appendix Number 4 is a proposed multi-client representation letter to be considered on those occasions when you proceed with representing multiple clients anyway.

VII. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

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

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

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

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

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

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

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

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

CONCLUSION

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

VIII. WHAT CAN YOU SUE A LAWYER FOR

Most claims against lawyers are for professional malpractice, which is based in negligence and consists of the standard four elements of any negligence action: duty, breach of the duty, proximate cause and damages. *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989) Texas courts have held that, for limitations purposes, courts will look to the true nature of the dispute being asserted. While many acts of negligence could also be couched in terms of a breach of a contingency or retainer contract with the lawyer, such allegations will not extend the statute of limitations from the two year negligent statute to the four year contract statute.

Judwin Properties, Inc. vs. Griggs & Harrison, 911 S.W.2d 498 (Tex. App. - Houston [1st Dist. 1995, no writ).

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

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

Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, or opinion, or similar professional skill. This exemption does not apply to: (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion; (2) a failure to disclose information in violation of Section 17.46(b)(23) (failing to disclose information that is intended to induce a consumer into a transaction which the consumer would not have entered into had the information been disclosed); (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; or (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion.

Although on its face, the exemption is broad sweeping, it is not clear if the law relating to liabilities

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

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

"glaring, noticeable, flagrant, complete, and unmitigated." *Id.* at 68.

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

As noted above, non-clients can also now sue lawyers for negligent misrepresentation if they can establish that the lawyer knew of their existence and intended that they rely upon the lawyer's

representations. *McCamish, Martin, Brown & Loffler vs. F.E. Appling, Interests*, 991 S.W. 2d 787 (Tex. 1999).

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

CONCLUSION

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

IX. ADDITIONAL MISCELLANEOUS THOUGHTS AND MUSINGS

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

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

Insurance Issues. Every lawyer should carry insurance for professional mistakes. To refuse to do so is to insult your client and exhibit a total lack of care for them, since we all know we make mistakes. How

do we feel about those who refuse to carry car insurance? Clients will probably in the future shop for lawyers by asking about such insurance. Lawyer's liability insurance is not like all insurance, however. Know what your policy covers and what it does not.

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

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

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

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

loss of the product proves the negligence of the lawyer, but it may also prevent the client from recovering on his legal malpractice case because he cannot produce the product to show that a different result would have occurred in the absence of the loss of the product.

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

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

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

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

shared confidences. Recently, the Texas Supreme Court further discussed the requirements for a Chinese Wall. *In re: American Home Products, Corp.*, 985 S.W. 2d 68 (Tex. 1998)

IX. HOT SPOTS, DANGER ZONES, RED FLAGS

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

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

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

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

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

Minimal Efforts Representation. Many times a client will ask that you assume representation but request that you not "run up a big fee." In effect, the client wants you to protect their interests fully, but at

the same time limit your involvement (and your fees) on the case or business transaction. This type of "bargain basement lawyering" is ripe with problems when the lawyer exercises discretion and fails to do some act which results in the client being prejudiced.

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

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

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

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

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

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

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

Rejected Business. Turn it down in writing. Send them to other lawyers. Discuss but don't render an

opinion on limitations unless the issue is clear (which it often isn't).

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

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

X. PREVENTION AND AVOIDANCE

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

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

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

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

Assign a partner to be in charge of malpractice avoidance and reward him for his efforts on behalf of

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

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

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

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

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