

Malpractice for Litigators:
An Update on Recent Developments in
Texas Legal Malpractice and Ethics Law

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*** We wish to thank Randy Johnston of Johnston Tobey, P.C. for his valuable comments and assistance in the preparation of this paper.**

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I. Introduction

This article provides an update on recent developments in Texas legal malpractice and ethics law. Of particular note are several recent Texas Supreme Court opinions on attorney liability and ethics issues. *Belt v. Oppenheimer, Blend, Harrison & Tate* further defines the applicability of the privity doctrine by allowing the personal representative of an estate to sue the testator's attorney for malpractice. *Alexander v. Turtur & Associates, Inc.* requires that expert testimony be used to prove causation in certain circumstances. And *Hoover Slovacek LLP v. Walton* provides new guidance on what constitutes an unconscionable contingency fee. In addition to these opinions, this article discusses the claims typically brought against attorneys, developments in what is required to establish professional negligence liability, and recent opinions on attorneys' ethical obligations that might affect litigators.

II. The Attorney-Client Relationship

A. General Background on the Privity Rule

Texas law generally prohibits non-clients from suing lawyers. Under the privity rule, persons outside the attorney-client relationship have no cause of action for injuries sustained due to an attorney's malpractice or breach of fiduciary duty. *See, e.g., Gillespie v. Scherr*, 987 S.W.2d 129, 132 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (holding the privity rule prevents claims against attorney for a class by non-client potential class action members); *Gamboa v. Shaw*, 956 S.W.2d 662, 665 (Tex. App.—San Antonio 1997, no pet.) (shareholders of a corporation may not sue the corporate attorney because “[s]uch a deviation [from the privity rule] would result in attorneys owing a duty to each shareholder of any corporation they represent,” and “would owe a duty to both sides of the litigation in any type of derivative suit brought against the corporation by a shareholder.”) *Cf. Kastner v. Jenkins & Gilchrist, P.C.*, 231 S.W.3d 571, 578 (Tex. App.—Dallas 2007, n.p.h.) (“It is well-established that an attorney’s representation of a partnership does not constitute representation of each of the individual partners.”).

Texas courts have advanced several policy concerns in favor of the privity rule. First, liability to non-clients can hamper an attorney's vigorous representation of his own client. As one court stated: “The attorney’s preoccupation or concern with the possibility of claims based on mere negligence (as distinguished from fraud) by any with whom his client might deal would prevent him from devoting his entire energies to his client’s interest.” *Bell v. Manning*, 613 S.W.2d 335, 339 (Tex. Civ. App.—Tyler 1981, writ ref’d n.r.e.); *see also Am. Centennial Ins. v. Canal Ins.*, 843 S.W.2d 480, 484 (Tex. 1992) (“Texas courts have been understandably reluctant to permit a malpractice action by a nonclient because of the potential interference with the duties an attorney owes to the client”). Thus, “[w]ithout the privity barrier, fear of liability would inject undesirable self-protective reservations into the attorney’s counseling role.” *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 401 (Tex. App.—Houston [14th Dist.] 1997, pet. dismissed by agr.).

A second concern is that liability to non-clients may “tend to encourage a party to contractual negotiations to forego personal legal representation and then sue counsel representing the other contracting party for negligent misrepresentation if the resulting contract later proves disfavorable in some respect.” *Bell*, 613 S.W.2d at 339. Furthermore, “[i]t is obvious that opening attorney-client contracts to third party scrutiny would entail a vast range of potential liability.” *Dickey v. Jansen*, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.).

The most common application of the privity rule in recent years has been in the context of wills and trusts, where beneficiaries have tried to sue the testator’s attorney. Texas courts have applied the privity rule in this context to prevent such claims by beneficiaries. In *Dickey v. Jansen*, for example, the First Court of Appeals upheld the application of privity in the context of a trust. *Dickey v. Jansen*, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.). In *Dickey*, the intended beneficiaries under a testamentary trust brought suit against the testator’s attorney for negligent preparation of the trust. The court of appeals held that the intended beneficiaries were not in privity with the testator’s attorney, and lack of privity precluded the action. *Id.* at 582. Similarly, in *Huie v. DeShazo*, the Texas Supreme Court held that only the trustee, not the trust beneficiary, is a client of the trustee’s attorney. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996). While the trustee still has a fiduciary duty to the beneficiary, any communication between the trustee and his attorney is protected from the beneficiary because of the attorney-client privilege. *Id.*; see also *Parish v. Wilhelm*, No. 10-08-00037, 2008 WL 5246685, at *2 (Tex. App.—Waco Dec. 17, 2008, no pet.) (holding that a deceased client’s attorney who was retained to change her life insurance beneficiary designation did not owe a duty to the prospective beneficiaries).

In *Barcelo v. Elliot*, the seminal Texas privity case, the Texas Supreme Court refused to recognize an exception to the privity rule in the estate planning and trust context, concluding that an attorney who drafts a will or trust does not owe a duty of care to named beneficiaries under the will or trust. *Barcelo v. Elliot*, 923 S.W.2d 575, 578-79 (Tex. 1996). In so holding, the *Barcelo* court reasoned that “the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent.” *Id.* at 578. The supreme court has recently held that the *Barcelo* rule does not preclude a legal malpractice claim brought by a representative of the estate, as opposed to the estate’s beneficiaries. *Belt v. Oppenheimer, Blend, Harrison & Tate*, 192 S.W.3d 780, 784 (Tex. 2006). The opinion, which is discussed in more detail below, makes clear that *Barcelo*’s bright line rule is still good law.

B. When is Privity Established Under Texas Law?

1. Nature of the Attorney-Client Relationship

For there to be privity, there must be an attorney-client relationship. The attorney-client relationship is a contractual relationship in which an attorney agrees to render professional services on behalf of the client. See *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5th Cir. 1995); *Sutton v. McCormick*, 47 S.W.3d 179, 182 (Tex. App.—Corpus Christi 2001, no pet.). The attorney-client relationship can also extend to “preliminary