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Legal Malpractice Update: Recent Developments in Texas Legal Malpractice and Ethics Law

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TABLE OF CONTENTS

I. Introduction 1

II. The Privity Rule Bars Claims by Non-Clients 1

III. Establishing an Attorney-Client Relationship 2

IV. Construing Attorney-Client Engagement Agreements 3

V. Establishing Malpractice Liability 5

A. Proving Breach of the Standard of Care 5

B. Proving Causation 6

1. Appellate Case-Within-the-Case Causation is a Question of Law. 7

2. The Role of Expert Testimony in Proving Causation. 7

3. Judicial Error Can Be a Superseding Cause as a Matter of Law. 10

4. Instructing the Jury on Causation 10

C. Damages Issues 12

1. Recovering Attorneys' Fees as Actual Damages 12

2. Proving Causation and Damages Based on Settlement Value 14

VI. Breach of Fiduciary Duty Claims 15

A. Traditional Fiduciary Duty Claims Seeking Actual Damages 15

B. Fee Forfeiture Claims 16

VII. Defensive Issues Unique to Lawsuits Against Attorneys 17

A. The Fracturing Rule 17

B. The "Litigation Privilege" Prohibits Attorney Liability for Conduct in Litigation 20

C. The Lawyer's Duties to the Client Are Limited by the Scope of the Engagement. 22

D. The Statute of Limitations and *Hughes* Tolling Doctrine 23

VIII. Ethics Update for Appellate Practitioners 24

A. Attorneys' Obligations to Preserve Confidentiality of Client Information 24

B. Case Law Regarding Unconscionable Attorney's Fees 26

C. Recent Ethics Opinions 27

1. Opinion 570: Attorney Notes and Other Work Product Belong to the Client. 27

2. Opinion 593: Lawyer May Settle Potential Malpractice Claim with Former Client if Proper Disclosures Are Made. 27

3. Opinion 673: Informal Online Consultations with Other Lawyers 28

4. Opinion 683: Statements to the Media About a Case Pending on Appeal 28

IX. Conclusion and Pointers for Avoiding Liability 29

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I. Introduction

This article provides an update on recent developments in Texas legal malpractice and ethics law. It discusses several recent Texas Supreme Court opinions on attorney liability. These opinions address a range of important issues such as proving and negating causation, recovering damages for lost settlement value, recovering attorney's fees as actual damages, and interpreting attorney-client fee agreements. This article also addresses important legal defenses available to attorneys. Finally, it provides an update on ethics developments applicable to appellate practitioners and provides pointers on avoiding liability.

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 common application of the privity rule 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*, 923 S.W.2d at 578-79. 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.

In two subsequent opinions the supreme court clarified 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); *Belt*

v. Oppenheimer, Blend, Harrison & Tate, 192 S.W.3d 780 (Tex. 2006). *Belt* allows claims by the representative of the estate for malpractice that occurred during estate planning. *Belt*, 192 S.W.3d at 783-84 (explaining 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). *Smith* permits claims by the estate representative for legal services performed for the decedent outside the estate planning context. *Smith*, 288 S.W.3d at 422 (finding privity when a personal representative of an estate sued the decedent's attorney for legal work performed for the decedent, regardless of whether or not the legal representation took place in the estate planning context).

Under *Smith* and *Belt*, privity does not bar claims by a decedent's estate against the decedent's attorney for legal malpractice in representing the decedent. However, privity still bars claims for alleged malpractice in representing a prior estate administrator—as opposed to the decedent with whom the original attorney-client relationship was formed. *See Messner v. Boon*, 466 S.W.3d 191, 203 (Tex. App.—Texarkana 2015, pet. granted, judg't vacated/remanded by agrt.) (estate administratrix had standing to pursue claims based on lawyer's negligence in representing decedent, but was legally barred from attempting to sue as a successor personal representative for alleged malpractice in representing prior representative).

Finally, the Texas Supreme Court recently held that the privity rule does not bar claims by an individual who received independent advice in a corporate transaction—so long as there is evidence that the individual received and relied on advice from the lawyer in his individual capacity (as opposed to his capacity as a corporate officer or shareholder). *Linegar v. DLA Piper LLP*, 495 S.W.3d 276, 281 (Tex. 2016). The *Linegar* holding centers on the fact that the individual pleaded and proved that he had formed an individual attorney-client relationship with the corporate law firm—and that he was personally and concretely aggrieved by the firm's malpractice. *Id.* *Linegar*, therefore, is not an expansion of the privity rule but instead a reflection of the importance of clarifying who the lawyer does—and does not—represent.

III. Establishing an 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.).

An attorney-client relationship is ordinarily created by an express agreement between the parties. *See, e.g.*, *Sutton*, 47 S.W.3d at 182. However, the attorney-client relationship can also be implied based on the parties' conduct. *See Kneipper*, 67 F.3d at 1198; *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied) ("The contract of employment may be implied by the conduct of the two parties . . . [if] the parties explicitly or by their conduct manifest an intention to create the attorney-client relationship."). This is the case for determining whether a relationship was formed – and when the relationship ended. *See Saulsberry v. Ross*, 485 S.W.3d 35, 43 (Tex. App.—Houston [14th Dist.] 2015, pet. denied)

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