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Texas Legal Malpractice Law Today: An Update on the Law and How to Avoid Liability

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I. Introduction

This article provides an update on recent developments in Texas legal malpractice and ethics law, focusing on privity, causation and fracturing issues commonly raised in lawsuits against lawyers. It also describes several recent Texas supreme court opinions affecting attorney liability, and provides pointers on avoiding malpractice liability and disciplinary claims.

II. The Privity Rule Bars Claims by Non-Clients

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".)" The primary policy underlying the privity rule is that potential liability to non-clients would hamper an attorney's ability to zealously represent his actual clients within the bounds of the law. *See Valls v. Johanson & Fairless, L.L.P.*, 314 S.W.3d 624, 636 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *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"). In other words, "[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. dism'd by agr.).

A. Recent Texas Supreme Court Cases on Privity

A 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. *See, e.g.*, *Barcelo v. Elliot*, 923 S.W.2d 575, 578-79 (Tex. 1996); *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996); *Dickey v. Jansen*, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). 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. However, two recent supreme court opinions hold that the *Barcelo* privity rule does not always preclude a legal malpractice claim brought by a representative of the estate, as opposed to the estate's beneficiaries. *See Smith v. O'Donnell*, 288 S.W.3d 417 (Tex. 2009); and *Belt v. Oppenheimer, Blend, Harrison &* Tate, 192 S.W.3d 780 (Tex. 2006).

1. Belt v. Oppenheimer, Blend, Harrison & Tate

In *Belt*, several attorneys represented David Terk in preparing his will and advising him on planning his estate. After Terk passed away, his children became the joint independent executors of the estate and, in that capacity, sued the attorneys alleging that the attorneys' estate planning advice caused the estate to incur $1.5 million in excess tax liability. The attorneys argued that the privity rule established in *Barcelo* prevented such a claim. The children responded that they

were not suing as beneficiaries of the estate, but rather directly on behalf of the estate, and thus were not barred under *Barcelo*.

The supreme court agreed with the children, and concluded that the *Barcelo* rule, while still in effect to prevent claims by estate beneficiaries, did not bar claims brought by the personal representatives of an estate. *Belt v. Oppenheimer, Blend, Harrison &* Tate, 192 S.W.3d 780, 784 (Tex. 2006). The court acknowledged that Texas is in the minority in requiring strict privity in estate-planning malpractice suits. *Id.* It also reasoned that the policy concerns articulated by *Barcelo*—possible conflicts between testator and beneficiaries during the estate planning process, the need for extrinsic evidence to prove the decedent's intent, and the importance of allowing estate planners to zealously represent their clients—are not implicated when the legal malpractice claim is brought on behalf of the estate itself rather than the beneficiaries. *Id.* at 783-84. The court concluded that allowing suits by personal representatives on the estate's behalf would not cause estate attorneys to have divided loyalties between the estate and the beneficiaries. Similarly, a suit asserting damage to the estate would not require proof of the decedent's intent regarding distribution of the estate assets. *Id.* at 787.

Finally, the court acknowledged that because estate beneficiaries often serve as personal representatives, some beneficiaries may try to leverage its holding by recasting a claim for a lost inheritance as a claim brought on behalf of the estate. But the court noted that "[t]he temptation to bring such claims will likely be tempered, however, by the fact that a personal representative who mismanages the performance of his or her duties may be removed from the position." *Id.* at 787-88.

2. *Smith v. O'Donnell*

On June 26, 2009 the supreme court decided *Smith v. O'Donnell*, a privity case that expands the *Belt* holding to claims for legal services performed outside the estate planning context. *See Smith v. O'Donnell*, 288 S.W.3d 417 (Tex. 2009). *Smith* involves a claim brought by the representative of an estate against the lawyers who had represented the decedent not in the estate planning context, but in connection with his administration of his wife's estate many years earlier. The now-deceased client, Denny, hired the lawyers to advise him in the independent administration of his second wife's estate. During the administration, a question was raised as to whether certain stock was community or separate property. The lawyers suggested that Denny obtain a declaratory judgment ruling as to the proper allocation, but Denny elected to treat the stock as his separate property. The stock thus was not included in his wife's testamentary trust. On Denny's death 29 years later the children sued the estate for $25 million they allegedly suffered as a result of the trust being underfunded due to the improper characterization of the stock. The estate settled with the beneficiaries and then immediately sought to recover the amount of the settlement from Denny's lawyers.

The lawyers asserted privity as a defense, and argued that *Belt* did not apply because the lawsuit did not result from estate planning advice. The supreme court, however, concluded that there is privity whenever a personal representative of an estate sues the decedent's attorney, regardless of whether or not the legal representation took place in the estate planning context. *Id.* at 422. The lawyers also argued that where the interests of the decedent, estate, and its beneficiaries are in conflict, the *Barcelo* privity rule should preclude a lawsuit by the estate's

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