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How to Avoid Malpractice in a Post-Pandemic Legal World

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I. INTRODUCTION

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

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

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

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 Most of the changes in the law were initially the result of more cases being filed and old, outdated legal principles being challenged anew: these changes in the law, however, once made, quickly converted from effect to cause, and began motivating the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

Of course, the world recently found itself in the grip of the novel coronavirus pandemic. The resulting changes to legal practice spawned presentations across the country on legal ethics in relation to the pandemic. But the pandemic didn't so much create new ethical issues as remind lawyers of already existing obligations to which they previously may not have given much thought.

The pandemic drove home that lawyers must possess the latest technology (including remote access) and know how to use it; have measures in place protecting transmission and storage of confidential information; have a plan in place for receiving client instructions in the event of a client's incapacity; and the importance of succession planning. These requirements existed before the pandemic. But they went from being "back-burner" items to critical issues.

II. WHO CAN SUE A LAWYER

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

A. Formation of the Attorney-Client Relationship.

Clearly clients can sue lawyers for malpractice, but there is often a question as to who is the client. Like many issues presented by legal malpractice claims, there is no clear, bright line as to when an attorney/client relationship actually begins. Surveys of lawyers indicate that many are unfamiliar with the standard which determines the beginning of the relationship. Typical answers from lawyers include the signing of a contract, the filing of suit, the acceptance of funds, the in-office meeting, etc. While all of these events (and many others) are indications of whether an attorney/client relationship exists, none of these factors decide the issue.

In *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App—Corpus Christi, 1991), the court ruled that attorney/client duties arise as soon as **the client** subjectively thinks he or she has representation. In that case, lawyers had been hired to represent the Coca Cola companies involved in the school bus crash in the Rio Grande Valley and, in that capacity, were interviewing the employee/bus driver of the company in the hospital. The lawyers subsequently turned over the substance of their interview to the district attorney for the purpose of prosecuting criminal claims against the bus driver and the bus driver sued. The court, in reversing summary judgment in favor of the attorneys, held that the attorneys may have breached a fiduciary owed to the bus driver and violated the DTPA.

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

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

B. Non-Clients Who May Sue a Lawyer

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

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

In permitting the excess insurance company to sue the insured's trial counsel, the court acknowledged that "attorneys are not ordinarily liable for damages to a non-client, because privity of contract is absent." *Id*. at 484. After examining the public policy concerns which require privity for a malpractice case (potential interference with the duties of the attorney to the client), the court concluded that a lack of privity would not be a defense to such a claim. The concurring opinion, joined in by five Justices, advanced the advisory opinion that the excess carrier's only cause of action would be for negligence and there would be no right to pursue a claim for gross negligence, punitive damages, or violation of the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code §17.41, et seq. The concurring opinion went further to state that the Court's holding should not be interpreted as to "suggest that a client's rights against his attorney may be assigned." *Id*. at 486.

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