PROJECT RUNAWAY*—ONE DAY YOU'RE IN AS THE ATTORNEY AND THE NEXT DAY YOU'RE OUT!

*by Sharon B. Gardner***

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* *See Project Runway* (Bravo Company 2007) (this play on words is taken from the title of the television series).

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I. INTRODUCTION

The combination of tort reform and the lifting of the privity bar for estate and trust lawyers have brought new and unwelcomed attention to probate attorneys.[1] Disenchanted and disappointed beneficiaries now find it easier to bring claims for professional malpractice. These claims have not been limited to those who have an interest in an estate; rather, the claims are going a step further to suggest attorneys may be liable to third parties. Previously, claims of malpractice in the probate area were met with a strong privity defense, but not anymore.[2] Claimants continue to chip away at defenses and go so far as to attempt to hold a lawyer and law firms liable simply because they represent fiduciaries.[3]

This article traces the history of attorney liability in Texas as it relates to probate and trust lawyers.[4] After reviewing the general concepts of liability, this discussion will cover those claims unique to this area of

1. *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 788 (Tex. 2006) (noting that the lifting of the privity bar provides an opportunity for disappointed beneficiaries to bring malpractice claims).

2. *See id*. at 782 (citing Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996)).

3. *See id*. at 785.

4. *See infra* Part II.

practice.[5] This article will suggest ways to reduce potential liability in these often unchartered waters.[6] Also discussed is the viability of using arbitration agreements in fee arrangements in the context of legal representation.[7]

The article further discusses a recent ethics opinion, requested from the State Bar of Texas by the author's law firm, regarding passing the cost of a legal malpractice claim defense to the underlying client in a way that is ethical when the claim is made by a third party.[8]

II. STATISTICS ON MALPRACTICE CLAIMS

Malpractice claims in the estate, trust, and probate area are on the rise.[9] In 2007, the American Bar Association (ABA) conducted several studies concerning malpractice claims.[10] The ABA compiled data from several malpractice insurers from all over the nation.[11] Because state law varies regarding legal malpractice claims, the results may be a little distorted from state to state.

In 2007, malpractice claims against estate, trust, and probate attorneys made up 9.7% of all malpractice claims.[12] Below is a chart illustrating the trends of malpractice claims in the estate, trust, and probate area from 1985 to 2007. The results from the studies show that from 2003 to 2007 malpractice claims against estate, trust, and probate attorneys rose 1.05% from 8.63% of all claims to 9.68% of all claims.[13]

Compare this to the rise in claims from 1985 to 1995, which was only 0.62%.[14]

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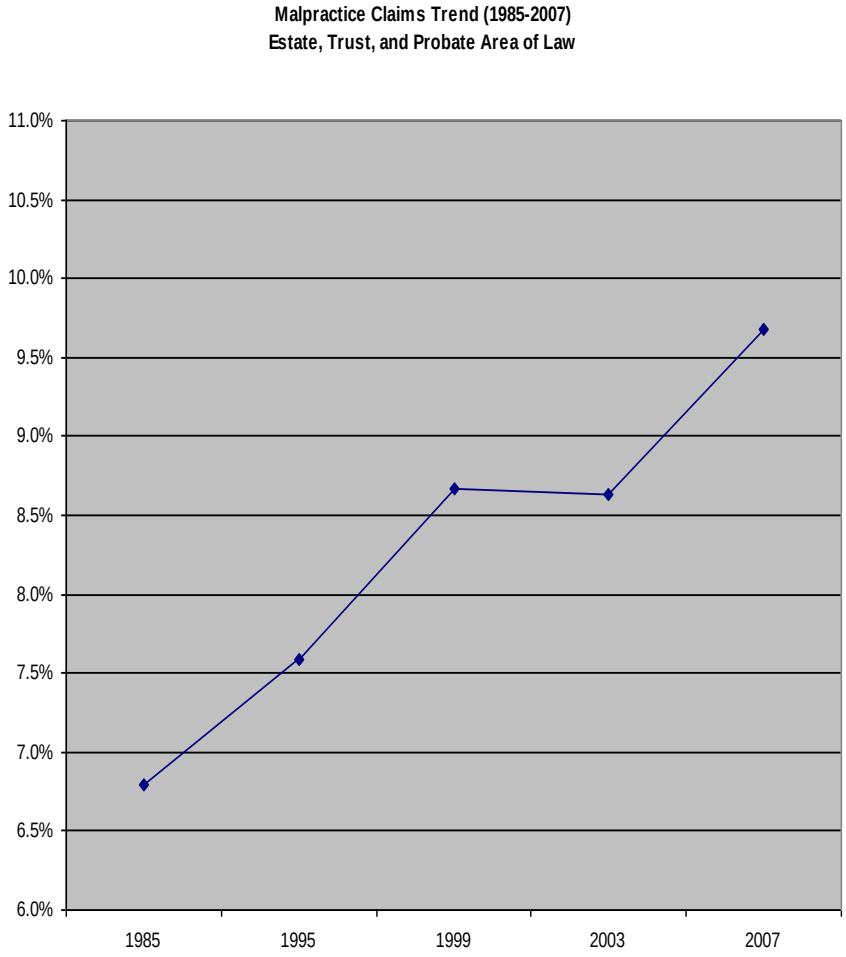
5. *See infra* Part III.
6. *See infra* Part VII.
7. *See infra* Part VIII.
8. *See infra* Part VIII.H.
9. Standing Committee on Lawyers' Professional Liability, *Profile of Legal Malpractice Claims: 2004-2007*, 4-5 (2008).
10. *See id*. at 4.
11. *See id*. at 3.
12. *See id*. at 4.
13. *See id*. at 5.
14. *Id*. at 4 tbl.1.



The most frequent types of claims in 2007 include the following: (i) the attorney's failure to know or properly apply the law, (ii) the attorney's failure to file a document, (iii) a planning error in the attorney's procedure choice, and (iv) inadequate discovery or investigation.[15] Within the subject of client relations, the attorney's failure to obtain consent from or to inform the client was the number one claim, while the attorney's failure to follow the client's instructions was number two claim.[16] However, as a group, substantive errors (i.e., failure to know or properly apply the law, planning error, inadequate discovery or investigation, etc.) accounted for 46.61% of all claims in 2007, while client relations errors accounted for only 11.22% of the overall claims.[17] The losses experienced

15. *Id.* at 10 tbl.5.
16. *Id.*
17. *Id.*

by Texas Lawyers' Insurance Exchange were consistent with the ABA findings.[18] For example, estate and trust litigation were 8% of the primary causes of claims in Texas during 2007.[19]

III. CLAIMS GENERALLY

The real issue in a legal malpractice case is whether the attorney exercised a sufficient standard of care and ability as a lawyer of ordinary skill would have exercised.[20] If an attorney's mistake is actionable, a cause of action may arise for legal malpractice with issues of whether the error occurred, if that error constitutes malpractice, and, subsequently, whether causation and damages can be found.[21] The recent trend is to simplify and present a global question to a jury.[22] A claim for legal malpractice is based on tort law, not contract law.[23] Examples of legal malpractice include giving an erroneous opinion or bad advice, not timely or adequately handling a matter entrusted to the attorney's care, and not using an attorney's ordinary care in all aspects of litigation, including preparation, management, and prosecution.[24] In *Black v. Wills*, the court acknowledged that the complaints were couched in terms of a legal contract but that the mentioned claim was for breach of fiduciary duty.[25] A successful legal malpractice action requires the plaintiff to show that but for the attorney's mistake he would have won his suit.[26] While many cases suggest that there is no private cause of action that involves a breach of the rules of professional responsibility, Texas courts have used ethical obligations as appropriate standards in cases of legal malpractice.[27]

In addition to ordinary negligence and breach of contract allegations, attorney liability is sometimes pled in the form of breach of fiduciary duty, negligent misrepresentation, and fraud.[28] However, owing a duty to the individual alleging malpractice is necessary because that fiduciary relationship permits the recovery of damages.[29] The standard for malpractice in Texas is the "objective exercise of professional judgment,

18. Jett Hanna, et. al., *The Nature of Legal Malpractice Claims and How to Avoid Them*, State Bar of Tex., Webcast, July 26, 2007, at 2.
19. *Id*.
20. Sledge v. Alsup, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ).
21. *Id*.
22. *Id.*
23. *Id*.
24. Murphy v. Gruber, 241 S.W.3d 689, 693 (Tex. App.—Dallas 2007, pet. denied).
25. Black v. Wills, 758 S.W.2d 809, 814 (Tex. App.—Dallas 1988, no writ).
26. Mackie v. McKenzie, 900 S.W.2d 445, 448-49 (Tex. App.—Texarkana 1995, writ denied).
27. *See, e.g.*, Employers Cas. Co. v. Tilley, 496 S.W.2d 552, 559 (Tex. 1973).
28. *See* 1 R. MALLEN & J SMITH, LEGAL MALPRACTICE SECTION 8.1 (5th ed. 2000).
29. *See id*.

not the subjective belief that [the attorney's] acts were in good faith."[30] An attorney's negligence is only actionable where the conduct is the cause of damages.[31] An attorney breaches his fiduciary duty when he inappropriately profits from his relationship with the client.[32] Examples of a breach of fiduciary duty include "subordinating his client's interests to his own, retaining the client's funds, using the client's confidences improperly, taking advantage of the client's trust, engaging in self-dealing or making misrepresentations."[33] Malpractice claims frequently include the following allegations:

(1) the attorney gave an incorrect legal opinion or erroneous advice;
(2) the attorney did not provide any advice or judgment when obligated to do so;
(3) the attorney did not follow the client's legitimate instruction;
(4) the attorney took an action contrary to the client's instructions;
(5) the attorney failed to timely handle a delegated legal matter for the client; and
(6) the attorney failed to use ordinary care in the litigation process that affects the client's interests.[34]

While a legal malpractice claim focuses on whether an attorney represented a client with the requisite level of skill, a breach of fiduciary duty claim focuses on whether an attorney received an inappropriate benefit from that representation.[35]

A. Assignability

Texas does not allow the assignability of malpractice claims.[36] The public policy reason supporting this rule is due to the "personal nature of the attorney's duty to the client, and the confidentiality of the attorney-client relationship."[37]

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30. Zenith Star Ins. Co. v. Wilkerson, 150 S.W.3d 525, 530 (Tex. App.—Austin 2004, no pet.) (citing Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989)).

31. Fireman's Fund Am. Ins. Co. v. Patterson, 528 S.W.2d 67, 69 (Tex. Civ. App.—Tyler, 1975, writ ref'd n.r.e.).

32. *See id*.

33. Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Ft. Worth 2002, pet. denied).

34. Zidell v. Bird, 692 S.W.2d 550, 553 (Tex. App.—Austin 1985, no writ).

35. *Kimleco Petroleum*, 91 S.W.3d at 923.

36. Wright v. Sydow, 173 S.W.3d 534, 551 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

37. City of Garland v. Booth, 895 S.W.2d 766, 769 (Tex. App.—Dallas 1995, writ denied).

B. Third Party Claims

In order for a non-client to hold an attorney liable for conspiring or assisting with a breach of fiduciary duty, proof that the attorney acted outside the scope of representation is necessary.[38] Privity is not a defense to fraud claims brought by third parties against attorneys.[39] In *Likover v. Sunflower Terrace II, Ltd.*, a non-client sued an attorney for fraud and conspiracy to defraud.[40] The court held that while an attorney has no general obligation to the opposing party, if his conduct is fraudulent or malicious, then the court will impose liability.[41] The court also held that an attorney might be liable for conspiring with his client to commit a wrong.[42] In order to recover for conspiracy against an attorney, the claimant must show the following elements:

(1) the attorney knew the "object and purpose of the conspiracy";
(2) "there was an understanding or agreement to inflict a wrong [or injury]";
(3) "there was a meeting of minds on the object or cause of action"; and
(4) "there was some mutual mental action coupled with an intent to commit the act that resulted in the injury."[43]

C. Fee for Forfeiture

In *Burrow v. Arce*, the Texas Supreme Court found that no actual damages were necessary to obtain fee forfeiture of attorney's fees for the attorney's "clear and serious" breach of fiduciary duty to the client.[44] The court also held that fee forfeiture is an equitable remedy intended to protect the client and discourage an agent's disloyalty.[45] The court further held that when a violation of a fiduciary duty justifies any fee forfeiture, the amount is determined based on the facts of the case.[46] The amount of any fee forfeiture is left to the judge and not left to a jury.[47]

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38. *See, e.g.*, Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ).
39. *See id*.
40. *Id*. at 471.
41. *Id*. at 472.
42. *Id*.
43. *Id.*
44. Burrow v. Arce, 997 S.W.2d 229, 241 (Tex. 1999).
45. *Id.* at 238.
46. *Id.* at 245.
47. *Id.* For a thorough discussion of fee forfeiture, *see* Shyla R. Buckner, *Fee Forfeiture in Legal Malpractice Cases*, 15 PROB. & PROP. 54, Sept.-Oct. (2001).

In *Jackson Law Office, P.C. v. Chappell*, the Tyler Court of Appeals held that there was no written fee agreement and that the lawyers did not keep billing records or record services rendered.[48] The lawyers also failed to provide billing statements, and, instead, the lawyers charged what the court described as an inflated fee.[49] The court held that the evidence supported the jury's finding of breach of fiduciary duty because there was evidence of a failure to disclose, misrepresentation, conflict of interest, and self-dealing.[50] Further, the court upheld a partial fee forfeiture.[51]

In *Baker Botts, L.L.P. v. Cailloux*, the client's son brought a claim on behalf of his incapacitated mother against the law firm that drafted her estate planning documents.[52] The son claimed that advising his mother to file a disclaimer in her husband's estate was a breach of duty because those assets went to charity and otherwise reduced her estate.[53] A jury trial resulted in a finding that the law firm had breached its fiduciary duty but concluded that there had been no economic loss as a result of its actions.[54] The trial court then imposed an equitable trust on Baker Botts and another defendant and ordered the repayment of the disclaimed amount plus interest.[55] The court of appeals reversed the judgment because the law firm never had title to the property.[56]

In the case of *In re Estate of Perry*, employees alleged that the attorney, who was also named as the executor, prepared documents for the testatrix that deprived the employees of rights that the testatrix intended to give them.[57] The trial court granted summary judgment for the attorney-executor on all causes of action.[58] Citing *King v. Acker*, the court of appeals ruled that tortious interference with inheritance rights is a recognized cause of action in Texas.[59] The court defined the elements of the cause of action by reference to the Restatement: "One who by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."[60]

The court of appeals held that the evidence of the attorney's breach of fiduciary duty owed to the testatrix due to a conflict of interest raised a

48. Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied).
49. *Id*.
50. *Id*. at 23.
51. *Id*.
52. Baker Botts, L.L.P. v. Cailloux, 224 S.W.3d 723, 725 (Tex. App.—San Antonio 2007, pet. denied).
53. *Id*. at 732.
54. *Id*. at 725-26.
55. *Id*. at 726.
56. *Id*. at 737.
57. *In re* Estate of Perry, No. 04-06-00205-CV, 2007 WL 2315967 (Tex. App.—San Antonio 2007), *withdrawn*, 2008 WL 182860.
58. *Id*.
59. *Id*.
60. *Id*. at 6 (citing RESTATEMENT (SECOND) OF TORTS § 774B (1979)).

genuine issue of material fact on the element of tortious means sufficient to defeat summary judgment.[61]

While the rules pertaining to fee forfeiture are harsh, in some fee forfeiture cases, denying an attorney all compensation would be an excessive sanction because it would result in a windfall for the client.[62]

D. Higher Standard of Care

A board certified attorney in estate planning and probate is held to a higher standard of care than a non-specialist.[63] In *Rhodes v. Batilla*, an attorney held himself out as a tax expert.[64] The court reasoned that whether the attorney's actions fell below the standard of care should be measured against those who had tax expertise.[65] Consequently, estate planning and probate lawyers should be cautious when making claims about the quality of their services that might lead a potential client or third party to believe that they have particular expertise.[66]

E. Deceptive Trade Practices

Attorneys can be liable under the Texas Deceptive Trade Practices Act (DTPA) if the claims are based on affirmative misrepresentations of material fact.[67] In *Latham v. Castillo*, the Texas Supreme Court held that claims based on affirmative misrepresentations of material fact, and not on mere allegations of inadequate legal representation or negligence, can give rise to liability for DTPA violations.[68] Essentially, attorneys may only be sued under the DTPA for truly deceptive acts and not mere negligence.[69]

In September of 1995, section 17.49(c) of the Texas Business and Commerce Code was amended and provides:

> (c) 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, 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;

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61. *Id*.

62. Swank v. Cunningham, 258 S.W.3d 647, 673 (Tex. App.—Eastland 2008, pet. denied).

63. *See* Rhodes v. Batilla, 848 S.W.2d 833, 843 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

64. *Id*.

65. *Id*.

66. S*ee generally* Buddy O. Herring, *Liability of a Board Certified Specialist in Legal Malpractice Action: Is There a Higher Standard?*, 12 GEO. J. LEGAL ETHICS 67 (1998) (discussing liability of board certified attorneys in an historical context).

67. *See* TEX. BUS. & COM. CODE ANN. § 17.49(c)(1) (Vernon Supp. 2008).

68. Latham v. Castillo, 972 S.W.2d 66, 69 (Tex. 1988).

69. *See id*.

> (2) a failure to disclose information in violation of Section 17.46(b)(24);
> (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion . . . .[70]

A legal malpractice claim under the DTPA requires a showing of the producing cause, as opposed to proximate cause, but lacks the foreseeability element necessary for the proximate cause standard.[71]

IV. IS THERE AN ATTORNEY CLIENT RELATIONSHIP?

Generally, attorney-client relationships are solidified with a written agreement and the payment of a retainer fee.[72] Under the legal test to determine whether an attorney-client relationship has been established, the relationship is deemed established just as soon as the client reasonably believes that the client has representation.[73] In *Perez v. Kirk & Carrigan*, the court held that an agreement to form an attorney-client relationship, so as to give rise to fiduciary duty of good faith and fair dealing, may be implied from the conduct of the parties.[74] The court further stated that "the relationship does not depend upon the payment of a fee, but may exist as a result of rendering services gratuitously."[75] An attorney's fiduciary relationship may also arise during preliminary consultations with a view toward undertaking representation.[76]

The relationship, however, can also be formed by the party's actions.[77] Courts can apply an objective standard when evaluating the parties' conversations and actions to determine if there was a meeting of the minds with respect to the creation of an attorney-client relationship.[78] In *Sutton v. McCormick*, the law firm believed that it was representing an executor, as opposed to the beneficiaries, who believed that the law firm was also representing them.[79] In *Vinson & Elkins v. Moran*, the beneficiaries of an estate sued the law firm representing the executor, claiming that the law firm also represented them.[80] The beneficiaries also alleged that the law

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70. TEX. BUS. & COM. CODE ANN. § 17.49(c) (Vernon Supp. 2008).

71. Turtur & Assocs., Inc. v. Alexander, 86 S.W.3d 646, 652 (Tex. App.—Houston [1st Dist.] 2001), *rev'd on other grounds*, 146 S.W.3d 113 (Tex. 2004).

72. *See* David J. Beck, *Legal Malpractice in Texas: Second Edition*, 50 BAYLOR L. REV. 551, 551-52 (1998).

73. *See id*. at 555-56.

74. Perez v. Kirk & Carrigan, 822 S.W.2d 261, 263 (Tex. App.—Corpus Christi 1991, writ denied).

75. *Id.*

76. Nolan v. Foreman, 665 F.2d 738, 739 n.3 (5th Cir. 1982).

77. Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1995).

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

79. *Id*. at 184.

80. Vinson & Elkins v. Moran, 946 S.W.2d 381, 387 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.).

firm had a conflict of interest.[81] The law firm asserted that the claims should fail because the law firm only represented the executors and not the beneficiaries.[82] Imagine the law firm's surprise when it learned that the jury found an attorney-client relationship existed between the beneficiaries and the law firm.[83] In *Querner v. Rindfuss*, the court held that an attorney can be negligent if he does not advise a potential client that he is not actually representing them.[84] In *Robertson v. ADJ Partnership, Ltd.*, an attorney claimed that there was no attorney-client relationship, but the court held a fiduciary relationship was established because of the trust and confidence with members of a family partnership.[85] As a matter of law, the burden falls on the attorney to show the non-existence of the relationship.[86]

In *Estate of Arlitt v. Patterson*, the court recognized that an attorney hired by a testator to draft a will does not owe any professional duty of care to those beneficiaries named in the will.[87] In *Arlitt*, the husband died leaving a 1983 will and a 1985 codicil that substantially decreased the size of the daughter's share.[88] The daughter contested the will and codicil.[89] The wife, individually and as the executor of the estate, along with the other children, sued the attorneys who drafted both the will and codicil.[90] The wife successfully argued that she and her husband were jointly represented in preparing their estate plans and that the law firm was negligent in that preparation.[91] The law firm pleaded privity, the expiration of the statute of limitations, and lack of jurisdiction.[92] The appellate court reversed and held that limitations period did not begin to run until the wife and the other children discovered or reasonably should have discovered the injury.[93] The court then went on to recognize that an attorney retained by a testator to draft a will is not in privity with the beneficiaries.[94] Likewise, the court held that summary judgment was proper against the executor.[95] However, the court also held that the wife was in privity with the law firm and that

81. *Id*.
82. *Id*. at 404.
83. *Id*. at 405.
84. Querner v. Rindfuss, 966 S.W.2d 661, 667 (Tex. App.—San Antonio 1998, pet. denied).
85. Robertson v. ADJ P'ship, Ltd., 204 S.W.3d 484, 491-92 (Tex. App.—Beaumont 2006, pet. denied).
86. Stancu v. Stalcup, 127 S.W.3d 429, 432 (Tex. App.—Dallas 2004, no pet.).
87. Estate of Arlitt v. Patterson, 995 S.W.2d 713, 720 (Tex. App.—San Antonio 1999, pet. denied), *disapproved by* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 785 (Tex. 2006) ("We disapprove *Estate of Artlitt's* holding that no legal malpractice claim accrues before death when an estate-planning attorney's negligent drafting results in increased estate tax consequences.").
88. *Id*. at 716-17.
89. *Id*. at 717.
90. *Id*.
91. *Id*.
92. *Id*. at 717-21.
93. *Id*. at 719.
94. *Id*. at 720-21.
95. *Id*. at 722.

Barcelo would not prevent her from bringing her own claim.[96] "The *Barcelo* rule thus does not deny a cause of action to one of two joint clients."[97] Additionally, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Opinion 05-434, which deals with conflicts that may arise when an attorney represents several members of the same family with their respective estate plans.[98]

In *Moser v. Davis*, a legal secretary drafted a will that failed to dispose of the estate as the testator intended, the court held that the attorney was not liable for his legal secretary's error because she had no discretion or authority to render legal advice and make legal decisions on behalf of the testator or any other client.[99]

V. PRIVITY DEFENSE

The liability of a lawyer practicing in the probate and estate are was previously limited to causes of action that did not allow privity of contract as a defense.[100] Malpractice cases were difficult to prove because clients were either dead when the malpractice was discovered or there was no way to adequately prove what testator actually intended.[101] Prior to 1996, Texas courts squarely rejected claims against attorneys by non-clients based on the policy that it would be almost impossible to determine the intent of a deceased grantor.[102]

California was the first state to chip away at the privity defense.[103] In *Lucas v. Hamm*, the California Supreme Court set out a balancing test to determine the liability of an attorney to disappointed beneficiaries of an estate.[104] The court employed the test to determine whether, based on specific facts of a case, a third party not in privity with the attorney could hold the attorney liable for professional malpractice.[105] In conducting a balancing test, the court looked at the following factors:

- the extent to which the transaction was intended to affect the plaintiff;
- the foreseeability of harm to [the plaintiff];

96. *Id*. at 721 (citing Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 2006)).
97. *Id.*
98. ABA Comm. on Prof'l Ethics and Responsibility, Formal Op. 05-434 (2004).
99. Moser v. Davis, 79 S.W.3d 162, 165-66 (Tex. App.—Amarillo 2002, no pet.).
100. *See* Berry v. Dodson, Nunley & Taylor, P.C., 717 S.W.2d 716, 719 (Tex. App.—San Antonio 1986, writ granted).
101. *See Barcelo*, 923 S.W.2d at 578.
102. *See id*. at 579.
103. *See* Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1961).
104. *Id.*
105. *Id.*

- the degree of certainty that the plaintiff suffered injury; and
- the closeness of the connection between the [attorney's] conduct and the injury.[106]

The court upheld the application of the privity doctrine in a claim brought by intended beneficiaries against a drafting attorney.[107] The court further held that an attorney's liability for preparing a will could extend to the intended beneficiary based on the following reasoning:

> [O]ne of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of prevent future harm would be impaired.[108]

In *Bucquet v. Livingston*, the California court of appeals gave insight to the problems inherent in estate planning and probate practice.[109] The court held as follows:

> Arguably, the provisions of the Internal Revenue Code and applicable regulations on the subject are as much of a "technicality-ridden legal nightmare" as the California law on perpetuities involved in *Lucas v. Hamm*. However, the marital deduction trust, such as the one drafted in the instant case, is one of the best known estate planning devices. Its details and tax consequences are all the more significant for a California attorney since it is well known that the original Internal Revenue Code amendments permitting marital deduction trusts were enacted to make available to residents of non community property states certain tax benefits enjoyed by residents of community property states, such as California. Further, the pertinent provisions of Internal Revenue Code section 2041 making taxable for federal estate tax purposes a general power of appointment created after October 21, 1942, were first enacted in 1951, [ten] years before the trust instrument here in issue was drafted. . . . The potential consequences of the retention of a general power of appointment are a matter within the reasonable competence of an attorney.[110]

106. *Id*. at 687.
107. *Id*. at 688.
108. *Id*.
109. Bucquet v. Livingston, 129 Cal. Rptr. 514, 519 (Cal. Ct. App. 1976).
110. *Id*. (citation omitted).

In *Dickey v. Jansen*, the remainderman alleged that the lawyer failed to draft a trust provision that would operate under Louisiana law as to the testator's property in Louisiana.[111] The intended beneficiaries were denied recovery based on a privity defense.[112] The attorney should have known that his conduct would lead a reasonable person to believe that the attorney was representing that person.[113] In *Thomas v. Pryor*, a beneficiary was intended to receive a bequest under a will prepared through a pro bono legal aid program.[114] The will was not witnessed, and it was denied probate.[115] The court held that the lack of privity between the attorney and the intended beneficiary prevented liability.[116] The court further held that the privity rule is supported by public policy and that disturbing consequences could occur if an attorney were held liable to third parties.[117] The Texas Supreme Court granted writ again but the parties settled the case before rehearing.[118]

In 1986, the diligence of an attorney in preparing an estate planning document for a hospitalized client was addressed when only a draft of the will was completed before the testator died.[119] The disappointed beneficiaries sued the drafting lawyer, alleging that the wife had requested the attorney to come to the hospital to execute the document twice and that the attorney reassured her that he had tape recordings of conversations with the decedent that would be sufficient if the testator died.[120] The decedent's prior will named his wife and children by a former marriage as beneficiaries.[121] Changes were made to the will which would add his wife's children as beneficiaries, change the trustees of the children's trusts to be set up for their benefit, and leave his wife certain business assets.[122] The draft of the will was prepared but never signed.[123] The prior will was probated without the new beneficiaries receiving the gifts intended under the new will.[124] The disappointed beneficiaries sued the lawyer for malpractice.[125]

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111. Dickey v. Jansen, 731 S.W.2d 581, 582 (Tex. App.—Houston [1st Dist.] 1987, writ refused n.r.e.).

112. *Id.*

113. *Id*.

114. Thomas v. Pryor, 847 S.W.2d 303, 303-04 (Tex. App.—Dallas 1992), *judgment vacated pursuant to settlement*, 863 S.W.2d 462 (Tex. 1993).

115. *Id*. at 304.

116. *Id*.

117. *Id*. at 305.

118. Thomas v. Pryor, 863 S.W.2d 462, 462 (Tex. 1993).

119. Berry v. Dodson, Nunley & Taylor, P.C., 717 S.W.2d 716, 717 (Tex. App.—San Antonio 1986 writ dism'd by agr.).

120. *Id*. at 718.

121. *Id*. at 717.

122. *Id*.

123. *Id*.

124. *Id*.

125. *Id*.

The court held that no privity existed between the wife and her children and the drafting attorney.[126] The Texas Supreme Court granted writ, however, but the case was settled and dismissed by the agreement of the parties.[127]

In *Thompson v. Vinson & Elkins*, the residuary beneficiaries under a will brought suit against the law firm hired by the trustee to represent the estate in distributing the assets.[128] The court of appeals held that the beneficiaries did not have standing to bring a claim for professional malpractice against the law firm because they were not in privity of contract.[129] An attorney-client relationship did not exist between the drafting attorney and the testator's daughter at the time the attorney prepared the testator's will even though the attorney discussed with the daughter the documents he prepared for the testator in light of the fact that the testator asked the attorney to inform the daughter of her roles as executrix under the will and as agent under a power of attorney.[130]

Thereafter, in *Barcelo v. Elliott*, the Texas Supreme Court upheld the privity doctrine for estate lawyers.[131] In *Barcelo*, an attorney was hired to draft a will and trust documents.[132] Sometime after the death of the trustor, the trust was found to be invalid.[133] The grandchildren, who were the intended beneficiaries of the trust, brought suit against the draftsman-lawyer for negligence.[134] The court held that an attorney does not owe a duty to a disappointed or intended beneficiary of an estate plan.[135] Although other states had relaxed the privity rule, Texas held firm, and estate and trust lawyers breathed a sigh of relief.[136] The court provided a summary of their opinion:

> In sum, we are unable to craft a bright-line rule that allows a lawsuit 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 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.[137]

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126. *Id.* at 719; *see also* Burnap v. Linnartz, 914 S.W.2d 142, 148-49 (Tex. App.—San Antonio 1995, no writ).

127. Berry v. Dodson, Nunley & Taylor, P.C., 729 S.W.2d 690, 690 (Tex. 1987).

128. Thompson v. Vinson & Elkins, 859 S.W.2d 617, 619 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

129. *Id.* at 621.

130. *Id.* at 623.

131. Barcelo v. Elliott, 923 S.W.2d 575, 575 (Tex. 1996).

132. *Id.* at 576.

133. *Id.*

134. *Id.*

135. *Id.* at 578.

136. *Id.*

137. *Id.*

Allowing disappointed will and trust beneficiaries to sue would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under a will or trust.[138] This potential tort liability to third parties would create a conflict during the estate planning process, dividing attorneys' loyalty between their clients and the third party beneficiaries.[139] In a dissenting opinion, Justice Cornyn expressed his disapproval.[140] He argued that the court's opinion "insulates an entire class of negligent lawyers from the consequences of their wrongdoing. . . ."[141]

In 1997, the San Antonio Court of Appeals followed the rationale in *Barcelo* and refused to allow a shareholder to sue the corporation's lawyer for allegations of malpractice.[142] Although *Huie v. DeShazo* is not a case dealing with professional malpractice, the Texas Supreme Court held that only the trustee, and not the beneficiaries, was a client of the trustee's attorney.[143] The court held that any communication between the trustee and his attorney was protected from disclosure based on the attorney-client privilege.[144]

In *Guest v. Cochran*, the testator's son, individually and as independent co-executor of his parents' estates, sued an attorney because he did not advise the surviving spouse to execute a disclaimer that would save estate tax upon her death.[145] He also failed to advise the spouse to sign a new estate plan that would reduce taxes.[146] The trial court granted summary judgment against the children who received a disproportionate amount of the parents' estate.[147] The court rejected the arguments that *Barcelo* was bad law and upheld the privity bar.[148]

In 1999, the plaintiff's lawyers became more creative and sued an attorney for negligent misrepresentation.[149] The Texas Supreme Court held that "a negligent misrepresentation claim is not the equivalent of a legal malpractice claim and is not barred by the privity rule."[150] The court specifically held that privity did not bar the lawsuit and reversed the summary judgment.[151]

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138. *See id*.
139. *Id*.
140. *Id*. at 579.
141. *Id*.
142. Gamboa v. Shaw, 956 S.W.2d 662, 663 (Tex. App.—San Antonio 1997, no writ).
143. Huie v. DeShazo, 922 S.W.2d 920, 921 (Tex. 1996).
144. *Id*. at 925.
145. Guest v. Cochran, 993 S.W.2d 397, 399 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
146. *Id*.
147. *Id*.
148. *Id*. at 406.
149. *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 788 (Tex. 1999).
150. *Id*.
151. *Id*.

In *Longaker v. Evans*, the settlor terminated an inter vivos trust, which prevented the son from receiving the trust property.[152] The son asserted that his brother, an attorney, violated his fiduciary duty to the settlor by assisting the settlor in terminating the trust.[153] The appellate court awarded no damages because the assets were in the settlor's estate and, thus, actual damages.[154] Further, the court held that the brother did not owe a duty to the son because no attorney-client relationship was established.[155]

In *Byrd v. Woodruff*, a guardian ad litem appointed for minors could not be held liable for attorney malpractice because she did not enter into a contractual relationship with the minor to perform legal services.[156] In 2000, co-executors were administering an estate; one of the executors retained counsel but the other did not.[157] The court of appeals ruled that the attorney had no duty to the executor who claimed that he relied on the negligent misrepresentation of the other executor's attorney.[158] In *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, the court held that trusts as entities cannot recover damages under any cause of action as a matter for law for conduct in connection with its representation of the trustee because the trusts were not clients.[159]

In 2006, the Texas Supreme Court chipped away at the longstanding privity doctrine when it held that the executor could bring a claim for malpractice against the estate planning attorney.[160] In *Belt*, the executors brought a claim for malpractice against the drafting lawyer contending that the attorney negligently drafted their father's will and that by failing to properly advise their father, the attorney caused the estate to incur tax liability of $1.5 million that would not have otherwise been incurred.[161]

The parties reached a settlement with the surviving spouse, who was serving as executor, and the children became executors to strengthen their standing.[162] The law firm pleaded a lack of privity between the law firm and the executor of the decedent's estate.[163] Because no duty was owed to the beneficiaries, the law firm argued that there was a strict bar to liability.[164] The Supreme Court determined that the executor stands in the shoes of the deceased in seeking legal malpractice claims against a

152. Longaker v. Evans, 32 S.W.3d 725, 728 (Tex. App.—San Antonio 2000, pet. withdrawn).
153. *Id.* at 730.
154. *Id.* at 737.
155. *Id.* at 734.
156. Byrd v. Woodruff, 891 S.W.2d 689, 710 (Tex. App.—Dallas 1994, writ denied).
157. Lesikar v. Rappeport, 33 S.W.3d 282 (Tex. App.—Texarkana 2000, pet. denied).
158. *Id.* at 319-20.
159. Chapman Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 439-42 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).
160. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 782 (Tex. 2006).
161. *Id.* at 782-83.
162. *Id.* at 786-87.
163. *Id.* at 784.
164. *Id.* at 783.

negligent attorney.[165] The opinion likens the claim to those made by estate representatives that have standing after death to sue for a survival claim.[166]

The court went on to state that "[i]n cases involving depletion of the decedent's estate due to negligent tax planning, however, the personal representative need not prove how the decedent intended to distribute the estate; rather, the representative need only demonstrate that the decedent intended to minimize tax liability for the estate as a whole."[167] A caveat in a footnote does offer some guidance for the estate planner, mentioning that "[a] testator may intentionally structure the estate in a way that does not minimize tax liability . . . rather, it is the complaining party's burden to present evidence of this intent."[168]

In *Daves v. Commission for Lawyer Discipline*, an attorney had his license suspended for nine months because of a conflict of interest.[169] The attorney represented both the child and the child's parents in a settlement and failed to advise them of the conflict of interest or obtain consent from his clients.[170] The attorney argued that because the child had an ad litem, his representation did not include the child.[171] His argument was unsuccessful and led to sanctions imposed by the state bar.[172]

In *O'Donnell v. Smith*, an attorney was sued for malpractice that had allegedly occurred in 1969.[173] The Cox & Smith law firm filed a Federal Estate Tax Return for Denney, the executor of Gilcrease's estate.[174] The tax return included an inventory of Gilcrease's property.[175] The tax return and schedule did not include Gilcrease Oil interests or the Automation stock as Gilcrease's property.[176] The characterization of Gilcrease's separate and community property on the tax return formed the "basis on which Denney funded his wife's testamentary trust."[177] Denney died in April 1999.[178] One month later, the Denney children sued Denney's estate for $25 million in damages, claiming they had suffered "as a result of the Gilcrease trust being underfunded due to a mischaracterization of separate and community property assets."[179] The children claimed that their father "wrongly held

165. *Id*. at 788.
166. *Id*. at 786.
167. *Id*. at 787.
168. *Id*. at 787 n.7.
169. Daves v. Comm'n for Lawyer Discipline, 952 S.W.2d 573, 575-76 (Tex. App.—Amarillo 1997, writ denied).
170. *Id*. at 576.
171. *Id*. at 576-77.
172. *Id*. at 579.
173. O'Donnell v. Smith, 234 S.W.3d 135, 138 (Tex. App.—San Antonio 2007, pet. granted).
174. *Id*. at 139.
175. *Id*.
176. *Id*.
177. *Id*.
178. *Id*.
179. *Id*.

Gilcrease's community interest in Automation stock and Gilcrease Oil for over 30 years, causing the trust to be underfunded by $1,845,622."[180]

O'Donnell, as executor of the estate, settled the children's claims for $12.9 million.[181] O'Donnell then sued Cox & Smith, alleging legal malpractice as a result of Cox & Smith's negligent representation between 1968 and 1970, which resulted in a settlement with the beneficiaries.[182] Cox & Smith sought summary judgment, denying any basis for liability.[183] The court undertook a long analysis of both the *Belt* and *Barcelo* decisions.[184] The court noted that, as in *Belt*, "the instant suit does not involve disappointed heirs or quarreling beneficiaries seeking to impose liability against a law firm that represented them."[185] Instead, O'Donnell sought to "stand in Denney's shoes" to carry out Denney's previous legal malpractice suit against Denney's attorneys.[186]

Furthermore, the issues in *O'Donnell* differ from *Barcelo* with regard to how Denney "'intended' to apportion his estate."[187] O'Donnell sought damages suffered by Denney's estate as a result of the services provided to Denney by Cox & Smith.[188]

Finally, the court held that it was not concerned with subjecting an attorney to "almost unlimited liability" by a suit from a representative of the client's estate.[189] As the court noted in *Belt*, "[w]hile the interests of the decedent and a potential beneficiary may conflict, a decedent's interests should mirror those of his estate."[190] In this case, the personal representative of the estate was the only claimant; therefore, this suit should have mirrored the malpractice action Denney was allowed during his lifetime.[191]

The court concluded that the holding in *Belt* does not compel the view that "the Supreme Court intended to disallow a personal representative from bringing other types of malpractice claims on behalf of the estate."[192]

In *Belt*, the Texas Supreme Court stated that, as the general common law rule, penal or personal causes of action do not typically survive the

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180. *Id*.
181. *Id*.
182. *Id*.
183. *Id*.
184. *Id*.
185. *Id*. at 144.
186. *See id*.; *see also* Belt v. Oppenheimer, Blend, Harrison, & Tate, Inc., 192 S.W.3d 780, 788-89 (Tex. 2006) ("[T]he interests of the estate—which merely 'stands in the shoes' of the client after death—are compatible with the client's interests.").
187. O'Donnell v. Smith, 234 S.W.3d 135, 144 (Tex. App.—San Antonio 2007, pet. granted).
188. *Id*.; *see also Belt*, 192 S.W.3d at 788 ("[B]ecause the claim allowed under our holding today is for injuries suffered by the client's estate, any damages recovered would be paid to the estate, and, only then, distributed in accordance with the decedent's existing estate plan.").
189. *O'Donnell*, 234 S.W.3d at 144.
190. *Id*.
191. *Id*.
192. *Id*.

death of a party.[193] On the other hand, contractual claims or property related claims do typically survive the death of either party unless there is an express statute to the contrary.[194] O'Donnell compared his malpractice claim to that in *Belt* because his suit sought "economic loss for the depletion of Denney's estate."[195] The appellate court agreed that such claims survive in favor of the deceased client's estate.[196] The summary judgment in favor of Cox & Smith based on privity was improper because the record revealed fact issues on both accrual and survival.[197] As a personal representative of the estate, O'Donnell stood in the shoes of Denney and was, therefore, in privity with Cox & Smith and could sue for legal malpractice.[198]

The court further analyzed the developing law in this area by holding that Texas precedent will not allow a plaintiff to "fracture legal malpractice claims into separate claims."[199] A claim for breach of fiduciary duty is based on whether an attorney received an improper benefit through representation of the client, while a claim for legal malpractice is based on whether an attorney adequately represented a client.[200]

"Breach of fiduciary duty often involves the attorney's failure to disclose conflicts of interest, failure to deliver funds belonging to the client, improper use of client confidences, or engaging in self-dealing," while legal malpractice results from the negligence of an attorney giving bad advice or inadequately representing a client.[201]

O'Donnell argued a breach of contract claim, stating that "Cox & Smith failed to exercise the highest degree of care, good faith, and honest dealing;" however, this argument was insufficient to maintain a separate

193. *Id*. at 145; *see Belt*, 192 S.W.3d at 788-89.

194. *O'Donnell*, 234 S.W.3d at 145.

195. *Id*. at 146.

196. *Id*. at 145-46; *see Belt*, 192 S.W.3d at 785.

197. *O'Donnell*, 234 S.W.3d at 146-47.

198. *Id*. at 146.

199. *Id*.; *see also* Aiken v. Hancock, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, pet. denied); Greathouse v. McConnell, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

200. *O'Donnell,* 234 S.W.3d at 146; *Aiken*, 115 S.W.3d at 28; *see also* Kimleco Petroleum Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied).

201. *See Aiken*, 115 S.W.3d at 28; Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) (legal malpractice claim arises from attorney's failure to exercise ordinary care).

breach of fiduciary duty claim.[202] For this reason, the trial court correctly granted summary judgment.[203]

For the first prong of the analysis, O'Donnell argued that a "recognizable, extreme risk of harm" existed at the time of Cox & Smith's acts or omissions because of mischaracterizations of stock and oil interests and that "'a reasonably prudent lawyer should . . . recognize[] the extreme degree of risk resulting from improper characterization of the community and separate assets.'"[204]

Regarding the second prong, O'Donnell referred to Guenther's deposition and contended that "Paul Smith and Jack Guenther 'subjectively' recognized the risk involved and the importance of property characterization."[205] The testimony showed that Guenther did not recall advising the review of the tracking work, per a California accountant, to confirm that it followed Texas law and such failure to advise indicated Cox & Smith's indifference to Denney's risk of harm.[206]

The court of appeals decided that O'Donnell did not present more than a scintilla of evidence that Cox & Smith acted with malice.[207] The court explained four reasons of how O'Donnell did not properly offer up evidence to prove malice.[208] First, "the evidence shows that Cox & Smith did recognize the importance of the characterization issue, conducted its own independent research, and advised Denney that it was 'presumably community' and that further information was needed to determine whether it could be characterized as separate property."[209] Second, in his testimony, Guenther stated that he advised Denney to verify the property's status as separate property under Texas law in Texas probate court.[210] Third, evidence showed that Denney believed that he had a sufficient "oral agreement with Gilcrease to keep the property separate . . . ."[211] Fourth, no evidence showed that Cox & Smith was aware of Denney's extreme risk and proceeded with conscious indifference anyway or intended to cause

202. *Kimleco*, 91 S.W.3d at 923 ("The essence of a breach of fiduciary duty involves the 'integrity and fidelity' of an attorney" and occurs when the "attorney obtain[s] an improper benefit from representing a client."); *O'Donnell*, 234 S.W.3d at 146; *see Aiken*, 115 S.W.3d at 28-29; *see also* Goffney v. Rabson, 56 S.W.3d 186, 193-94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (stating that where attorney's misrepresentation is "no more than a claim for legal malpractice," there is no separate claim for breach of fiduciary duty); *Greathouse*, 982 S.W.2d at 172 (crux of the breach of fiduciary duty claim was that the attorney did not provide adequate legal representation, which was a malpractice claim).

203. *O'Donnell*, 234 S.W.3d at 147.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 147-48.

208. *Id.* at 148.

209. *Id.*

210. *Id.*

211. *Id.*

substantial injury to Denney.[212] Therefore, the court granted summary judgment.[213]

In *Bradt v. West*, the court reaffirmed that in the context of claims made by the opposing party, a litigation privilege exists preventing a lawsuit against the opposing party or opposing counsel, sometimes referred to as "attorney immunity."[214] Generally, there is no right to recover against an opposing attorney in litigation, even if the positions taken were meritless or frivolous.[215] The court further addressed the reasoning behind this policy:

> An attorney should not go into court knowing that he may be sued by the other side's attorney for something he does in the course of representing his client; such a policy would favor *tentative* representation, not the *zealous* representation that our profession rightly regards as an ideal and that the public has a right to expect. That policy would dilute the vigor with which Texas attorneys represent their clients, which would not be in the best interests of justice.[216]

The privilege applies equally to allegations of fraud and conspiracy to defraud, so long as the conduct was part of representing an opposing party in a lawsuit.[217]

Of course, if a lawyer participates in independent fraudulent acts, then liability may exist if his actions are foreign to a lawyer's duties.[218] Thereafter, in *Chu v. Hong*, the court held a lawyer liable for fraudulently transferring family business assets and conspiring with a former husband for aiding and abetting by knowingly committing fraudulent acts that injured the wife or for purposefully entering into a conspiracy to defraud a wife under the Texas Uniform Fraudulent Transfer Act.[219] But note the decision by the Texas Supreme Court, holding that the buyers' attorney could not be held liable to the former wife in tort as a third party for breach of a fiduciary duty or for conversion when allegedly conspiring with the wife's former husband to make a fraudulent transfer.[220] The court also pointed out that a legal malpractice claim carries the community property presumption.[221]

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212. *Id*.
213. *Id*.
214. Bradt v. West, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
215. *Id*.
216. *Id*.
217. *Id*.
218. *See id*. at 61-62.
219. Chu v. Hong, 185 S.W.3d 507, 513 (Tex. App.—Fort Worth 2005), *rev'd*, 249 S.W.3d 441 (Tex. 2008).
220. Chu v. Hong, 249 S.W.3d 441, 445 (Tex. 2008).
221. *Id*. at 444.

As a direct result of the cases described above and similar cases, the author's law firm, Crain, Caton & James, requested a formal ethics opinion from the State Bar of Texas.[222] The request dealt with how to ethically include in a fee agreement the scenario that if the lawyer was sued by the opposing party, the law firm could ask the client for payment.[223] While the firm was successful in assessing sanctions against Alpert in *Alpert*, the sanction did not cover the cost of the malpractice defense.[224] In an effort to prevent a repeat of this situation, Crain, Caton, & James wrote the State Bar requesting an answer to the following question: "May a lawyer entering into an agreement to defend a client in litigation include in the engagement agreement with the client a provision that requires the client to pay defense expenses incurred by the lawyer if the lawyer is later joined as a defendant in the litigation?"[225]

In response, the Professional Ethics Committee for the State Bar of Texas published Opinion No. 581 in April 2008.[226] Opinion No. 581 is based on the situation where a lawyer is engaged to defend a client in a lawsuit filed by the beneficiary of an estate, and the lawyer is then joined as a defendant by the beneficiary based on allegations of fraud and conspiracy occurring between the lawyer and his client.[227] The lawyer believes that this is a tactic used by the beneficiary to dissuade the attorney from appearing as counsel for the defendant.[228] In the past, the lawyer typically bore the costs of his own defense.[229] However, the lawyer would like for clients, under the lawyer-client engagement letter, to agree to pay the lawyer's defense expenses if the beneficiary sued the lawyer in a case in which the lawyer is engaged.[230]

The committee concluded that a lawyer-client engagement letter may include a provision under which the client agrees to pay the defense expenses incurred by the lawyer if the lawyer is joined as a defendant in the client's litigation.[231] In arriving at the opinion, the committee determined that such a provision is ethical so long as the following two-prong test is met: (i) the agreement does not prospectively limit the lawyer's liability to the client for malpractice "unless the agreement is permitted by law and the client is independently represented in making the agreement;" and (ii) the agreement is clear that the obligation to pay the defense costs incurred by

222. *See* Tex. Comm. on Prof'l Ethics, Op. 581, 71 TEX. B.J. 587 (2008); Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

223. *See* Tex. Comm. on Prof'l Ethics, Op. 581, 71 Tex. B.J. 587 (2008).

224. *See generally Alpert*, 178 S.W.3d at 402.

225. Tex. Comm. on Prof'l Ethics, Op. 581, 71 TEX. B.J. 587 (2008).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

the lawyer does not limit his liability and does not permit him to "receive and retain reimbursement for legal expenses if such expenses are determined to have arisen from the lawyer's malpractice."[232] The proposed arrangement also must not be unconscionable under Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct, which provides that "[a] lawyer shall not enter into an arrangement for . . . an illegal fee or unconscionable fee," and that "[a] fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable."[233]

Under Rule 1.04(b), some factors to consider in determining whether a proposed compensation arrangement is reasonable include "the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly" and "the experience, reputation, and ability of the lawyer or lawyers performing the services."[234]

VI. THE BEST DEFENSE IS A GOOD OFFENSE[235]

As the saying goes, the best defense is a good offense.[236] Generally, when undertaking representation, the lawyer should clearly set out the scope of his engagement in a written fee agreement.[237] The agreement should outline who the lawyer represents and what the lawyer will accomplish through the representation.[238] Equally important is to advise the potential client when no representation is accepted.[239] Many times potential clients are just looking for free information, or they are looking to disqualify the attorney from representing the opposing party. The latter is a tactic that is sometimes used by individuals who have already secured other representation.

To avoid being disqualified, the attorney should run a conflicts check prior to any information being given.[240] The attorney should also warn the client that the information obtained by the conflicts check is not privileged, and no attorney client relationship is secured until a written agreement is signed and a retainer received.[241] As a practice tip, the attorney should stop

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232. *Id*.

233. *Id*.; TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

234. Tex. Comm. on Prof'l Ethics, Op. 581, 71 Tex. B.J. 7 (2008); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(b).

235. Source anonymous, although some have Jack Dempsey, the prize-fighter, as the original source.

236. *Id*.

237. Sarah Patel Pacheco & W. Cameron McCulloch, *Landmines for Lawyers*, WILLS AND PROBATE INSTITUTE: SOUTH TEXAS COLLEGE OF LAW, Sept. 2007, at 1, 4.

238. *Id*.

239. *See id*.

240. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subt. G app. A (Vernon 2005).

241. *Id*. at 1.05.

the proposed client who wants to provide too much information before the attorney agrees to the representation, and the attorney should not agree to review materials without setting the parameters of that review. Nothing is worse than receiving a file and, by the time the attorney reviews the material, learning that the statute of limitations has run.[242]

VII. SPECIFIC WAYS TO REDUCE LIABILITY DURING THE INITIAL STAGE OF THE ENGAGEMENT

The American Bar Association published a study in April 2002 concerning the public's perception of lawyers.[243] The study demonstrates that the public has a negative view of attorneys, even though many are satisfied with their own lawyer's service.[244] Relevant findings include:

- Lawyers have a reputation for winning at all costs;
- Lawyers are driven by profit and self-interest;
- Lawyers' tactics border on unethical conduct;
- Consumers complain most about lawyers' fees—saying they charge too much, are often not up front about their fees, or are unwilling to account for charges or hours billed; and
- Lawyers drag out cases unnecessarily.[245]

It is with this backdrop that each case must be evaluated based on the facts and circumstances of that particular proposed representation.[246] Some cases involve greater litigation risks than others. Warning signs of a representation that may cause potential litigation include:

- A client who has been represented by a number of attorneys;
- A client who is emotionally out of control, often recognizable as the one who indicates, "It is the principle of the matter" or "I would rather pay you all the money in attorney's fees than give one dime to the other side";
- A client with unreasonable expectations;
- The know-it-all client;
- The client who wants to micromanage the representation;

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242. *See* Pacheco & McCulloch, *supra* note 237, at 45.

243. *See Public Perceptions of Lawyers Consumer Research Findings*, SECTION OF LITIGATION (American Bar Association, Chicago, IL), Apr. 2002, *available at* http://abanet.org/litigation/lawyers/public perceptions.pdf.

244. *Id*. at 14.

245. *Id*. at 7-9, 14-15. Additional findings were also made in a survey conducted by the ABA in an article on *Perceptions of the U.S. Justice System* in 1998.

246. This paragraph and the remainder of Part VII are adapted from Pacheco & McCulloch, *supra* note 237, at 1.

- A client who wants to include the beneficiaries in administration matters;
- A client who is dependent on a third party;
- The out of control fiduciary;
- The out of control beneficiary;
- A hostile or vindictive fiduciary;
- A hostile or vindictive beneficiaries;
- An estate planning client that seeks an unusual disposition of estate;
- A potentially incapacitated client;
- Representing spouses, particularly those with disparate wealth between them;
- Beneficiaries with drug, alcohol, or other dependencies; and
- Existing or anticipated family conflict.

Unfortunately, the warning signs listed above generally constitute the types of clients that enlist the help of probate and trust litigators.

While the preceding list is not intended to be comprehensive, these situations are often a precursor to future litigation, which could include the attorney. An attorney is not under an ethical obligation to accept every requested engagement. It is appropriate for an attorney to consider whether the proposed engagement will result in him or her becoming an unwilling witness in, or a party to, future litigation.

A. Assess Your Own Legal Competency and the Capacity of Your Legal Team to Keep Up with the Workload[247]

Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct provides that an attorney may not accept or continue a representation which the attorney knows or should know is beyond his or her legal competence.[248] When determining whether a matter is beyond an attorney's competence, the practice area of the underlying representation is not the only issue.[249] Relevant factors include the complexity of the particular case, the attorney's experience in addressing the facts of that particular case, the time the attorney has available to address the issues, and the attorney's experience in handling issues raised by such representation.[250]

While an attorney may be technically competent to handle the proposed engagement, the attorney, to better serve the proposed client's needs, may refer the potential client to another attorney who has dealt with the specific issues and complexities that may be raised during the

247. This section is adapted from Pacheco & McCulloch, *supra* note 237, at 1-2, 12.

248. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005)

249. *Id.* at cmt. 1.

250. *Id.*

representation.[251] An attorney does not violate the Rules of Professional Conduct, however, if he or she associates with another attorney for purposes of gaining additional knowledge or expertise with regard to the client's specific issues, provided that the attorney can competently represent the client upon receiving such additional advice.[252]

An attorney may reduce or eliminate liability to a non-client by: (i) setting forth limitations as to whom should rely on the representation, or (ii) providing an accurate delineation and disclaimers as to the scope of the representation.[253]

In *Kastner v. Jenkens & Gilchrist, P.C.*, the appellate court held that "[f]or purposes of determining whether the non-client justifiably relied on the representation, the reviewing court must consider the nature of the relationship between the attorney, client, and non-client."[254] A non-client cannot rely on representations made by a non-retained attorney unless the attorney invites that reliance.[255] Thus, the mere forwarding of a partnership agreement to a non-client "cannot reasonably be construed as a legal opinion on the validity of the agreement or the propriety of investment in the partnership."[256] In reaching its decision, the appellate court in *Kastner* stated:

> We similarly reject the [plaintiffs'] attempt to characterize the contents of the partnership agreement as representations made by [the attorney-defendant]. To do so would effectively require attorneys to adopt as their own the terms of-and representations made in-legal documents they prepare for their clients. Such an expansive interpretation far exceeds the scope of *McCamish* liability.[257]

B. Consider Potential Conflicts of Interest[258]

The Texas Disciplinary Rules of Professional Conduct provide that an attorney should not represent individuals who have material conflicts of interest.[259] In a civil proceeding, clients may consent to certain conflicts of

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251. *See id*.

252. *See id*. at 1.01(a). *See infra* text accompanying notes 253-55.

253. McCamish v. F.E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999); *see infra* text accompanying notes 254-55; *see also* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 176-77 (Tex. 1997).

254. Kastner v. Jenkens & Gilchrist, P.C., 231 S.W.3d 571, 577-78 (Tex. App.—Dallas 2007, no pet.).

255. *See id*. (citing *McCamish*, 991 S.W.2d at 792); *see also* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 788 (Tex. 2006) (discussing *McCamish* reliance requirements in the context of an estate planning malpractice claim).

256. *Kastner*, 231 S.W.3d at 578.

257. *Id*.

258. This section is adapted from Pacheco & McCulloch, *supra* note 237, at 2.

259. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

interest created by joint representation provided the consent is obtained after full disclosure.[260] Potential or alleged conflicts of interest are generally raised when an attorney represents both a husband and wife or other joint clients in a trust, estate, or other estate planning context.[261] While potential conflicts of interest do not prohibit all joint representations, an attorney must evaluate the potential conflicts and the nature, implications, and possible consequences of the joint representation before agreeing to the joint engagement.[262] The failure to recognize conflicts of interest can lead to claims against the attorney by the client or a third party.[263]

C. Clearly Identify the Client[264]

Care should be taken to clearly (i) identify the client, (ii) identify the specific capacities of which the client needs representation, and (iii) confirm the authority of the client to enter into the engagement. In matters relating to trust and estates, one person may represent a variety of interests. For example, a surviving spouse may seek representation as an executor and as a trustee of a trust created under the deceased spouse's will. He or she may also have individual claims or interests that require representation. The attorney must determine whether the spouse requires representation in all capacities or only certain capacities.[265] Sometimes, a lawyer is described as the "attorney for the estate."[266] This description is inaccurate.[267] When an attorney obtains admission of a will to probate or settles the estate, the attorney represents the executor, not the estate, so the executor is responsible for the attorney's services.[268] However, in *Querner v. Rindfuss*, beneficiaries alleged that a Texas attorney told them that he was not the attorney for the independent executrix but for the estate.[269] They also claimed that that attorney promised to provide various notices and to protect their interests in certain respects.[270]

Likewise, it is advisable to review any relevant documents to confirm the potential client or clients have the legal ability to retain the attorney. For example, co-fiduciaries may require a joint agreement under the terms of the governing instrument.[271] Also, engagement by an entity requires the

260. *See id*.; *see also* FDIC v. U.S. Fire Ins. Co., 50 F.3d 1304, 1314 (5th Cir. 1995).
261. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 15.
262. *See id*. 1.06(c).
263. *See* discussion *infra* Part III.
264. This section is adapted from Pacheco & McCulloch, *supra* note 237, at 1, 2.
265. *See* discussion *infra* Part VII.D.2.
266. Querner v. Rindfuss, 966 S.W.2d 661, 666 (Tex. App.—San Antonio 1998, pet. denied).
267. *Id*. at 667.
268. *Id*.
269. *Id*.
270. *Id*.
271. *See* Conte v. Conte, 56 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

consent of certain officers or directors or appropriate resolutions. A unique situation can also occur when an attorney drafts a power of attorney for an agent.[272] The lawyer must clearly advise the agent that he stands in the shoes of the principal and that the lawyer will be acting on the principal's sole behalf when giving advice.[273]

D. Obtain Engagement/Fee Agreements[274]

A well drafted engagement or fee agreement can both provide protection to the attorney and be beneficial to the client. The agreement should set out the scope of the engagement as well as the method of calculating and collecting fees. For example, if entering into a joint representation of a husband and wife or co-fiduciaries, the fee agreement should also discuss potential conflicts of interest and the expected course of action in the event of an actual future conflict. The agreement may also contain dispute resolution provisions. The lawyer should verify that an executed fee agreement was received—an unsigned agreement shows that the client is non-responsive and does not intend to be liable.[275]

Some of the more significant provisions that may reduce future litigation follow.

1. Address Joint Representation Issues

The engagement letter should address the issues involving a joint representation and provide any necessary disclosures, and the attorney should obtain the client's consent to the joint representation. With regard to a potential engagement involving the joint estate planning of a husband and wife, the fee agreement may address the joint representation as follows:

> Clients have elected to jointly hire Firm. By agreeing to a joint representation rather than engaging separate independent counsel, Clients have each foregone the potential benefits of having Clients' own lawyer advocate on each Clients' behalf in an effort to minimize expenses and facilitate the development of a coordinated estate plan. As Firm has discussed, many couples have reasonable differences of opinion with regard to one or more aspects of their estate plan, however, Firm, in representing both Clients, cannot advocate on behalf of just one of the Clients over the other. Rather, Firm will balance both views, advise both Clients regarding the positives and negatives associated with each view,

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272. *See* CRAIG B. GLIDDON & GREG ABBOTT, TEXAS PRACTICE GUIDE: BUSINESS & COMMERCIAL LITIGATION § 28.111 (2007).

273. *See* RONALD R. CRISSWELL ET AL., TEXAS PRACTICE GUIDE: WILLS, TRUSTS & ESTATE PLANNING § 9:43 (2008).

274. This section is adapted from Pacheco & McCulloch, *supra* note 237, at 2.

275. *See* KIM J. ASKEW & JUDGE ADALE HEDGES, TEXAS PRACTICE GUIDE: CIVIL PRETRIAL § 1:172 (2008).

> and attempt to resolve disagreements before they rise to the level of an actual conflict of interest. Firm does not currently have knowledge of any existing conflict between Clients, or any knowledge of any facts that may result in a future conflict. If any conflict or potential conflict does arise, however, Clients agree to make Firm aware of the conflict immediately. If Firm is unable to resolve the conflict, Firm will withdraw from representation of Clients jointly and each of the Clients, individually.

In a joint fiduciary representation situation, the agreement may provide as follows:

> The Clients have requested that the Firm represent them jointly. The Clients are aware that the Firm has a duty to exercise independent professional judgment on behalf of each of the Clients. When an attorney is requested to represent multiple clients in the same matter, he or she can do so if he or she concludes that he or she can fulfill this duty with regard to each of the clients on an impartial basis and obtains the consent of each client after an explanation of the possible risks involved in the multiple representation situation. Further, if at any time during the representation it is determined that, because of the differences between the joint clients, an attorney can no longer represent each of the clients impartially, then the attorney must at that time withdraw from representing all of the clients. If any conflict arises that could affect the Firm's representation of any of the Clients, the Clients agree they shall promptly inform the Firm of the conflict. The Clients understand, however, that if in the future the Clients' differences of opinion arise which cannot be resolved on an amicable basis or that the Firm concludes that the Clients' differences of opinion cannot be resolved on terms compatible with the best interest of all the Clients, then the Firm will withdraw from the representation. In the event of withdrawal, the Firm will be entitled to payment for their fees and expenses incurred to date.

Finally, the attorney should inform the client that information provided by one joint client will be shared with the other joint client and obtain all the clients' contents to such disclosure. For example, the fee agreement may provide as follows:

> The Clients further understand that any documents or information disclosed or provided by any of the Clients may be disclosed to the other Clients in connection with this representation. Each Client consents and agrees that the Firm may disclose such information to all Clients and waive any privilege it may have as to such documents and information as between the Clients.

2. Address Identity of Client and Relevant Capacities

An attorney should be clear whether he represents the potential client in all capacities if no conflict exists or represents the potential client only in some capacities.[276] It is advisable to address these in the fee engagement. For example, the fee agreement may provide that:

> Firm's representation, with respect to this matter, will include advising, counseling, processing, litigating, and advising Client in Client's capacity as the executor of Mr. X's estate. Firm's services may also include advising Client regarding the administration of Mr. X's estate so that Client may properly carry out Client's duties and responsibilities as executor. Note that as we discussed, Firm will not be representing Client individually or advising Client on Client's individual claims or interest. Firm recommends that Client seek the advice of separate and independent counsel if Client has any questions regarding Client's individual rights and claims with the regard to Mr. X's estate.

3. Address Scope of Representation

Because an estate planning or fiduciary engagement may include a host of issues related to the engagement, it is advisable for the attorney to be clear regarding the scope of engagement.[277] It is suggested that the fee agreement include a statement as to those matters for which the attorney is engaged. Likewise, the fee agreement should attempt to be as clear as possible about any limitations on the scope of the representation with regard to specific actions that will and will not be undertaken.[278]

For example, in an estate planning engagement, the agreement may provide as follows:

> Client has retained Firm to prepare the following estate planning documents for Client:
>
> - Last Will and Testament;
> - Directive to Physicians;
> - Durable General Power of Attorney;
> - Power of Attorney for Health Care - Designation of Health Care Agent;
> - Declaration of Guardian Before Need Arises; and
> - Instructions for preparing beneficiary designations to coordinate transfer of non-probate assets.

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276. *Id.* at 4.

277. *Id.* at 4, 5.

278. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

> With regard to these documents, Client has advised Firm that his total property is worth less than $1,000,000 and notwithstanding the fact that his net worth may increase in the future, he has decided that he does not want to engage Firm to prepare wills that provide for estate tax planning or otherwise address potential estate taxes. Client agrees that once Firm has prepared and assisted Client in the execution and implementation of Client's estate plan, Firm's representation of Client in this matter will terminate.

A sample of an engagement involving the settlement of an estate may provide as follows:

> Firm will represent Client in Client's capacity as personal representative (i.e., executor and/or any other related fiduciary capacities) of the Estate. Firm will provide legal advice and counsel regarding Client's fiduciary rights and duties under applicable law, including the Texas Probate Code, the Texas Trust Code, the Texas Tax Code, and the Internal Revenue Code, and will assist Client in the proper fulfillment of those duties. Once Firm becomes more familiar with the circumstances and issues of the Estate, Firm will provide more detail but, generally, Firm's anticipated services include the following:
>
> - Estate administration: Firm will determine whether probate and/or administration are necessary or desirable. If so, Firm will prepare the required Court pleadings and documents, attend the required Court hearings, and advise Client on matters relating to the collection and administration of Estate assets.
> - Tax returns: Firm will determine whether a federal estate tax return and any state inheritance tax returns are required for the Estate once Client provides the information needed to make such a determination. If so, Firm will prepare the returns as required. (Note: Firm does not prepare income tax returns, such as Form 1041 or the deceased's final Form 1040. Generally, a CPA will prepare income tax returns and Firm advises Client to engage a qualified CPA to advise Client on such matters).
> - Estate distribution–implementation and winding up: Firm will advise Client on matters relating to the final distribution of Estate assets in accordance with the provisions of the decedent's will and other estate planning documents.

Finally, it is advisable to clearly identify matters that the attorney will not handle. Such matters are those that commonly arise during the course of the engagement that the client could claim a trust and estate attorney handles, such as fiduciary income tax returns. For example, a sample provision confirming the attorney will be providing estate tax advice but not income tax advice may provide the following:

> Client understands that Firm's representation does not include rendering any income tax advice to Client or the preparation of any income tax returns. Client must seek such advice from Client's accountant or other financial advisor. Firm will, however, be advising Client regarding the federal estate tax . . . and preparing the appropriate federal estate . . . tax returns.

4. Address Basis for Legal Fees and Expenses[279]

The fee agreement should generally set forth the method of computing attorney's fees.[280] The fee agreement must be in writing for a matter handled on a contingency basis.[281] A written agreement is consistent with the expressed preference of the Texas Disciplinary Rule of Professional Conduct 1.04 in the non-contingent fee situation.[282] A written agreement is consistent with the express requirements of Texas Disciplinary Rule of Professional Conduct 1.04 and section 82.065 of the Texas Government Code in the contingent fee situation.[283] Also, when the attorney customarily bills in minimum units of time, regardless of the actual time undertaken on a specific matter, a disclosure should be made in the document.[284]

For example, a fixed fee estate planning agreement may provide as follows:

> Based on Firm's attached customary fixed-fee schedule for estate-planning services, Firm [has] agreed on a total fixed fee of $____. The balance will be due when Client signs the documents described above, or, if sooner, one month after Firm first delivers to Client proposed drafts of the documents described above. The fixed fee covers: (1) Firm's initial conference or review of financial information and proposed estate plan, (2) preparation of first drafts of the estate-planning documents indicated above in accordance with Firm's discussions or review and written instructions to date, and (3) an in-office signing conference. The fixed fee also includes up to ___ hour(s) of additional attorney time (at the undersigned's hourly rate) for (a) any additional conferences and communications (in person, by phone, or by e-mail) with Client or others on Client's behalf, and (b) any revisions to the initial drafts (e.g., where Client changes his mind or because information Client [has] given Firm so far proves to be inaccurate or incomplete). Note, Firm's fixed fee includes standard expenses (basic photocopying, postage, etc.), but does not include additional expenses Firm may incur on Client's behalf (such as

279. This subsection is adapted from Pacheco & McCulloch, *supra* note 237, at 4-5.

280. TEX. GOV'T CODE ANN. § 82.065 (Vernon 2005); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(d), *reprinted in* TEX. GOV'T CODE ANN., tit. 2 , subtit. G app. A (Vernon 2005).

281. TEX. GOV'T CODE ANN. § 82.065; TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 & cmts.

282. TEX. GOV'T CODE ANN. § 82.065; TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 & cmts.

283. *See* TEX. GOV'T CODE ANN. § 82.065; TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 & cmts.

284. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 cmt. 2.

> requested messenger delivery charges, staff overtime when Client requests rush service, filing and recording fees, long distance charges, extra photocopies, etc.), which Firm will bill to Client.

An hourly rate engagement with explanation of the method of billing units may provide as follows:

> Firm's fee will be a reasonable fee based primarily on the time Firm expends providing the service outlined above (including additional conferences and communications, in person, by phone, by letter, or by e-mail, with Client or others on Client's behalf). Firm generally charges its time in minimum units of ¼ hour, i.e., 15 minute units. More than one attorney or paralegal with the Firm may assist with respect to this matter. Currently, hourly rates for Firm's paralegals and attorneys vary from $___ to $___. Firm reviews and may adjust its billing rates from time to time and Client agrees that Firm may do so.

The engagement agreement may alternatively provide:

> In consideration of this representation, Client agrees to pay Firm, in ___, Texas, the following amounts: a fee of $__ per attorney hour for the time spent on the case for all work, including but not limited to, pleadings, preparation for trial, research, telephone calls, drafting of documents, depositions, interrogatories, and court appearance; a fee of $___ per hour for support staff time. Each portion of a quarter hour is billed as a full quarter hour. Client promises to reimburse and indemnify Firm for and against all sums that they may spend or incur in representing Client such as Court costs, taking of depositions, the gathering and adducing of evidence, expert or otherwise, obtaining photographs and x-ray pictures, medical examinations and treatment, duplication expense, long distance telephone calls, certified mailing charges and travel. Client agrees to pay all fees and costs on a monthly basis, with payment due upon receipt of a statement from the Firm. This fee schedule will be valid for a period of one year from the date of this contract, but will be subject to change after that time.

If the fee is based on a percentage, the contingency must be approved in writing, preferably prior to the commencement of the engagement. A contingency fee agreement may provide as follows:

> Client hereby assigns, sells, conveys, and agrees to pay and deliver to the Law Firm the following contingent interest in the Lawsuit measured by the amount or recovery to be enjoyed, realized out of, or collected from, Lawsuit (whether in money, other property, future relief, or other consideration), either through settlement, compromise, or judgment (such amount of recovery is hereinafter referred to as the "Litigation Proceeds" and is more specifically defined below):

- If, after the effective date of this Agreement, the Lawsuit is settled, thirty percent (30%) of the Litigation Proceeds;
- If the Lawsuit is tried in the initial trial court, thirty-five percent 35%) of the Litigation Proceeds (for the purpose of this Agreement, the Lawsuit will be deemed to be "tried" if the Law Firm announces ready at a trial on the merits of the case or if any hearing approving a settlement agreement is contested);
- If the judgment of the initial trial court is appealed to a Court of Civil Appeals, thirty-seven and one-half percent (37 ½ %) of the Litigation Proceeds (for the purpose of this agreement, the law suit will be deemed to be "appealed" if the first step in such appeal such as filing the cost bond by either side has been done). Client understands that a case may be tried and a settlement reached in principle but not documented by the time cost bonds and other filings are done which would increase the attorney's fee;
- If the judgment of the Court of Civil Appeals is appealed to the Texas Supreme Court, forty percent (40%) of the Litigation Proceeds.

5. Address Payment and Sources of Fees[285]

The agreement should be clear as to the client's responsibility for the payment of the attorney's fees and expenses. For example, when the client is a fiduciary, the fee agreement should clarify whether the client is liable only in a fiduciary capacity or whether the client is also individually liable. This should be confirmed in both the provisions of the fee agreement by requiring the client to sign in all relevant capacities.

Furthermore, care should be taken to confirm that any payments from fiduciary assets are authorized under the instrument or Texas law. As discussed previously, the payment of an attorney has led to claims against the attorney for conspiracy.[286] While such claims are often frivolous, the attorney will be forced, at a minimum, to defend against such claims.

6. Include Dispute Resolution Provisions[287]

While not required, it is advisable to include a mechanism to resolve future disputes relating to the engagement. These provisions may range from mediation to arbitration. A brief discussion of the most common provisions follows.

a. Arbitration

Arbitration continues to provide parties an alternative forum in which to settle disputes and often avoids unwanted publicity or disclosures

285. This subsection is adapted from Pacheco & McCulloch, *supra* note 237, at 7.
286. *See* discussion *supra* Part III.B.
287. This subsection is adapted from Pacheco & McCulloch, *supra* note 237, at 7-9.

associated with a public proceeding. To be binding, parties must contractually agree to submit their disputes to arbitration in lieu of, or in addition to, other remedies available under Texas law. In the past decade, arbitration procedures have been routinely included in agreements involving business associations such as partnerships, employment, purchase and sale, and professional service agreements. More recently, arbitration agreements are being used by attorneys to resolve disputes with their clients.

Although Texas law is still developing in this area, it appears that Texas courts have supported the enforcement of arbitration provisions in engagement agreements. In the case of *In re Hartigan*, the San Antonio Court of Appeals considered the enforceability of an arbitration provision in an attorney engagement agreement.[288] The former client claimed that an arbitration provision in an engagement agreement violated Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct.[289] Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct reads as follows:

> (g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client with out first advising that person in writing that independent representation is appropriate in connection therewith.[290]

The court, however, found that the arbitration provision in the engagement agreement did not violate Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct.[291] Rather, the court found that the arbitration provision merely prescribed the procedure for resolving any conflicts between client and attorney and did not act to limit the attorney's potential malpractice liability.[292] Therefore, the court ruled that requiring the client to arbitrate her legal malpractice claims would not violate Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct.[293]

In a more recent decision, attorney Stephen T. Leas, who was facing several grievance matters, asked attorney Robert S. Bennett to represent him.[294] Bennett and Leas soon entered into a retainer agreement that contained an arbitration clause.[295] Shortly thereafter, Leas approached

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288. *In re* Hartigan, 107 S.W.3d 684 (Tex. App.—San Antonio 2003, pet. denied).

289. *Id*. at 686; *see* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(g).

290. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(g).

291. *In re* Hartigan, 107 S.W. 3d at 689.

292. *Id*.

293. *Id*.

294. Bennett v. Leas, No. 13-06-469-CV, 2008 WL 2525403, at *1 (Tex. App.—Corpus Christi June 26, 2008, pet. filed).

295. *Id*.

Bennett seeking representation regarding several other grievances filed against Leas.[296]

In December 2003, Bennett sought to initiate arbitration after contending that Leas failed to pay his invoices for legal services.[297] Leas then sued Bennett and requested a declaratory judgment preventing Bennett from arbitration.[298] Bennett filed a plea in abatement requesting enforcement of the arbitration agreement and suppression of Leas's petition.[299]

After a hearing, the trial court ordered abatement of both Bennett's requests for arbitration and Leas's lawsuit until the original grievance matters were completed.[300] Bennett tried to appeal the trial court's order, but the Texas Thirteenth Court of Appeals dismissed Bennett's appeal for want of jurisdiction.[301] Soon after Bennett filed a petition for review, Leas informed the trial court that the grievance matters had been completed.[302] The trial court then placed the case back on its docket.[303]

Bennett again requested an order for arbitration from the court but the trial court denied his request.[304] The trial court's issued findings of fact and conclusions that included the following:

> 1) The Plaintiff [Leas] has alleged causes of action alleging legal malpractice, breach of fiduciary duty, fraud and breach of contract against Defendant [Bennett] concerning four (4) separate and independent cases in which Defendant represented Plaintiff. They are known as "Rodriguez," "Herrera," "Alvarez," and "Reyes."
> 2) There is no written agreement signed by the parties that involve any issues relating to the "Herrera," "Alvarez," and "Reyes" matters.
> 3) The Defendant, in a hearing before this Court on June 10, 2004, had stipulated to this Court that the "Rodriguez" contract only concerned the "Rodriguez" matter and no other matter.
> 4) There is a written contract between the parties concerning only the "Rodriguez" matter that does contain an arbitration clause under the Texas Arbitration Act (TAA).

296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*

> 5) One of the causes of action alleged by the Plaintiff concerning the "Rodriguez" matter is for a personal injury.
> . . .
> 7) The contract was not signed by either party's attorney of record.
> 8) The Plaintiff was not advised in writing by the Defendant to consult an attorney prior to signing the agreement.
> 9) The Plaintiff was not independently represented when the agreement was made between the parties.
> 10) The arbitration clause in the 'Rodriguez' matter attempts to limit the liability of the Defendant for malpractice.
> . . .
> 19) The Texas Civil Practice and Remedy [sic] Code § 171.001, states that, for an arbitration agreement to be enforceable, that there must exist a written agreement to arbitrate between the parties. Therefore, there being no written contract with an arbitration agreement that exist[s] between the parties concerning the "Herrera," "Alvarez," and "Reyes" matters, the Defendant is not entitled to compel arbitration on those matters.
> 20) The arbitration clause in the "Rodriguez" matter is in violation of the Texas Rules of Professional Conduct, Rule 1.08(g), and as such is against public policy and is therefore unenforceable.
> 21) The Defendant has waived any right to arbitrate in the "Rodriguez" matter, by substantially invoking the judicial process resulting in the Plaintiff suffering actual prejudice.[305]

Courts generally enforce arbitration agreements, but there can be no such enforcement in the absence of such an agreement.[306] The parties must have a clear arbitration agreement.[307] If one party contests that a binding arbitration agreement exists, then the trial court can decide whether to compel arbitration, considering uncontroverted affidavits, pleadings, discovery, and stipulations.[308] A reviewing court that decides whether the parties agreed to arbitrate does not resolve doubts or presume in favor of arbitration.[309] In order to determine whether a valid arbitration agreement

305. *Id*. at *1-2.

306. *Id*. at *2 (citing Cappadonna Elec. Mgmt. v. Cameron County, 180 S.W.3d 364 (Tex. App.—Corpus Christi 2005, no pet.)).

307. *Id*.

308. *Id*.

309. *Id*. (citing *In re* Bunzl U.S.A., Inc., 155 S.W.3d 202 (Tex. App.—El Paso 2004, no pet.)).

exists, the reviewing court applies standard contract principles.[310] The existence of an enforceable agreement to arbitrate is a question of law, reviewed de novo.[311]

The appellate court held that, to determine if a claim is within the scope of an arbitration agreement, the court must look to the trial court's legal interpretation of that agreement and review that interpretation de novo.[312] The court further held that the party opposing arbitration has the burden to show that the claims are outside the scope of the agreement.[313] In *Bennett v. Leas*, the appellants argued that, even though the contract did not mention the Alvarez, Herrera, and Reyes matters, they were still covered by the arbitration clause because they were included in the attorney-client relationship between Bennett and Leas.[314] Appellants also argued that the trial court should have recognized the provision holding that arbitration was applicable to any "'controversy, claim, or dispute in the course and scope of the Attorney-Client relationship or arising out of or relating to'" the agreement.[315]

The lower court found that Bennett had specified in a 2004 hearing that the contract dealt only with the Rodriguez matter, but the appellants claimed that was untrue.[316] The appellants admitted that the contract mentioned only the Rodriguez matter but argued that there was nothing regarding the limits of the arbitration clause.[317]

The first paragraph of the Rodriguez contract is as follows:

> The purpose of this agreement is to set forth our understanding and agreement ("Agreement"), pursuant to which our law firm, THE BENNETT LAW FIRM ("Firm"), has agreed to represent STEPHEN T. LEAS ("Client" or "you") in the following referenced matters: *State Bar of Texas Grievance Matters;* Appeal and Motion to Reconsider—S2080103329; *Maria H. Rodriguez—Stephen T. Leas* and BODA Case No. 26618; *Stephen T. Leas v. Commission for Lawyer Discipline* ("Matters")[.] We have, of course, discussed these Matters with you previously, but it is prudent that our understandings be documented to prevent any confusion or misunderstanding in the future.[318]

310. *Id.*

311. *Id.* (citing Cappadonna Elec. Mgmt. v. Cameron County, 180 S.W.3d 364 (Tex. App.—Corpus Christi 2005, no pet.)).

312. McReynolds v. Elston, 222 S.W.3d 731, 740 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

313. *Id.*

314. *Bennett*, 2008 WL 2525403 at *3.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at *5.

Section V paragraph C states:

> The legal fees agreed upon herein are for representation of the Client in the above referenced Matters and do not include Firm's legal services in any other matter. In the event that representation is required in any other court or regarding any other matter, a new agreement must be made between the Firm and the Client.[319]

Section VIII states:

> To further clarify our agreement on arbitration, arbitration would apply to any controversy, claim or dispute in the course and scope of the Attorney-Client relationship or arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate. Our dispute shall be determined by arbitration in Houston, Texas before a solo arbitrator, in accordance with the laws of the State of Texas for agreements made in and to be performed in Texas.
> "Disputes" shall include, without limitation, those involving fees, costs, billing, and breach of ethical or fiduciary duties.[320]

The appellants also submitted an affidavit from Robert Bennett.[321] Bennett stated that Leas "'had the Firm take on the additional cases, and representation in these cases was undertaken on the mutual consent of both parties that the representation in all cases would be handled per the terms of the original contract.'"[322]

The lower court found no written agreement with regard to the Herrera, Alvarez, or Reyes matters.[323] It also held that the parties were not entitled to arbitration regarding those mattes per section 171.001 of the Texas Civil Practice and Remedies Code because the parties lacked an arbitration agreement.[324] The appellate court agreed with both of these findings.[325]

The appellants also contended that the lower court inappropriately applied the "personal injury" exception of section 171.002(a)(3) of the Civil Practice and Remedies Code, arguing that: (i) that a claim for legal

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319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(a) (Vernon 2005) ("A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that: (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement.").
325. *Bennett*, 2008 WL 2525403 at *5.

malpractice is different from a personal injury claim, and (ii) that both Bennett and Leas were lawyers when they signed the agreement.[326]

In sustaining the lower court's finding that neither party's attorney of record signed the Rodriguez contract, the appellate court pointed out that the only signatures on the contract were from Leas and Bennett.[327] The appellants further argued that, even if the court was to find a claim for personal injury, the court should hold that the clause still comports with the TAA requirement because both parties were attorneys.[328] However, the appellate court recognized that personal injury claims do not fall within the statute unless "'each party to the claim, on the advice of counsel, agrees in writing to arbitrate'" and "'the agreement is signed by each party *and each party's attorney*.'"[329] The court held that no statutory exception exists for parties who are also attorneys.[330] The evidence was sufficient to sustain the lower court's holding that neither party's attorney of record signed the contract.[331] The appellate court held that, if the malpractice claim is a personal injury claim, the trial court properly denied arbitration because the Rodriguez contract failed to comply with section 171.002(c).[332]

Appellants note that since the court's holding in *Godt*, three other appellate courts have held that a legal malpractice claim is not a claim for personal injury.[333] In *In re Hartigan*, the San Antonio Court of Appeals relied on a "plain reading of section 107.002" to conclude that a legal malpractice claim "is not specifically prohibited from arbitration."[334] The *Hartigan* court criticized the reliance on the cases cited in *Godt* and held that the legislative history of section 107.002 gives no indication that the legislature intended for legal malpractice claims to fall within the personal injury provision.[335]

In *Miller v. Brewer*, the Amarillo court followed the rationale of the *Hartigan* court in "refus[ing] to hold that a legal malpractice suit [is] *per se* one for personal injuries."[336] The *Miller* court reasoned that the plaintiff's legal malpractice claim arose "out of a suit for economic losses as a result of employment discrimination," and was, therefore, like the malpractice

326. *Id.* at *6.
327. *Id.*
328. *Id.*
329. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(c) (Vernon 2005)) (emphasis added).
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.* at *7 (citing Taylor v. Wilson, 180 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2005, pet. denied), Miller v. Brewer, 118 S.W.3d 896, 898 (Tex. App.—Amarillo 2003, no pet.) (per curiam), *In re* Hartigan, 107 S.W.3d 684, 687, 690 (Tex. App.—San Antonio 2003, pet. denied).
334. *In re Hartigan*, 107 S.W.3d at 687, 690 (addressing a legal malpractice claim against attorneys in the context of a divorce proceeding).
335. *Id.*
336. Miller v. Brewer, 118 S.W.3d 896, 898 (Tex. App.—Amarillo 2003, no pet.).

claim in *Hartigan*, "not a suit for personal injuries within the purview" of the statute.[337]

Finally, in *Taylor v. Wilson*, the Houston Fourteenth Court of Appeals reached the same conclusion as the *Hartigan* and *Miller* courts in holding that a legal malpractice claim is not a claim for personal injury.[338] In *Wilson*, the court noted that the plaintiff's "underlying claim was for economic losses rather than for personal injury."[339] The *Wilson* court also relied on the legislative history of the TAA, which, according to the court, "reveals the legislature intended to restrict the scope of the personal injury exception to *physical* personal injury."[340]

In his concurring opinion in *Wilson*, Justice Frost noted that "[t]he term 'personal injury' has been used in both a narrow sense of 'bodily injury' and a broader sense, meaning a personal wrong, including libel, slander, malicious prosecution, assault, and false imprisonment, as well as bodily injury."[341] Justice Frost concluded that a legal malpractice claim is not a personal injury claim "under *either* the narrow or broad definition" because it "does not involve bodily injury, and it does not involve injuries to rights regarding the person."[342] Justice Frost also criticized the majority's legislative history argument, noting that the argument relies solely on an opinion of the author of a law journal comment and is, therefore, "not part of the legislative history at all."[343]

Godt used *Sample v. Freeman* and *Estate of Degley v. Vega* to support the holding that section 171.001(a) of the Texas Civil Practice and Remedies Code translates to exclude legal malpractice from claims of personal injury.[344] However, the court recognized that its sister courts decided not to follow *Godt*.[345] Despite other courts' resistance, the *Bennett* court refused to abandon its precedent without guidance from the Texas Supreme Court.[346] Conflict aside, the *Bennett* court still affirmed the trial court, finding that one of the appellee's claims for legal malpractice was a personal injury claim.[347] The court concluded that, because the legal malpractice claim is a personal injury claim under section 171.001(a) and because appellee's contract fell short of section 171.001(a)'s requirements,

337. *Id.* at 899.

338. Taylor v. Wilson, 180 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

339. *Id.* at 630.

340. *Id.*

341. *Id.* at 632 (Frost, J., concurring).

342. *Id.* at 632-33 (emphasis added).

343. *Id.* at 634 (citing Robert J. Kraemer, *Attorney-Client Conundrum: The Use of Arbitration Agreements for Legal Malpractice in Texas*, 33 ST. MARY'S L.J. 909, 933 n.139 (2002)).

344. Bennett v. Leas, No. 13-06-469-CV, 2008 WL 2525403, at *7 (Tex. App.—Corpus Christi June 26, 2008, pet. filed) (mem.) (citing *In re* Godt, 28 S.W.3d 732, 738-39 (Tex. App.—Corpus Christi 2000, no pet.)).

345. *Id.*

346. *Id.*

347. *Id.*

the trial court's denial of arbitration was proper.[348] Furthermore, the court acknowledged that, if the trial court's decision was founded on any proper grounds, the court must uphold the lower court's ruling and refrain from addressing the remaining issues.[349]

If arbitration is desired, the arbitration provision should expressly address the following: (i) the matters that may be submitted to arbitration; (ii) the process of arbitration; (iii) who shall pay the fees of arbitration; and (iv) whether there are any specific requirements as to the proposed arbitrators, such as board certified attorneys.

For example, a simple provision that allows either side to compel arbitration may provide as follows:

> The Client and Law Firm agree that any disputes arising out of or in any way related to Law Firm's agreement (including but not limited to the services performed by any attorney under this agreement) shall be submitted to confidential binding arbitration in X County, Texas in accordance with the rules of the American Arbitration Association.

A more detailed provision that limits the qualifications of the arbiter may provide the following:

> Any dispute that may arise with respect to Firm's services or any aspect of this fee agreement shall, on the written request of either of us, be submitted to arbitration in accordance with appropriate statutes of the state of Texas and the Commercial Arbitration Rules of the American Arbitration Association; and, judgment upon the award rendered by the arbitrators may be entered in any court having appropriate jurisdiction. Each party shall appoint one person to serve as an arbitrator within 30 days after the notice of arbitration is served, and a third (or second if either Client or Firm fail to timely select an arbitrator as provided) arbitrator shall be chosen by the arbitrator(s) timely selected by the parties; provided however, if there is no agreement as to the last arbitrator within 60 days after the notice of arbitration is served, then the last arbitrator shall be selected by a district or probate judge in Harris County, Texas, having subject matter jurisdiction over the dispute. We further agree that the expenses of arbitration shall be paid in such proportions as the arbitrators decide, except that the successful party in any such proceeding seeking enforcement of the provisions of this agreement shall be entitled to receive from the party not prevailing reasonable and necessary attorney's fees and expenses, in addition to any other sums to which such successful party may be entitled. The arbitrators shall decide the identity of the successful party for purposes of the preceding sentence. We also agree that each of

348. *Id.* at *8.

349. *Id.* (citing TEX. R. APP. P. 47.1 (2008); Grand Homes 96, L.P. v. Loudermilk, 208 S.W.3d 696, 702 (Tex. App.—Fort Worth 2006, pet. denied)). The following paragraphs are adapted from Pacheco & McCulloch, *supra* note 237, at 8.

> the arbitrators shall be either (i) Board Certified as an Estate Planning and Probate Law specialist by the State Bar of Texas, or (ii) a Fellow of the American College of Trust and Estate Counsel. Arbitration is final and binding on the parties. The parties are waiving their right to seek remedies in Court, including the right to jury trial. Pre-arbitration discovery is generally more limited than and different from court proceedings. The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

b. Mediation[350]

Whether or not an arbitration provision is included, it is advisable to include, at a minimum, a provision to mediate any disputes. This allows issues to be addressed in a non-public forum, preferably before litigation is filed that could cause either party to become entrenched in defending their position. For example, the engagement agreement may provide:

> Before resorting to litigation or arbitration, any disputes arising out of or connected with this engagement agreement or Law Firm's engagement (including but not limited to the services performed by any attorney under this agreement) will be submitted to mediation in _____ County, Texas, in accordance with the rules for alternative dispute resolution set forth under Texas law. Firm and Client will mutually cooperate to select the mediator to be used. Any and all information, negotiation, and results of the mediation will remain confidential.

c. Waiver of Right to Jury Trial[351]

If arbitration is not included, then another alternative to reduce future litigation costs is to include a jury trial waiver on any issues relating to the representation. While there is no Texas case that has addressed this in the context of an engagement agreement, the Texas Supreme Court has upheld such a provision in a commercial contract.[352]

In *Prudential*, the Texas Supreme Court considered the issue of whether a lease provision waiving a jury in any litigation over the lease was by itself unenforceable.[353] The underlying lawsuit involved a restaurant company's lease with a Prudential agent and the restaurant owner's

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350. Portions of this section are adapted from Pacheco & McCulloch, *supra* note 237, at 8-9.

351. *Id.*

352. *See In re* Prudential Ins. Co. of Am. and Four Partners L.L.C., 148 S.W.3d 124 (Tex. 2004); *see also In re* Gen. Elec. Capital Corp. 203 S.W.3d 314 (Tex. 2006) (trial court abused its discretion in refusing to enforce jury waiver because contractual provision was not proven to be invalid or impliedly waived by knowing conduct of the party seeking to enforce it).

353. *In re Prudential*, 148 S.W.3d at 127.

guarantee of the lease.[354] The restaurant company and the owners sued to end the lease because of an allegedly foul odor on the premises and requested a jury trial.[355] Prudential sought to quash the demand for a jury trial, but the trial court denied the motion.[356] The court of appeals then denied mandamus relief.[357] Reversing the lower courts, the Texas Supreme Court held that a contractual jury trial waiver clause in an agreement is permitted provided it does not violate Texas law or public policy.[358] Rather, the court reasoned that if public policy permits parties to waive trial altogether, it does not forbid waiver of trial by jury. Thus, if the parties willingly agree to a non-jury trial, then enforcing that agreement is preferable to leaving them with arbitration as their only enforceable option because in arbitration parties waive not only their right to trial by jury but also their right to appeal. As with any waiver, the waiver of the constitutional right to a jury trial should be voluntary and with an understanding of the legal consequences.

A sample jury waiver provision based on the *Prudential* decision may provide:

> **THE CLIENT HEREBY UNCONDITIONALLY WAIVES CLIENT'S RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF, DIRECTLY OR INDIRECTLY, THIS ENGAGEMENT AGREEMENT (INCLUDING BUT NOT LIMITED TO THE SERVICES PERFORMED BY ANY ATTORNEY UNDER THIS AGREEMENT), OR ANY OF ITS PROVISIONS. IN THE EVENT OF LITIGATION, THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO A TRIAL BY THE COURT.**

In light of the *General Electric* decision, it is advisable to make this provision as conspicuous as possible to avoid a claim that the potential client did not see it or was not aware of its inclusion.[359]

Direct-benefits estoppel may not be utilized to force a jury waiver clause on a party that did not first sign the contract with such a clause.[360] Although Texas courts have previously applied arbitration principles when deciding jury-waiver issues, this prior use does not deviate from the lasting policy that Texas disfavors jury waivers.[361] Jury waiver provisions and

354. *Id.*
355. *Id.* at 125.
356. *Id.* at 128.
357. *Id.* at 129.
358. *Id.*
359. *In re Gen. Elec. Capital Corp.*, 203 S.W.3d at 316 (conspicuous provision is prima facie evidence of knowing and voluntary waiver and shifts burden to opposing party to rebut it).
360. *In re* Credit Susse First Boston Mortgage Capital, L.L.C., 257 S.W.3d 486, 492 (Tex. App.—Houston [14th Dist.] 2008, no pet.).
361. *Id.*

arbitration clauses cannot be interpreted in the same manner because they represent different policies and principles.[362] Accordingly, *Prudential* and *Wells Fargo* do not support the interpretation that jury waiver provisions and arbitration clauses are comparable.[363] Decisions reached by fact finders, rather than jurors, will not change that position.[364]

As the Texas Supreme Court acknowledged, arbitration agreements are looked upon favorably because resolutions can be reached without going through the civil justice system when the parties contractually agree to this method of resolution.[365] "The use of arbitration *as an example* of contractual waiver should not be read as a statement that, henceforth, jury waivers are to be analyzed interchangeably with arbitration agreements."[366]

The court went on to note that the Fort Worth Court of Appeals recently outlined several reasons why arbitration agreements differ from contractual jury-waiver clauses:

- Public policy favors arbitration; the same cannot be said of the waiver of constitutional rights.
- Although statutes generally require courts to compel contractual arbitration, no comparable statutory mandate directs courts to enforce contractual jury trial waivers.
- Application of the standards for enforcing arbitration clauses would conflict with the *Brady* "knowing and voluntary" standard that the Texas Supreme Court adopted in *In re Prudential*.
- "A distinction exists between an agreement to resolve disputes out of court and an agreement to resolve disputes in court but to waive constitutional aspects of that in-court resolution."[367]

"The right to a trial by jury is 'one of our most precious rights,' and holds 'a sacred place' in our history. Restrictions placed on that right will therefore be subject to utmost scrutiny."[368]

If the real party in interest (Developer) was required to reference the terms of the Loan Agreement to prove fraud against Credit Susse First Boston (CSFB), then the Developer would be forced into a non-jury trial based on the rules of direct-benefits estoppel.[369] In this case, the Developer

362. *Id*.

363. *Id*.; *In re Prudential*, 148 S.W.3d at 124; *In re* Wells Fargo Bank Minn. N.A., 115 S.W.3d 600, 607 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

364. *In re Credit Susse*, 257 S.W.3d at 492.

365. *Id*.

366. *Id*.

367. *Id*. at 492-93.

368. *Id*. at 493 (citations omitted).

369. *Id*. at 493.

neither knowingly nor voluntarily waived its rights to jury trial.[370] Accordingly, the "knowing and voluntary" waiver standard requirements were not met, and the rules of direct-benefits estoppels cannot be used as a means to avoid this standard.[371]

d. Consider Court Appointments Carefully

As discussed previously, attorneys should consider court appointments carefully before accepting them.[372] Considerations should include the following:

- The legal issues involved;
- The competency to handle the appointment;
- The time to commit to the appointment;
- The potential liability involved;
- The hostility of the parties; and
- The financial ability to adequately carry out the appointment.[373]

When in doubt, the attorney should consider declining the appointment.[374] Also, the attorney should verify that he or she is familiar with the rules that may require certain expertise in a particular appointment.[375] In the guardianship area, for example, the law requires that *ad litem*, certified by the State Bar of _____, to have completed a certain number of hours in order to serve as an attorney *ad litem* in a guardianship proceeding.[376]

VIII. WAYS TO REDUCE LIABILITY DURING THE ENGAGEMENT

A. Be Clear Who the Attorney Represents[377]

As discussed previously, the existence of an attorney-client relationship may be either express or implied from the parties' conduct.[378] Once established, the attorney-client relationship gives rise to

370. *Id.*
371. *Id.*
372. *See* discussion *supra* Part VII.A.
373. *Id.*; *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(a) cmt. 1-2; 6.01(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).
374. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01 cmt. 5; 6.01 cmt. 1; 1.15 & cmt. 1.
375. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt.1 (2008).
376. *See* TEX. PROB. CODE ANN. § 647A (Vernon 2003).
377. This section is adapted from Pacheco & McCulloch, *supra* note 237, at 12-13.
378. *See* Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

corresponding duties on the attorney's part.[379] Thus, an attorney representing a fiduciary should be careful never to create the impression that he or she represents a beneficiary, creditor, or other third party. These impressions can be formed via meetings, letters, and other communications with third parties. Ways to reduce such potential claims include the following:

- Any meetings should be preceded with a statement that the attorney only represents the fiduciary;
- A written notice of non-representation can be given to any potential beneficiaries and creditors in the initial letter or contact;
- A written acknowledgement of no representation may be requested before any meetings with the third parties;
- The attorney should not answer any questions regarding the third parties' rights;
- Documents to be signed by the third party should not be prepared by the attorney, if possible; and
- Documents to be signed by the third party and prepared by someone other than his or her attorney should confirm that the drafter does not represent such person and that the signor has been advised to seek independent counsel before signing.

While the preceding list is not exclusive or even mandatory, it reflects efforts to claims made in actual proceedings over the past few years.

B. Be Clear and Careful in All Written Communications with Clients[380]

Decisions related to estate, trust, and guardian issues are often not black and white. Rather, the advice provided often depends on financial and personal factors that differ from case to case. For example, a client with a substantial estate may elect to have a simple, non-taxed planned will when most would opt for tax planning. Likewise, in litigation, one client's litigation tolerance may be substantially different than another's.

1. Use Correspondence to Confirm and Clarify[381]

As the objectives of clients may differ in hindsight, it is often advisable to confirm in writing the attorney's advice on given significant issues. For example, in the estate planning area, the forwarding of drafts

379. *Id.*
380. This section is adapted from Pacheco & McCulloch, *supra* note 237, at 42.
381. *Id.*

and final documents provides an opportunity to confirm the client's objectives, including any decision not to take advantage of certain techniques. In a litigation matter, a letter forwarding a draft of a settlement agreement may discuss the client's decision to settle and the potential recovery if the client elected not to settle and the case proceeds to trial.

2. Use Documents to Confirm and Clarify[382]

Additionally, in the wake of *Belt*, some estate planning attorneys have been considering how to allow the documents prepared to speak to the client's planning objections. For example, Steve Saunders provided the following paragraph that could be inserted in a client's will:

> *Consideration of Disposition:* I recognize that the law allows me to dispose of my estate in any way and to any beneficiary or beneficiaries that I wish to leave my property to. I have carefully considered this plan for the disposition of my estate over a period of _____ and this will reflects my wishes.
>
> I also recognize and have been apprised, and have considered, that there are many other things I could do in my estate planning to, among other things, minimize potential taxes (including estate and generation skipping taxes) and to protect assets from the claims of my creditors and those of my beneficiaries. I recognize that some of those estate-planning techniques could protect assets from creditor's claims and minimize taxes. Those estate planning techniques include, but are not limited to, making gifts, (including charitable gifts), using [more or additional] trusts in my planning, life insurance planning, rearranging my financial assets to concentrate them in assets exempt from creditors' claims, [offshore planning], and the use of partnerships and other entit[i]es. My attorney and I have discussed these planning opportunities available to me and I have explicitly declined to pursue them. I fully recognize that I have not taken advantage of every opportunity available to me in my estate planning, including all opportunities to minimize taxes and protect assets from creditor's claims. My current planning meets my wishes in every respect.

3. Practice Safe E-mailing[383]

Care should be taken in e-mail correspondence with clients. This form of communication is rapidly becoming the norm with many clients. It has become desirable because it invites a quick response, and it is sometimes less costly than calling the attorney. While a short response to some inquires is appropriate, many times the inquiry does not include all the

382. *Id.*
383. *Id.* at 42-43.

relevant information, and the response does not include the detailed analysis that the attorney would include in a more formal communication. Also, continued e-mail communications have a tendency to inhibit the formation of a strong attorney-client relationship. Therefore, the client may be more apt to change counsel instead of discussing a concern regarding a bill or related matters with the attorney.

C. Be Careful in All Written Communications with Beneficiaries and Third Parties[384]

Common practice when representing a fiduciary is to communicate with the beneficiaries, creditors, or both of the estate or trust on the fiduciary's behalf. As discussed previously, these contacts may create a claim that the beneficiary or creditor believed that the attorney represented that beneficiary or creditor. Thus, any written communication with any potential non-client should reiterate whom the attorney represents and that the attorney does not represent the recipient.

Furthermore, an attorney should avoid preparing legal documents, such as waivers or disclaimers, for non-clients. However, given the realities of the estate and trust area, sometimes the fiduciary's attorney must prepare such documents to expedite the attorney's appointment or the settlement of the estate or trust. If the attorney is providing the non-client a document for execution, then the correspondence should clearly suggest that the recipient have the document reviewed by the recipient's own counsel.

For example, common practice is to require waivers of service from various heirs or beneficiaries to proceed on an application regarding an estate or trust. The letter forwarding a waiver of service may provide the following:

> A number of matters must be completed before Mr. X's appointment. Among those is to provide a copy of the application to you and serve it upon you in accordance with Texas law. Therefore, by separate copy of this letter, we have forwarded you a copy of the enclosed by certified mail to meet this technical requirement. It is possible, however, to expedite this matter by asking you to sign the enclosed Waiver of Citation. Assuming you are willing to do so, we enclose a Waiver of Citation for your review. If the enclosed meets your approval, please sign where indicated in the presence of a Notary Public. Once signed, please arrange to forward your signed Waiver to my offices in the enclosed self-addressed stamped envelope. Upon receipt, we can file it with the court indicating you have received a copy of the enclosed application. This will help Mr. X in moving this matter forward as soon as possible. Note, that we must

384. *Id.* at 13-14.

> remind you that we do not represent you in this matter. Therefore, if you have any questions or wish to discuss the legal significance of the enclosed Waiver, we suggest you contact counsel of your own selection before signing the enclosed Waiver as it may affect your legal rights with regard to the Estate.

Likewise, an acknowledgement of non-representation should be included in the document. Note, the lending industry has been requiring these statements and acknowledgements in real estate closings for a number of years.[385] For example, a section 145 designation may include the following provisions:

> I further acknowledge that X Firm has prepared this Designation on behalf of its client, Mr. Y, as the proposed Independent Administrator with Will Annexed of the Estate of _____, Deceased, and does not represent me in this matter. I further acknowledge that I am aware that I may retain my own counsel to advise me regarding this Designation and/or the Estate.

Furthermore, personal representatives or trustees winding up their affairs may seek a receipt and release from various heirs or beneficiaries to seek their discharge as the fiduciary for the estate or trust. The letter forwarding a receipt and release may include the following:

> We remind you that we only represent Ms. X, in her capacity as trustee, in matters relating to the ABC Trust. Therefore, if you have any questions regarding this matter, we ask that you discuss those with counsel of your choosing before signing and returning the enclosed Receipt and Release and negotiating the enclosed check.

Finally, any letter to a potential beneficiary or heir should be written, if possible, in a manner that confirms that the attorney cannot answer any legal questions of the recipient. For example, the letter may include the following:

> Thank you in advance for your prompt attention and assistance in the preceding matters. Please feel free to call my legal assistant or me with any inquiries regarding Mr. X's administration of the estate; however, any legal questions should be directed to your attorney.

D. Advise Client of Client's Fiduciary Duties and Potential Liability[386]

The attorney for a proposed personal representative or guardian should explain to the potential fiduciary the attorney's powers, duties, and potential

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385. *See, e.g.*, 12 U.S.C. § 2603 (2006).

386. This section is adapted from Pacheco & McCulloch, *supra* note 235, at 37.

liability prior to the attorney's appointment, if possible. In these discussions, impressing upon the potential or new appointee the possibility of being sued because of his or her fiduciary appointment is important. Following up with a letter confirming these discussions and reducing them to writing is advisable.

E. Avoid Making Alleged Representations and Use Disclaimers of Reliance When Appropriate[387]

Common practice is for other parties to request that a fiduciary make express representations to verify certain facts or conditions. Representations may be used to confirm assets, liabilities, past events, or other matters that an interested party deems relevant to an estate or trust. While such information is needed, or even mandatory, to meet certain fiduciary duties, the attorney for the fiduciary should avoid being the one making such representations. When the attorney makes such representations and is incorrect, the attorney may face claims of negligent misrepresentation.

Furthermore, for any written documents that may be prepared by the attorney for the fiduciary and signed by a beneficiary or third party, the document should include a statement that the attorney, the attorney's law firm, or both do not represent the other parties. For example, a distribution or settlement agreement may include the following provision:

> Each Party confirms and agrees _____, and the law firm of _____, solely represent A and B and do not and has never represented any other Party and have not provided any other Party legal advice or services, information or made any representation to any other Party.

The Texas Supreme Court has sanctioned the use of such disclaimers of reliance to reduce potential claims based on reliance or negligent misrepresentation.[388] A disclaimer of reliance may provide as follows:

> Each party confirms and agrees that such party (i) has relied on his or her own judgment and has not been induced to sign or execute this Agreement by promises, agreements or representations not expressly stated herein, (ii) has freely and willingly executed this Agreement and hereby expressly disclaims reliance on any fact, promise, undertaking or representation made by the other party, save and except for the express agreements and

387. *Id*. at 14-15.

388. *See* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 181-82 (Tex. 1997); Atl. Lloyds Ins. Co. v. Butler, 137 S.W.3d 199, 216-17 (Tex. App.—Houston [1st Dist.] 2004, pet. filed) (disclaimer of reliance in settlement agreement conclusively negated other parties' alleged reliance on any representations or lack of disclosure by other parties).

> representations contained in this Agreement, (iii) waives any right to additional information regarding the matters governed and effected by this Agreement, (iv) was not in a significantly disparate bargaining position with the other party, and (v) has been represented by legal counsel in this matter [*or has voluntarily and of his or her own judgment waived his or her right to seek counsel*].

F. Theft by a Fiduciary-Client

Attorneys representing guardians generally advise their clients of the client's fiduciary duties at the time of appointment as fiduciary and assist those clients in complying with the provisions of the Texas Probate Code during the period of their administration.[389] However, the realities of practicing law teach us that not all clients are perfect and not all clients follow their attorney's advice. When those clients are acting as a fiduciary, the clients' actions may become a reflection on their attorney. Furthermore, the client may have unknowingly used the attorney's services to further the client's fraudulent conduct.[390]

For example, a person may engage an attorney to obtain an appointment as a fiduciary and then use those fiduciary assets for his or her personal benefit. Upon discovering the nefarious conduct, the attorney representing the fiduciary must decide whether the attorney can continue to represent the fiduciary and whether the attorney can do anything ethically to rectify or mitigate the damage caused by the fiduciary's breach.[391]

In deciding on a course of action, it is important to recognize that there is no clear authority that requires the disclosure of information gained from attorney-client communications regarding theft of fiduciary property or fraud on the fiduciary estate.[392] Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct provides some guidance as follows:

> (c) A lawyer may reveal confidential information:
>
> . . .
>
> (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

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389. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

390. *But see id*. at 1.02(e).

391. *Id*. at 1.15, cmts. 7-8; *see also id*. at 1.02, cmts. 7-11.

392. *See, e.g.*, *id*. at 1.05(c)(7)-(8) (remember that the word "may" designates authorization and is not a requirement. *But cf. id*. at 1.05 (e) (remember that the word "shall" designates a requirement and, in this case, it is a required disclosure if the conduct is "likely to result in death or substantial bodily harm to a person.").

> (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.[393]

Comment 10 to Rule 1.05 indicates, however, that a client's information cannot be fully or justifiably protected if the client plans to or engages in criminal or fraudulent conduct or if the attorney's conduct is culpable.[394] The comments elaborate on several situations where an attorney may disclose client communications.[395] First, according to Rule 1.05(c)(4), an attorney may reveal information regarding the attorney's representation of the client to avoid providing assistance in a client's criminal or fraudulent conduct.[396] Second, an attorney has a duty to not use false or fabricated evidence, and Rule 1.05(c)(4) authorizes an attorney to reveal information necessary to comply with that duty.[397] Third, the attorney may have been unknowingly associated or involved with a client's past criminal or fraudulent conduct, and, if so, the attorney's services become an instrument of the client's crime or fraud.[398] Therefore, comment 12 of Rule 1.05 provides that "the lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable."[399]

Rule 1.05(c)(6) and (8) authorize the attorney to use discretion in revealing both unprivileged and privileged information while trying to serve those interests.[400] Finally, an attorney's knowledge of a client's intended criminal or fraudulent conduct may enable the attorney to stop such conduct prior to its commission.[401] Comment 13 states that "[w]hen the threatened injury is grave, the lawyer's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information."[402] Rule 1.05(c)(7) grants the attorney the "professional discretion, based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act."[403] Finally, comment 14 to Rule 1.05 provides the following:

> The lawyer's exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood

393. *Id*. at 1.05(c)(7)-(8).
394. *Id*. at cmt. 10.
395. *See id*. 1.05 cmts. 11-14.
396. *Id*. at cmt. 11.
397. *Id*.; *see also id*. at 3.03(a).
398. *Id*. at 1.05 cmt. 12.
399. *Id*.
400. *Id*.
401. *Id*. at cmt. 13.
402. *Id*.
403. *Id*.

> of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.[404]

At a minimum, the attorney should consider resigning as attorney of record.[405] This often signals to the court and the other parties that a problem exists that requires closer scrutiny. This also allows the attorney to comply with comment 21 to Rule 1.05, which provides that "[i]f the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.15(a)(1)."[406]

G. Consider the Possible Rights of Successor Fiduciaries[407]

Attorneys representing a fiduciary should be aware that an issue exists regarding the right and privity of a successor fiduciary to the agents of the former fiduciary. When a fiduciary has been removed or has died, a successor fiduciary is generally imposed with a duty to redress the predecessor fiduciary's actions. When counsel represents a fiduciary, the question then becomes whether the successor is entitled to the predecessor's legal files.[408] While the Texas Supreme Court's decision in *Huie v. DeShazo* seems to imply that the attorney only represented that fiduciary-client, no Texas court has clearly addressed this issue in the context of an estate or guardianship, and at least one trial court has ordered the turnover of the prior attorney's files.[409]

Until this issue is decided, an attorney for a former fiduciary should request the consent of the client or the client's representatives before releasing the attorney's files to a successor fiduciary.[410] If the attorney

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404. *Id.* at cmt. 14.

405. *Id.* at cmt 21.

406. *Id.*

407. This section is adapted from Pacheco & McCulloch, *supra* note 237, at 43.

408. *See* Amy Clark-Meacham & Jessica Palvino, *Aiding-and-Abetting Liability: Is Privity Making a Comeback?* 70 TEX. B.J. 1, 52-53 (2007).

409. Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996).

410. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(2), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

cannot obtain consent, then the attorney should require a court order to compel the turnover of the attorney's files.[411]

H. Review Malpractice Coverage Regarding Fiduciary Appointments

As discussed previously, court appointments may result in a range of potential claims from attorney malpractice to breach of fiduciary duty. [412] Before accepting a court appointment, the appointee should consider whether potential claims would be covered by the appointee's errors and omissions policy.[413] For example, some policies do not cover fiduciary claims.[414] Generally, the attorney can add this coverage with a fiduciary rider.[415] The potential role of the attorney can be candidly discussed with the insurance representative to avoid a coverage issue in the future.[416]

I. Malpractice Claims are Compulsory Counter-Claims

It has been held that malpractice claims are compulsory counter-claims to suit for attorney's fees when they arise out of the same transaction.[417] Prior to bringing suit for the recovery of unpaid attorney's fees, careful consideration should be given as to whether a malpractice claim will be plead in answer to a suit for unpaid fees.

J. Be Cognizant of the Discovery Rule

While the standard statute of limitations on legal malpractice is two years and breach of fiduciary duty is four years, the discovery rule can toll these applicable limitations periods for years into the future.[418] The Texas Supreme Court has twice held a fiduciary's misconduct is inherently undiscoverable.[419] The discovery of such claims may relate to the attorney's representation of the fiduciary, the fiduciary's actions or inactions, or both.[420] As a result, the attorney should continue to retain files

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411. *Id*.

412. *See* Pacheco & McCulloch, *supra* note 237, at 38.

413. *See id*. at 39, 41.

414. *Id*. at 41.

415. *See id*.

416. *See id*.

417. Goggin v. Grimes, 969 S.W.2d 135, 138 (Tex. App. Houston—[14th Dist.] 1998, no pet.); CLS Assocs., Ltd. V. A, B, 762 S.W.2d 221, 224 (Tex. App.—Dallas 1988, no writ.).

418. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5) (Vernon 2002) (statute of limitation for fiduciary); Sharpe v. Roman Catholic Diocese of Dallas, 97 S.W.3d 791, 793 (Tex. App.—Dallas 2003, pet. denied) (statute of limitations for legal malpractice).

419. *See* Willis v. Maverick, 760 S.W.2d 642, 647 (Tex. 1988) (attorney-malpractice actions subject to discovery rule because of fiduciary relationship between attorney and client and client's lack of actual or constructive knowledge of injury); Slay v. Burnett Trusts, 187 S.W.2d 377, 394 (1945) (trustee).

420. *See Willis*, 760 S.W.2d at 645.

and other information or documentation relevant to these engagements far beyond the standard period.

K. Other Thoughts

Finally, common sense probably provides the best guide to avoid becoming a defendant in the estate, trust, and guardianship area. When representing a fiduciary, both the fiduciary and his or her attorney (as the fiduciary's agent) appear to be held to a higher standard.[421] Thus, both should carefully carry out their respective roles.[422] Some final suggestions include the following:

- Avoid "Rambo" litigation;
- Be cognizant of a fiduciary's duties of disclosure;
- Do not allow fiduciary-client to use attorney's services to enable a clear breach of his or her duties;
- Consider when to put matters in writing and when not to—even to the fiduciary; and
- Appropriate payment and segregation of fees and expenses.[423]

IX. CONCLUSION

The law continues to evolve in the area of legal malpractice in the probate and trust area.[424] What is certain in these uncertain financial times is that disappointed beneficiaries and clients will continue to attempt to make the lawyer their insurer.[425] While tort reform put many lawyers out of business, it also created fertile ground and a new source of business for the plaintiff's bar.[426] They say each lawyer will face an average of three lawsuits during the lawyer's practice.[427] Hopefully, the discussion in the article will reduce the average.

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421. *See* Pacheco & McCulloch, *supra* note 237, at 41 (discussing liability of guardian ad litem).
422. *Id*.
423. *See* Sofia Adrogué, *"Rambo" Style Litigation in the Third Millennium—The End of an Era?*, 37 HOUS. LAW 22, 22 (2000) (defining "Rambo" litigation); Pacheco & McCulloch, *supra* note 237, at 7, 41.
424. *See* Pacheco & McCulloch, *supra* note 237, at 16-17.
425. *See id*. at 17.
426. *See id*. at 17-24.
427. *Id.*