

**What Every Bankruptcy Lawyer Should Know About Legal
Malpractice Claims In Texas**

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**For the 26th Annual Jay L. Westbrook Bankruptcy Conference
University of Texas School of Law
Austin, Texas
November 15, 2007**

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Lawyers who practice in the area of financial negotiations, out-of-court restructurings, and bankruptcies routinely place themselves in the middle of what could be the worst period of an individual's or an organization's life. They assume the responsibility for representing their clients through this process, making numerous strategy decisions and judgment calls along the way – often with incomplete information. Increasingly, at the end of the restructuring process, the party or parties who feel they did not get an optimal result are suing their bankruptcy professionals, including attorneys, and alleging that had different decisions been made along the way, a different result could have been achieved. Accordingly, bankruptcy practice is not without appreciable peril, and it is prudent for restructuring and bankruptcy lawyers to stay abreast of recent developments in the area of legal malpractice. Legal malpractice law continues to evolve, and in the last few years, there have been important developments on the issues of who can bring a claim, when those claims can be brought, where those claims can be brought, what claims can be asserted, and how a plaintiff can prove that any alleged malpractice actually caused compensable damages.

I. Who Can Sue You?

One of the most crucial questions any lawyer should consider is: “Who can sue me?” It is important to understand the potential universe of malpractice plaintiffs. For the most part, that question is governed by what is known as the “privity rule.”

The Texas Supreme Court has held that “[a]t common law, an attorney owes a duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligent representation of the client.”² In other words, a non-client “has no cause of action against an attorney for negligent performance of legal work.”³ The effect of this principle, which sometimes is referred to as the “privity barrier,”⁴ is that a plaintiff will be unable to establish the duty element of a legal malpractice claim unless he can show he was in privity of contract with the attorney he is seeking to sue.

The existence of duty typically is a question of law for the court.⁵ Therefore, if a defendant attorney can establish that the person or persons bringing a malpractice claim were not clients and are not otherwise in privity with the attorney, it may provide the basis for an early summary judgment. In most cases, a well-crafted engagement letter, setting forth with specificity who is and is not the client, will go a long way in establishing who has standing to

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² *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996) (citations omitted).

³ *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied).

⁴ *Barcelo*, 923 S.W.2d at 577.

⁵ *Bird v. W.C.W.*, 868 S.W.2d 767, 769 (Tex. 1994).

sue. In the bankruptcy arena, however, the formation of the bankruptcy estate, the turnover of corporate management, and the disposition of assets can alter typical notions of privity and who can bring suit.

Assignment of Malpractice Claims

For example, in certain circumstances, legal malpractice claims can be assigned to and brought by persons who were not in privity with the attorney. Generally under Texas law, causes of action are assignable. However, that general rule does not apply universally to legal malpractice claims. The courts will examine the particular assignment at issue to see if it violates public policy. For example, assignments of legal malpractice claims “necessitating a duplicitous change in the positions taken by the parties in antecedent litigation and those involving commercial marketing of legal malpractice claims are disfavored under Texas law.”⁶

When examining an agreement with public policy concerns in mind, the court determines whether the agreement has a tendency to “injure the public good.”⁷ No standard definition or test applies to all cases, but courts generally find that a contract injures the public good if it is illegal, or is inconsistent with or contrary to the best interests of the public.⁸

In a recent example, the Houston Court of Appeals found that the assignment at issue in *Wright v. Sydow* violated public policy. In that case, the clients sued their lawyers for malpractice and then, shortly before signing a settlement agreement with the lawyers, assigned their malpractice claims to a third party. Accordingly, although they purported to release all of their claims against the attorneys, those claims were later brought by the third party assignees. The court found that to allow such an assignment would defeat the strong public policy of resolving disputes through settlement and would injure the public good. The court wrote:

Upholding these assignments would undermine the strong public policy favoring voluntary settlement agreements. It would encourage parties to negotiate and execute settlement agreements in bad faith. It would incite litigation rather than settling it. It would produce disharmony and ill will rather than peace. In short, our State’s public policy would be undone.⁹

The court therefore declared the assignments void.¹⁰

Assignment of Claims to a Bankruptcy Trustee

Where a potential malpractice plaintiff files bankruptcy, however, any state law restrictions on the assignment of legal malpractice claims are trumped by federal bankruptcy laws, which place the bankruptcy trustee in the shoes of the debtor.¹¹ Accordingly, federal law controls whether a bankruptcy trustee can bring a malpractice action on behalf of the estate, and

⁶ *Wright v. Sydow*, 173 S.W.3d 534 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (internal quotation marks omitted); see also *Mallios v. Baker*, 11 S.W.3d 157 (Tex. 2000).

⁷ *Wright*, 173 S.W.3d at 551.

⁸ *Id.*

⁹ *Id.* at 553.

¹⁰ *Id.*

federal law provides that “when a legal malpractice cause of action has accrued to a debtor as of the commencement of the bankruptcy case it becomes part of the debtor’s bankruptcy estate.”¹² “Because the claims are property of the bankruptcy estate, the Trustee is the real party in interest with exclusive standing to assert them.”¹³

This shifting of the plaintiff from the actual client – with whom the attorney worked and from whom the attorney took direction – to the bankruptcy estate or trustee can cause difficulties for the defendant attorney. The trustee or estate – with the benefit of hindsight and/or with the motive of obtaining a large amount of money for the estate – may allege that the attorney should have acted in ways that are completely contrary to the instructions of the client at the time.¹⁴ Arguably, a trustee might be in a better position at times to pursue a malpractice action for the benefit of creditors than the debtor would have been,¹⁵ even in cases where the debtor could not have assigned the malpractice action to creditors directly.

Claims Asserted Post-Confirmation, Case Closure, or Dismissal

When the client, or its successor, waits until after the bankruptcy confirmation, case closure, or dismissal to bring a malpractice claim against bankruptcy counsel, the question of who has standing to bring the claim is further complicated. Plaintiff typically stakes its ownership of the claim on 11 U.S.C. § 554(c) (abandonment) or on 11 U.S.C. § 349(b)(3) (revestment upon dismissal). Both bases are problematic to the plaintiff/debtor if the claim asserts post-petition malpractice. On its face, 11 U.S.C. § 349 “revests” property of the estate in the entity in which such property was invested “immediately before the commencement of the case under this title.” In the case of post-petition malpractice, that was nowhere.

*Industrial Clearinghouse, Inc. v. Jackson Walker, LLP*¹⁶ stands for the proposition that a claim of post-petition malpractice is not abandoned by operation of law under 11 U.S.C. § 554(c). The Texas court relied on a bankruptcy decision that had emphasized the textual difference between 554(a) and 554(b), abandonment after motion and hearing, and 554(c), abandonment by operation of law. Abandonment under 554(a) or 554(b) applies to all property of the estate, including property of the estate which first came to exist post-petition (such as, e.g., preference claims created by bankruptcy law). By contrast, 554(c) abandonment by operation of law, textually, operates only on property of the estate “scheduled under Section 521(1).” So can there be property of the estate scheduled *other than* under Section 521? Well, yes. The caselaw is slim, and the Texas court noted there was language in bankruptcy court opinions that does not appear to recognize an operational distinction between 554(c) technical abandonment, on the one hand, and 554(a) and (b) motion and hearing abandonment, on the other hand. However, it noted that the question was not distinctly posed in those cases that ignored the textual difference and was squarely addressed in the bankruptcy case on which the Texas court relied. Accordingly, it held that the property of the estate scheduled under 521 is pre-petition property, and that post-

¹¹ *Stanley v. Trinchar*d, Nos. 06-30120, 06-30299, 2007 WL 2669828, at *9 (5th Cir. Sept. 13, 2007).

¹² *Id.* (quoting *In re Segerstrom*, 247 F. 3d 218, 233 (5th Cir. 2001)).

¹³ *Id.* at *3 n.14 (quoting *Wieburg v. GTE Southwest, Inc.*, 272 F. 3d 302, 306 (5th Cir. 2001)).

¹⁴ *See, e.g., Segerstrom*, 247 F. 3d 218.

¹⁵ *See, Stanley v. Trinchar*d, 2007 WL 2669828.

¹⁶ 162 S.W.3d 388 (Tex. App. – Dallas 2005, pet. denied).

petition property of the estate is *not* property of the estate “scheduled under Section 521(1).” Therefore, post-petition property of the estate, even if scheduled and unadministered, is not abandoned to the debtor upon case closure.

If this result is followed, one consequence is that malpractice, alleged to have been committed by debtor’s counsel post-petition, must either be pursued by the estate representative or abandoned only after motion and hearing. This ratifies the common-sense notion that a debtor should not receive, by operation of law upon case closure, something debtor never owned pre-petition. Stated another way, the decision rightly eliminates the oxymoron of “revesting” (via 554(c) technical abandonment) in the debtor something never previously “vested” in the debtor.

“Administration” presents another interesting ownership conundrum in the context of claimed post-petition malpractice by debtor’s counsel. In particular, does a decision not to pursue a claim for legal malpractice mean the same thing in a post-petition fact pattern as it does in a pre-petition fact pattern? Non-pursuit of pre-petition malpractice by debtor’s pre-petition counsel would seem to follow standard pathways and be taken as non-administration. As 554(c) requires a legal malpractice claim to be scheduled and unadministered to be technically abandoned upon case closure, non-pursuit of pre-petition legal malpractice tends to equate to non-administration and results in 554(c) abandonment.

But by its nature, at least in Chapters 7 and 11 cases, alleged post-petition malpractice by debtor’s counsel occurs in the representation of an estate representative charged with fiduciary duties. Even if scheduled, a decision by the estate representative not to pursue a claim for post-petition malpractice, for legal services rendered to that representative, seems more like an administration. Unlike pre-petition claims, the estate representative is the very one who knows the most about the alleged claims and has the duty to do something if the conduct has harmed the estate. Non-pursuit, in these circumstances, looks more like a determination the case lacks merit and ought not to be pursued by anyone. This was asserted by the Trustee, but not decided, in the proceedings reported in *In re Coastal Plains, Inc.*¹⁷ There, the complaint was a Trustee’s failure to pursue alleged post-petition malpractice, and the court held the failure to object to the Trustee’s final report, and fee therein, barred later complaint by estate creditors when they knew of the decision not to pursue the claim at the time the report was filed.

Finally, non-scheduling of a claim for pre-petition or post-petition legal malpractice not only thwarts claims to the ownership of a claim for legal malpractice under 11 U.S.C. § 554(c) but also, in a surprising result, may thwart “revestment” of a claim for legal malpractice in the debtor upon case dismissal under 11 U.S.C. § 349 (b)(3).¹⁸

Transfer During Sale of Assets

In *Greene’s Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P.*, the court examined when an attorney-client relationship might be transferred to a party not in privity with the attorney through a merger or a sale of assets. In that case, Pipetronix purchased a company named Coulter and the rights to the “Coulter Process.” Pipetronix retained Fulbright & Jaworski

¹⁷ 338 B.R. 703, 708 (N.D. Texas 2006).

¹⁸ See *Kunica v. St. Jean Financial, Inc.*, 233 B.R. 46 (S.D.N.Y. 1999).

to issue an opinion letter that the Coulter Process did not infringe on a certain patent. The rights to the “Coulter Process” were later sold to Greene. Greene began using the Coulter Process, and a third party, BJS, asserted that such use violated the aforementioned patent. BJS sued Greene and was represented by Fulbright & Jaworski. Greene sued Fulbright for malpractice, breach of fiduciary duty, and violations of the DTPA. Fulbright moved for and won summary judgment on the grounds that Greene had no standing to sue because it was never Fulbright’s client and, thus, Fulbright never owed Greene any duty. Greene appealed arguing that, when it purchased the Coulter Process, it purchased the right to assert the former attorney-client relationship concerning the asset. The Houston Court of Appeals disagreed.¹⁹

The court noted that an attorney-client relationship will transfer when there is a merger.²⁰ In a merger, the successor organization stands in the shoes of the prior management and continues the operations of the prior entity.²¹ When, as in the *Greene’s* case, there is merely a sale of assets, however, the rights and liabilities generally do not transfer unless expressly assumed.²² The *Greene’s* court did not discuss whether or not Greene could have specifically bargained for the rights to the attorney-client relationship in the original sale.

II. When Can They Sue?

Texas courts also have continued to develop the case law regarding the applicable statute of limitations, or how long a malpractice claimant can wait before bringing suit. A legal malpractice cause of action is in the nature of a tort, and so is governed by a two-year statute of limitations.²³ However, because it is unrealistic to expect a lay client to have the legal acumen to perceive the negligence of his attorney in giving faulty legal advice, and because the injury flowing from faulty legal advice can be objectively verifiable, the Texas Supreme Court has recognized that the discovery rule applies to legal malpractice claims.²⁴ Accordingly, such a claim does not accrue until the claimant “knows or in the exercise of ordinary diligence should know of the wrongful act and resulting injury.”²⁵

In addition, the Texas Supreme Court created in 1991 what has become known as the Hughes Tolling Rule.²⁶ The Hughes Tolling Rule is a bright-line rule that tolls the statute of limitations when “an attorney commits malpractice in the prosecution or defense of a claim that results in litigation until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded.”²⁷ The Court reiterated in 2001 the need for bright-line rules in the

¹⁹ *Greene’s Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P.*, 178 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

²⁰ *Id.* (citing *In re Cap Rock Elec. Co-op., Inc.*, 35 S.W.3d 222, 227 (Tex. App.—Texarkana 2000, no pet.)).

²¹ *Greene’s Pressure Treating & Rentals*, 178 S.W.3d at 44.

²² *Id.*

²³ *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988); *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 120 (Tex. 2001).

²⁴ *Apex Towing Co.*, 41 S.W.3d at 120-121.

²⁵ *Murphy v. Mullin, Hoard & Brown, L.L.P.*, 168 S.W.3d 288, 291 (Tex. App.—Dallas 2005, no pet.).

²⁶ *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991).

²⁷ *Id.*; see restatement of rule in *Apex Towing*, 41 S.W.3d at 119-120. For a few years there was confusion in this area caused by the accounting malpractice case of *Murphy v. Campbell*, 964 S.W.2d 265, 271 (Tex. 1997). Some appellate courts held that *Murphy* narrowed the Hughes Tolling Rule such that the statute of limitations begins to run when a party hires new counsel to handle the underlying litigation. But the Texas Supreme Court confirmed in

area of limitations and advised that “without re-examining whether the policy reasons behind the tolling rule apply in each legal-malpractice case matching the Hughes paradigm, courts should simply apply the Hughes Tolling Rule to the category of legal malpractice cases encompassed within its definition.”²⁸ Texas courts construe the phrase “claim that results in litigation” broadly to include all claims for an indivisible injury that an attorney is hired to pursue on behalf of a client, as well as any claim the attorney must assert on behalf of the client in the exercise of reasonable care.²⁹ Therefore, when an attorney represents a client on multiple claims arising out of the same occurrence or subject matter, but negligently fails to file one or more of those claims entirely, the Hughes rule tolls the statute of limitations for a malpractice claim against the attorney until all appeals for the underlying filed claims are exhausted.³⁰

In 2005, the Dallas Court of Appeals was asked to expand the Hughes Tolling Rule to include cases in which the malpractice occurred – not in the prosecution or defense of a claim (i.e., “litigation malpractice”) – but in the course of a transactional representation that later led to litigation (i.e., “transactional malpractice”). In *Murphy v. Mullin, Hoard & Brown, LLP*, the law firm of Mullin, Hoard & Brown had been retained in the mid-1990s to form two family limited partnerships in an effort to reduce the estate taxes that would be owed by the plaintiffs’ mother. Three years later, after the mother’s death, the IRS sent a letter to the plaintiffs stating that it was contesting the valuation of the partnerships and the resulting tax savings. The IRS later served plaintiffs with a notice of tax deficiency of over \$3 million. The tax case settled in July 2000. On March 7, 2002, plaintiffs filed suit against the law firm alleging that the law firm negligently drafted the partnership agreements and failed to timely notify them of defects in the agreements. The law firm moved for summary judgment on statute of limitations grounds, alleging that the advice was given in 1994, and the alleged negligence was or should have been discovered no later than June 25, 1998, when plaintiffs received the deficiency notice from the IRS.

The trial court granted a take-nothing summary judgment in favor of the defendant attorney, refusing to apply the Hughes Tolling Rule. The Dallas Court of Appeals affirmed, holding that the Hughes Tolling Rule does *not* apply to malpractice claims based on transactional work because the malpractice did not arise during the prosecution or defense of a claim in litigation.³¹ The court acknowledged that many of the policy considerations underlying the Hughes Tolling Rule were present in the *Murphy* case as well, but was unmoved by that fact. “Although one of the policy considerations behind [the Hughes] rule is to prevent a litigant from being forced to take inconsistent positions, it is not so broad as to apply whenever that would be the case.”³²

2001, in *Apex Towing*, that no such modification had occurred and that continued representation by the allegedly negligent attorney is not a requirement for the tolling rule. 41 S.W.3d at 121.

²⁸ *Apex Towing*, 41 S.W.3d at 122.

²⁹ *Estate of Whitsett v. Junell*, No. 01-04-00078-CV, 2007 WL 274226, *5 (Tex. App.—Houston [1st Dist.] Feb. 1, 2007, no pet. h.) (citing *Sanchez v. Hastings*, 898 S.W.2d 287 (Tex. 1995)).

³⁰ *Id.*

³¹ *Murphy v. Mullin, Hoard & Brown, L.L.P.*, 168 S.W.3d at 292.

³² *Id.* (citing *Murphy v. Campbell*, 964 S.W.2d at 272); see also *The Vacek Group, Inc. v. Clark*, 95 S.W.3d 439 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (same result in case involving alleged malpractice in connection with the drafting of “corporate divorce” agreement).

The Houston Court of Appeals reached the same conclusion in the 2006 case *J.M.K. 6, Inc. v. Gregg & Gregg, P.C.*³³ That case was brought by a developer, JMK, who had hired the defendant Gregg to assist in converting apartment buildings to condominiums. JMK claimed Gregg advised it that the properties complied with all legal requirements and were ready for sale, and that JMK and Gregg had a conference call with the proposed buyers, BMW and Tyson, during which Gregg said the same thing. The condos did not comply with the legal requirements, however, and the city would not permit the buyers to proceed with the conversion. Gregg contended that the legal malpractice claim accrued when the paperwork for the condos was filed in August 2000 or, at the latest, by June 26, 2001, when the buyer went before the city’s planning committee and the city unanimously passed a motion disapproving the type of condominium conversion at issue in the project. JMK admitted knowing about the potential claims on June 25, but believed the commissioners would change their minds. JMK argued its cause of action did not accrue until December 2001, when the planning committee “definitively informed” it that it would have to spend \$2 million on various improvements and modifications before the city would recognize the conversion and that compliance was, therefore, “not a viable solution.”

The court rejected JMK’s argument: “This is an objective inquiry into whether the plaintiff should have discovered the injury, and not an inquiry into the plaintiff’s subjective belief as to whether the injury could be remedied affordably.”³⁴ Finding out that there was no affordable remedy was not the same as finding out about additional wrongful acts or omissions by Gregg. The court also declined JMK’s invitation to extend the Hughes Tolling Rule, holding that the Hughes rule could not be applied on a case-by-case basis, but must be applied with a bright-line approach. “Following the bright-line approach set forth in *Apex Towing Co.*, [the court] therefore limit[ed its] inquiry to determining whether the malpractice is alleged to have occurred ‘in the prosecution or defense of a claim that results in litigation.’”³⁵

III. Where Can They Bring the Claim?

Although perhaps not as important as the questions of privity and limitations, the forum in which a legal malpractice claim can be brought can make a real difference in the length, cost, and sometimes even the outcome of the claim.

Must a Bankruptcy-Related Malpractice Claim Be Tried in Bankruptcy Court?

When a client alleges that its attorneys committed malpractice during a bankruptcy proceeding and/or in the weeks and months leading up to bankruptcy, an additional question may be whether such malpractice claim is appropriately filed in the bankruptcy court (where the client would not be entitled to a jury) or in a state or federal district court.

³³ 192 S.W.3d 189 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

³⁴ *Id.* at 197.

³⁵ *Id.* at 198.

Bankruptcy practitioners are familiar with the Barton Doctrine in the context of suits against trustees.³⁶ As to claims for post-petition legal malpractice, the fact the court approves, by order, counsel for the trustee arguably brings that counsel within the gambit of the Barton Doctrine. See *In re Delorean Motor Company*, 991 F. 2d 1236 (6th Cir. 1993) (counsel to a trustee) and *In re Allnut*, 220 B.R. 871, 888 (Bkrcty. D. Md. 1998) (stating that Barton Doctrine applies to counsel for debtor-in-possession as well as for trustee and continues to operate after case closure). Whether the attorney/defendant wants to be in the bankruptcy forum is not an easy question to answer. But if the answer is that the attorney desires that forum, the Barton Doctrine, which has exceptions, is sometimes overlooked as a potential avenue to get there.

In addition, in *Granfinanciera, S.A. v. Nordberg*,³⁷ the Supreme Court recognized that actions that are “part of the process of allowance and disallowance of claims” or that are “integral to the restructuring of debtor-creditor relations” lose any legal character they otherwise had, and become triable in equity. Because the determination of a bankruptcy attorney’s fee application is often intertwined with any claims of alleged malpractice, the client may not be entitled to a jury trial, and the bankruptcy court may be the appropriate forum.³⁸ In *Langenkamp v. Culp*,³⁹ the Supreme Court reasoned that a creditor that files a claim against a bankruptcy estate “triggers the process of ‘allowance and disallowance of claims,’ thereby subjecting himself to the bankruptcy court’s equitable power.”⁴⁰ In the same way, where the issues central to debtor’s counsel’s fee application and the client’s malpractice action are intertwined, they are both part and parcel of the claims allowance process, integral to the restructuring of the debtor-creditor relations, and therefore triable only in equity.

In *Billing v. Ravin, Greenberg & Zackin, P.A. (In re Billing)*,⁴¹ for example, the debtors objected to the fee application of debtors’ counsel and filed a separate lawsuit in federal district court against debtors’ counsel alleging legal malpractice.⁴² The debtors’ primary objection to the fee application depended on the malpractice allegations.⁴³ The debtors requested a jury trial on the claims asserted in the lawsuit. In analyzing whether the debtors had a jury trial right under the Seventh Amendment, the Third Circuit examined applicable Supreme Court precedent, including *Granfinanciera* and *Langenkamp*, and held that the plaintiffs had no Seventh Amendment jury trial right on the malpractice claims. The court noted that “the merits of the malpractice claims must be resolved before there can be resolution of the fee dispute;” the plaintiffs’ objections to the fee application “rest[] heavily” on the adversary proceeding claims; and there is

³⁶ The Barton Doctrine proceeds from the proposition that a trustee is an officer of the court that appoints the trustee such that a party must sue the trustee in the court that appointed the trustee after first obtaining the court’s permission to do so. See discussion in *In re Coastal Plains*, 326 B.R. 102 (Bkrcty. N.D. Tex. 2005).

³⁷ 492 U.S. 33, 58 (1989).

³⁸ See, e.g., *National Benevolent Association v. Weil, Gotshal, & Manges, LLP*, No. SA-05-CA-01221-RF, 2006 WL 2516522 (W.D. Tex. August 2, 2006) (denying client/ plaintiff’s Motion to Withdraw the Reference, noting that, because the Bankruptcy Court was “intimately aware of the fee application in question, . . . it is prudent for the bankruptcy judge to use his background knowledge of the case to reach a decision on [the malpractice] issue”).

³⁹ 498 U.S. 42 (1990).

⁴⁰ *Id.* at 44 (quoting *Granfinanciera*, 492 U.S. at 58-59, and n. 14).

⁴¹ 22 F.3d 1242 (3d Cir. 1994).

⁴² *Id.* at 1244.

⁴³ *Id.*

a “close connection” between plaintiffs’ claims and the fee objection.⁴⁴ Consequently, such claims had been converted from a legal dispute “into an equitable dispute over a share of the estate.”⁴⁵

The Southern District of New York recently reached a different result (albeit under different circumstances) in *Official Committee of Unsecured Creditors of the VWE Group, Inc. et al. v. Amlicke, et al. (In re VWE Group, Inc., d/b/a V.W. Eimicka Assoc., Inc.)* (“VWE”).⁴⁶ In that case, the creditors’ committee brought legal malpractice claims against certain former partners of a law firm (“Firm A,” as it is sometimes called in the decision) based on Firm A’s “alleged failure to advise the debtor to seek Chapter 11 protection in a timely manner.” Some of the defendant partners had, in the interim, gone to work at Firm B. Firm B was not a defendant in *VWE*. Firm B, and not Firm A, represented the debtor during the bankruptcy. Firm A thus never submitted itself to the Bankruptcy Court’s equitable jurisdiction. All of the alleged misconduct of Firm A occurred before the debtor’s bankruptcy filing and, in fact, Firm A was dissolved nearly six months before the debtor filed its bankruptcy petition. The court stated that “[t]here is no question that adjudication of [Firm B’s] fee application concerns the ‘allowance or disallowance of claims,’ which is a core bankruptcy function.” The court went on to note that “[m]oreover, where a creditor has filed a proof of claim and thereby initiated a proceeding that affects the allowance or disallowance of a claim, adversary proceedings commenced by the debtor that are ‘tantamount to a counterclaim are also properly considered core.’”⁴⁷ But because Firm A had not filed a fee claim against the estate, the estate’s claim against that firm was *not* a counterclaim; therefore, it was not a core proceeding. The district court therefore withdrew the reference from the bankruptcy court.

Can an Out-of-State Lawyer Be Sued in Texas?

One issue recently faced by the Texas courts is when to allow non-Texas attorneys to be sued in Texas by Texas citizens. In *Bergenholtz v. Cannata*, the Dallas Court of Appeals determined whether the State of Texas had personal jurisdiction over attorneys licensed and working in California when their clients filed bankruptcy in Texas.⁴⁸ In that case, the California lawyers represented Bergenholtz and related parties in litigation in California. The plaintiff client alleged that one of the California attorneys told Bergenholtz “the Texas bankruptcy would lead to a quicker settlement with ISM for a lesser amount,” and “would provide an effective strategic tool for resolving the litigation in California.” After Bergenholtz filed bankruptcy in Texas, the California lawyers communicated with the Texas bankruptcy lawyers and other parties involved in the Texas bankruptcy proceeding, including the bankruptcy trustee.

Bergenholtz later filed a malpractice action against the California lawyers in Texas state court, and the lawyers moved to dismiss for lack of personal jurisdiction. The court considered how and to what extent the California attorneys were involved in the Texas bankruptcy proceeding in order to determine if they had purposefully availed themselves of the privileges

⁴⁴ *Id.* at 1252.

⁴⁵ *Id.* at 1253.

⁴⁶ 2007 WL 70408 (S.D.N.Y. January 5, 2007).

⁴⁷ *Id.* at 14.

⁴⁸ 200 S.W.3d 287 (Tex. App.—Dallas 2006, no pet.)

and benefits of conducting business in Texas.⁴⁹ Because one of the attorney's representation was limited to a California lawsuit, was not the result of the attorney seeking clients in Texas, and did not involve communication with Texas other than regarding the California lawsuit, the court held that he was not purposefully availing himself of the privileges and benefits of doing business in Texas.⁵⁰ Therefore the Texas court did not have personal jurisdiction over him.⁵¹ The court found that the second attorney was not subject to personal jurisdiction either, because she had not chosen the Texas forum for the bankruptcy case at issue, and she had only agreed to assist in the Texas bankruptcy case because of the original California lawsuit.⁵² The fact that the bankruptcy was pending in Texas was fortuitous as it related to the second attorney, rather than the result of her purposeful availment of the benefit of Texas law.⁵³ Therefore it seems clear that for Texas to hold personal jurisdiction over an out-of-state attorney, the attorney must take some kind of affirmative action to do business in the state, rather than simply being involved in out-of-state litigation, part of which ends up in Texas.

The Austin Court of Appeals reached a similar conclusion in *Red v. Dohert*,⁵⁴ in which California attorneys were sued in Texas state court after their client – the defendant in a wrongful death action in California – moved to Texas and filed bankruptcy here. In the Texas bankruptcy proceeding (in which the client was represented by Texas counsel), the bankruptcy court ruled that the wrongful death claims qualified as exceptions to discharge under 11 U.S.C. §523(a)(6) because the collision at issue was the result of the defendant's willful and malicious conduct. The California state court then ruled that such decision was res judicata as to the wrongful death claims against the defendant in California. The Austin Court of Appeals affirmed the trial court's ruling that the California lawyers could not be sued for malpractice in Texas.⁵⁵ The court noted that the California lawyers were hired to represent the defendant before he moved to Texas and that they did not have contact with the defendant or his counsel in Texas except as necessary to coordinate the defense in the California litigation; therefore, the California counsel did not purposefully avail themselves of the privileges and benefits of conducting business in Texas.⁵⁶

The Fourteenth Court of Appeals in Houston also issued two opinions this year on personal jurisdiction over out-of-state attorneys and, in both cases, found a lack of minimum contacts to support jurisdiction. In *Markette v. X-Ray X-Press Corp.*,⁵⁷ the court held that a non-resident attorney was not subject to jurisdiction in Texas where the attorney represented a client in an Indiana lawsuit but arguably provided advice regarding Texas law. In a letter to the client, the Indiana attorney advised the client of three options, one of which was to allow a default judgment to be taken in the Indiana lawsuit and then “use the Texas court system” to attack personal jurisdiction. The client followed that advice, and was ultimately required to satisfy the default judgment. In the malpractice case that followed, the Houston court held that the lawyer's act of giving legal advice on Texas law directed to a Texas client was insufficient to sustain

⁴⁹ *Id.* at 292-93.

⁵⁰ *Id.* at 295.

⁵¹ *Id.*

⁵² *Id.* at 296-97.

⁵³ *Id.*

⁵⁴ No. 03-06-00478-CV, 2007 WL 2066182 (Tex. App.—Austin July 20, 2007, no pet. h.).

⁵⁵ *Id.* at *6.

⁵⁶ *Id.*

⁵⁷ No. 14-07-00146-CV, 2007 WL 2447979 (Tex. App.—Houston [14th Dist.] August 30, 2007, no pet. h.).

personal jurisdiction over the attorney in Texas.⁵⁸ In *Weldon-Francke v. Fisher*,⁵⁹ the Houston court held that maintaining a firm website that is accessible to Texas residents is also insufficient to establish personal jurisdiction over a non-resident law firm. The court noted that Internet contacts are evaluated on a “sliding scale.”

At one end of the continuum, the website may support a finding of personal jurisdiction when a defendant does business over the Internet by entering into contracts and through the repeated transmission of computer files. At the other end of the continuum, personal jurisdiction cannot be based on the passive posting of information on the Internet.⁶⁰

Because the website at issue was “passive and informational” and did not allow for the exchange of information between the user and the law firm or the transaction of business or entry into contracts through the website, the law firm was not subject to personal jurisdiction in Texas.⁶¹

Can Attorneys Require Clients to Submit Malpractice Claims to Binding Arbitration?

Another forum related issue that continues to be discussed by Texas courts is the enforceability of arbitration agreements between attorneys and their clients. Many attorney engagement letters contain arbitration agreements. Such agreements are routinely enforced in fee dispute cases and, in fact, the Dallas Bar Association and other bar associations around the state have established fee dispute committees charged with conducting hearings and ruling on such disputes.

The law is not quite as settled, however, when it comes to arbitration of legal malpractice claims. Malpractice plaintiffs have tried several approaches to avoid being compelled to resolve their claims via arbitration, but those approaches have, with few exceptions, been unsuccessful.

In the 2000 case of *Henry v. Gonzalez*, the plaintiff client argued that arbitration should not be compelled because an arbitration agreement between attorney and client violates public policy.⁶² The dissent agreed, arguing that arbitration provisions between attorneys and clients are against public policy because of the fiduciary relationship involved and the opportunity such agreements would provide for attorneys to take advantage of their clients.⁶³ The majority of the San Antonio appeals court disagreed, however, and summarily rejected the public policy argument, noting that “well established caselaw favors mandatory arbitration.”⁶⁴ Accordingly, the court remanded the case to the trial court with instructions to enter an order compelling arbitration.

⁵⁸ *Id.* at *3-*4.

⁵⁹ No. 14-06-00834-CV, 2007 WL 2592990 (Tex. App.—Houston [14th Dist.] September 11, 2007, no pet. h.).

⁶⁰ *Id.* at *8.

⁶¹ *Id.*

⁶² *Henry v. Gonzalez*, 18 S.W.3d 684, 691 (Tex. App.—San Antonio 2000, pet. dism'd by agr.).

⁶³ *Id.* at 692-693.

⁶⁴ *Id.* at 691.

Also in 2000, the Corpus Christi Court of Appeals considered “an identical provision in an identical contract (same attorney, same contract, same complaint, and most distressingly, a virtually identical fact pattern with a different client)” in *In re Godt*.⁶⁵ The Corpus Christi court agreed with the San Antonio court that the Federal Arbitration Act (“FAA”),⁶⁶ which creates a strong policy in favor of enforcing arbitration agreements,⁶⁷ did not apply because the agreement did not affect interstate commerce.⁶⁸ But the Corpus Christi court disagreed with the San Antonio court with regard to the agreement’s enforceability under the Texas Arbitration Act (“TAA”). The TAA provides that a written agreement to arbitrate is generally enforceable.⁶⁹ The TAA contains several exclusions, however, and does not purport to apply to a “claim for personal injury” unless (1) each party to the claim agrees in writing to arbitrate with advice of outside counsel and (2) the agreement is signed by each party and each party’s attorney.⁷⁰ The *Godt* court held that a claim for legal malpractice is a “claim for personal injury” and is, therefore, not enforceable under the TAA.⁷¹ The *Godt* court also suggested in a footnote that attorney/client arbitration agreements might be against public policy, citing Disciplinary Rule 1.08(g), a contention that is rejected by the *In re Hartigan* case discussed below.

The San Antonio Court of Appeals considered these same issues again in the 2003 case of *In re Hartigan*,⁷² which was a legal malpractice case arising out of the attorney’s representation of a client in an underlying divorce proceeding. The court expressly disagreed with *Godt* and the other cases that had held a legal malpractice claim should be characterized as a claim for “personal injury” and held, instead, that a claim for legal malpractice is NOT excluded from the Texas Arbitration Act.⁷³ The plaintiff in that case also argued, as suggested by the *Godt* court, that the arbitration agreement should not be enforced because it violated Texas Disciplinary Rule 1.08(g).⁷⁴ Disciplinary Rule 1.08, entitled Conflict of Interest: Prohibited Transactions, provides: “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”.⁷⁵ The San Antonio court held, however, that an arbitration agreement does not limit the liability of a lawyer, it “merely prescribes the procedure for resolving any disputes between attorney and client;” therefore, an agreement to arbitrate does not violate Rule 1.08.⁷⁶

In *Feldman/Matz Interests, L.L.P. v. Settlement Capital Corp.*,⁷⁷ the Houston Court of Appeals did not reach the “personal injury” question because it found that the case involved

⁶⁵ 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, no pet.).

⁶⁶ The FAA, 9 U.S.C. §§ 1-16, applies to all cases involving interstate commerce whether those cases are filed in state or federal court. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-45 (2006).

⁶⁷ The FAA embodies the national policy favoring arbitration. *Buckeye Check Cashing*, 546 U.S. at 443.

⁶⁸ *In re Godt*, 28 S.W.3d at 736.

⁶⁹ Tex. Civ. Prac. & Rem. Code, § 171.001 (Vernon 2007).

⁷⁰ Tex. Civ. Prac. & Rem. Code, §§ 171.002(a)(3), 171.002(c) (Vernon 2007).

⁷¹ *In re Godt*, 28 S.W.3d at 738-39.

⁷² 107 S.W.3d 684 (Tex. App.—San Antonio 2003, pet. denied).

⁷³ *Id.* at 690.

⁷⁴ *Id.* at 689.

⁷⁵ Tex. Disciplinary R. Prof’l Conduct 1.08(g).

⁷⁶ *In re Hartigan*, 107 S.W.3d at 689.

⁷⁷ 140 S.W.3d 879 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

interstate commerce and, therefore, the FAA applied rather than the TAA.⁷⁸ The court noted that “the FAA extends to any contract affecting commerce, as far as the Commerce Clause of the United States Constitution will reach.”⁷⁹

One of the most recent cases on this subject, also out of the Houston Court of Appeals, is *Taylor v. Wilson*.⁸⁰ The court in that case agreed with the *Hartigan* court that legal malpractice claims are not claims for personal injury and are not, therefore, excluded from the Texas Arbitration Act. The court also distinguished *Godt* on the basis that the underlying claim in *Godt* was for personal injury, whereas the underlying claim in *Taylor* was against an investment firm and its banker.⁸¹

In sum, while Texas courts continue to wrestle with this issue, it appears likely that arbitration agreements between attorneys and clients, especially those involving interstate commerce, will be enforced. A separate question entirely, and one that is beyond the scope of this article, is whether attorneys *should* try to get potential clients to agree to arbitrate any future malpractice claims in the initial engagement letter. As mentioned above, arbitrating fee disputes is common and may be a quick and efficient way to resolve that type of disagreement. But many insurers and experienced malpractice defense counsel strongly believe that arbitration is not the best forum for resolving malpractice allegations. It may be that a law firm’s “technical” defenses, such as limitations, lack of privity, and lack of “but for” causation, have a better chance of success in front of a judge, as opposed to an arbitration panel that might have a tendency to ignore technical arguments in favor of equitable ones or to “split the baby.”

IV. What Claims Can They Bring?

The outcome of a legal malpractice action may turn on the particular cause of action that is pursued and ultimately allowed by the court. Generally, a malpractice claim is based on the “improper representation of a client or upon the failure of an attorney to exercise the degree of care and diligence that a lawyer would commonly exercise.”⁸²

Two Texas courts recently have confirmed that there is no private right of action for a violation of the State Bar disciplinary rules.⁸³ In *Jones v. Blume*, for example, one plaintiff’s attorney sued another over the allegedly improper division of a contingent fee alleging, among other things, that the defendant attorney violated the disciplinary rules of professional conduct. The Dallas Court of Appeals affirmed summary judgment on behalf of the defendant on that claim, however, holding that a “private cause of action does not exist for violation of the

⁷⁸ *Id.* at 884 n.3.

⁷⁹ *Id.* at 883 (citations omitted).

⁸⁰ 180 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

⁸¹ *Id.* A similar result was reached in *Miller v. Brewer*, 118 S.W.3d 896 (Tex. App.—Amarillo 2003, no pet.), which was a legal malpractice case arising out of a lawyer’s representation of a client in an underlying employment discrimination suit.

⁸² *Lajzerowicz v. McCormick*, No. 04-05-00681-CV, 2006 WL 2871298, at *1 (Tex. App.—San Antonio Oct. 11, 2006, no pet.).

⁸³ *Id.* (granting summary judgment on claim based on alleged violation of disciplinary rules); *Jones v. Blume*, 196 S.W.3d 440, 450 (Tex. App.—Dallas 2006, pet. denied) (same).

disciplinary rules.”⁸⁴ The court found that the disciplinary rules set forth the proper conduct of lawyers “solely for the purpose of discipline within the profession,” and any claim for breach of those rules should be addressed in a disciplinary proceeding.⁸⁵ Likewise, the San Antonio Court of Appeals held that a violation of the disciplinary rules does not, standing alone, give rise to a claim for legal malpractice.⁸⁶

Texas courts also have continued to reinforce the Texas rule that claims arising out of bad legal advice or representation are claims of negligence and a plaintiff may not fracture legal malpractice claims into other causes of action.⁸⁷

Often, a malpractice claim will be accompanied by a claim for breach of fiduciary duty. A breach of fiduciary duty claim is subject to a four-year, as opposed to a two-year, statute of limitations⁸⁸ and may give rise to punitive damages.⁸⁹ In addition, where there has been a breach of the attorney’s fiduciary duty to the client, the client need not prove actual damages in order to obtain forfeiture of the attorney’s fee.⁹⁰ However, when the fiduciary duty claim arises from the same set of facts as the malpractice claim, it is subsumed within the malpractice claim and cannot be separately maintained.⁹¹ The Dallas Court of Appeals recently affirmed that, unless the defendant attorney allegedly received an improper personal benefit, there can be no separate claim for breach of fiduciary duty arising out of legal representation.⁹²

Similarly, the Houston Court of Appeals recently held that a malpractice claim cannot be re-cast as a claim for breach of contract. Obviously, there are several potential benefits of combining a breach of contract claim with a malpractice claim. A plaintiff could take advantage of the four-year statute of limitations, and the Texas Civil Practice and Remedies Code provides for the recovery of attorneys’ fees in a claim for breach of contract.⁹³ But the court in *Rangel v. Lapin*⁹⁴ confirmed that where the breach of contract claim is merely a “means to an end” to complain of legal malpractice and the “crux” of the claim is an alleged failure to provide adequate legal advice, there can be no separate claim for breach of contract.⁹⁵

Another popular addition is the ubiquitous claim for violation of the Texas Deceptive Trade Practices Act. “Attorneys can be found to have engaged in unconscionable conduct by the way they represent their clients.”⁹⁶ Unlike a legal malpractice claim, the DTPA provides for treble damages and attorneys’ fees.⁹⁷ Perhaps more importantly, the Texas Supreme Court has

⁸⁴ *Jones*, 196 S.W.3d at 450.

⁸⁵ *Id.* (quoting 1 J. Hadley Edgar, Jr. & James B. Sales, *Texas Torts and Remedies* § 12.02[1][a][ii][A] (2000)).

⁸⁶ *Lajzerowicz*, 2006 WL 2871298, at *1.

⁸⁷ *Id.*

⁸⁸ Tex. Civ. Prac. & Rem. Code § 16.004(a)(5) (Vernon 2007).

⁸⁹ Tex. Civ. Prac. & Rem. Code §§ 41.001-41.013. (Vernon 2007).

⁹⁰ *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999).

⁹¹ *Cuyler v. Minns*, 60 S.W.3d 209, 216 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

⁹² *Murphy v. Mullin, Hoard & Brown, L.L.P.*, 168 S.W.3d 288; see also *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2002, pet. denied).

⁹³ Tex. Civ. Prac. & Rem. Code § 38.001(8) (Vernon 2007).

⁹⁴ 177 S.W.3d 17 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

⁹⁵ *Id.* at 24.

⁹⁶ *Latham v. Castillo*, 972 S.W.2d 66, 68 (Tex. 1998).

⁹⁷ Tex. Bus. & Com. Code § 17.50(b)(1) and (d).

held that a DTPA plaintiff need not prove the “suit within a suit” element required in a legal malpractice action.⁹⁸ (Causation and “suit within a suit” are discussed below in Section V.) Generally, however, DTPA claims are not available in legal malpractice actions because of the “professional services” exception to the statute.⁹⁹ Section 17.49 of the DTPA provides:

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.¹⁰⁰

“To qualify as a professional service, the task must arise out of acts particular to the individual’s specialized vocation.”¹⁰¹ Accordingly, an act is not a professional service merely because it is performed by a professional; instead, the act must require the “professional to use his specialized knowledge or training.”¹⁰²

This exception is broad enough to shield most legal malpractice claims from the DTPA’s reach, but it does not apply to “express misrepresentations of material fact” and other itemized conduct that “cannot be characterized as advice, judgment, or opinion.”¹⁰³ It can be difficult to predict where the line between “express misrepresentation” and “legal advice” will be drawn in a particular case. In *Rangel v. Lapin*,¹⁰⁴ for example, the Houston Court of Appeals stated in dicta that a law firm’s alleged representation that a paralegal was actually an attorney and an attorney’s alleged misrepresentation that he was board certified were both covered by the professional services exception to the DTPA. The court wrote that, because plaintiff claimed that the alleged misrepresentations caused him to weigh the firm’s advice with undue favor, it was “a claim that soundly rests within the arena of professional advice” and could not be pursued as a DTPA claim.¹⁰⁵

Another claim often found in legal malpractice cases is one for negligent misrepresentation. As with fiduciary duty claims, if the negligent misrepresentation claim is based on the same facts as the alleged malpractice, it cannot be separately maintained.¹⁰⁶ A negligent misrepresentation claim, however, has one distinct advantage over a malpractice claim. The theory of negligent misrepresentation “permits plaintiffs who are not parties to a contract for professional services to recover from the contracting professionals.” Such a claim is not a legal

⁹⁸ *Latham*, 972 S.W.2d at 69; *but see Rangel v. Lapin*, 177 S.W.3d 17, 23-24 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (stating that, as with a negligence claim, the DTPA requires that a malpractice plaintiff prove that “but for” the attorney’s breach of duty, the plaintiff would not have sustained injury); *Alexander v. Turtur & Assocs.*, 146 S.W.3d 113, 116 (Tex. 2004) (noting that while negligence requires a finding of “proximate cause” and the DTPA requires a finding of “producing cause,” both “require proof of causation in fact”).

⁹⁹ *See also Lajzerowicz*, 2006 WL 2871298, at *1 (stating that a plaintiff “is not permitted to recast a negligence claim as a DTPA claim”).

¹⁰⁰ Tex. Bus. & Com. Code § 17.49(c) (Vernon 2007).

¹⁰¹ *Nast v. St. Farm Fire & Cas. Co.*, 82 S.W.3d 114, 122 (Tex. App.—San Antonio 2002, no pet.) (quoting *Atlantic Lloyd’s Ins. Co. of Texas v. Susman Godfrey, L.L.P.*, 982 S.W.2d 472, 477 (Tex. App.—Dallas 1998, pet. denied)).

¹⁰² *Id.*

¹⁰³ Tex. Bus. & Com. Code § 17.49(c).

¹⁰⁴ 177 S.W.3d 17 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

¹⁰⁵ *Id.* at 24.

¹⁰⁶ *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

malpractice claim and, thus, does not require privity.¹⁰⁷ The duty imposed on an attorney to a non-client is limited to those situations in which (1) the attorney is aware of the non-client and intends that the non-client rely on the representation, and (2) the non-client justifiably relies on the attorney's representation of a material fact.¹⁰⁸

V. How Can They Prove Causation and Damages?

As more and more courts are confirming, proving a mistake by a lawyer is not enough to prevail on a legal malpractice claim. As legal malpractice claims arise in tort, they are treated like any other negligence claim. Therefore, the plaintiff must prove the traditional elements of negligence: duty, breach, causation, and damages.¹⁰⁹

Has the Client Really Been Damaged?

When a lawyer's malpractice results in a large money judgment against the client and the client is forced to file bankruptcy to avoid that judgment, has the client suffered any damages if the client is discharged of that liability? The Fifth Circuit recently answered that question yes.

In *Stanley v. Trincharde*, the client Gary Hale alleged that the negligence of Trincharde & Trincharde LLC and certain of its attorneys resulted in an adverse uninsured judgment against him for more than \$4,000,000. Hale was forced into an involuntary bankruptcy, and the bankruptcy trustee filed suit against the Trincharde defendants for legal malpractice. Hale was later discharged in the bankruptcy proceeding. The Trincharde defendants won summary judgment in the trial court on the basis that, because the judgment against Hale was discharged in bankruptcy, the Trustee could not show that Trincharde's alleged malpractice resulted in any damages. The Fifth Circuit disagreed, concluding that it was improper to excuse the malpractice liability of a potentially negligent attorney simply because of the "financial misfortunes" of the client/tort victim.¹¹⁰ The court noted that, when the bankruptcy proceedings commenced, Hale was a multi-million dollar judgment debtor, allegedly because of the defendants' negligence. "Hale's subsequent discharge from *personal liability* through the bankruptcy proceedings is irrelevant."¹¹¹

Did the Attorney's Alleged Malpractice Proximately Cause the Damages?

Even where the malpractice client can establish actual damages, it must also prove that the attorney's alleged malpractice was the proximate cause of those damages. If a legal malpractice case arises from prior litigation – such as a bankruptcy proceeding, a plaintiff must prove that, but for the attorney's breach of his duty, the plaintiff would have prevailed in the underlying case.¹¹² This aspect is referred to as "but for" causation or the "suit within a suit"

¹⁰⁷ *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999).

¹⁰⁸ *Id.* at 795.

¹⁰⁹ *See, e.g., Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 117 (Tex. 2004).

¹¹⁰ *Stanley*, 2007 WL 2669828, at *5.

¹¹¹ *Id.* at *6 (emphasis in original).

¹¹² *Collins v. Snow*, No. 04-05-00903-CV, 2006 WL 2955478, at *1 (Tex. App.—San Antonio Oct. 18, 2006, no pet.).

requirement.¹¹³

This “but for” link requires the fact-finder “to compare what did occur with what would have occurred if hypothetical, contrary-to-fact circumstances had existed.”¹¹⁴ A plaintiff establishes this link if he can show that the defendant’s negligent conduct was the reason the alternative scenario did not take place. But alleged negligence “is *not* a cause of the injury if the injury would have occurred even without the defendant’s conduct sued upon.”¹¹⁵

In a recent bankruptcy malpractice case, *Alexander v. Turtur & Assocs., Inc.*,¹¹⁶ a client sued a law firm regarding its handling of an adversary proceeding in bankruptcy court. The client hired the Houston law firm of Alexander & McEvily to represent it with the understanding that the name partner Tom Alexander would be lead counsel. Alexander assigned a young associate to assist him in getting the case ready for trial. When the adversary case was set for trial, the associate filed a motion for continuance based on Alexander’s conflicting trial setting in another case. The bankruptcy court denied the motion for continuance, and the associate was forced to try the case. The client was dissatisfied with the result in the bankruptcy court and sued Alexander for malpractice. The client claimed that causation was obvious, relying on the “sheer number of errors made by counsel in the preparation and trial of the underlying adversary proceeding.” The Texas Supreme Court disagreed, noting that “even when negligence is admitted, causation is not presumed.”¹¹⁷ The reasoning behind and the effect of legal tactics are something “beyond the ken of most jurors. And when the causal link is beyond the jury’s common understanding, expert testimony is needed.”¹¹⁸ Because the plaintiff had not offered any expert testimony or otherwise demonstrated the probable outcome of the case in the absence of the alleged mistakes, the Court found that the trial court was correct in entering a take-nothing judgment.¹¹⁹ In a concurring opinion, Justice Hecht expressed doubt as to whether a jury could ever be fairly expected to determine what a judge would have decided in such hypothetical circumstances.¹²⁰

In *F.W. Industries, Inc. v. McKeehan*,¹²¹ a client sued its lawyers alleging that the lawyers committed malpractice in their prosecution of a state court collections suit by, among other things, failing to notify the state court that the defendant had filed bankruptcy; failing to secure a lifting of the “stay” in the bankruptcy proceeding so as to allow F.W. to proceed to a final judgment in the state court action; and failing to move the bankruptcy court for relief from the “stay” order so that the interlocutory partial summary judgment in the state court suit could be

¹¹³ *Rangel*, 177 S.W.3d at 22.

¹¹⁴ *Greene v. Thiet*, 846 S.W.2d 26, 30 (Tex. App.—San Antonio 1993, writ denied).

¹¹⁵ *Id.*; see also *Industrial Clearinghouse, Inc. v. Jackson Walker, L.L.P.*, 162 S.W.3d 384, 389 (Tex. App.—Dallas 2005, pet. denied) (“While this evidence arguably raises a fact issue on the element of duty, it is irrelevant with respect to the issue of causation.”).

¹¹⁶ 146 S.W.3d 113 (Tex. 2004).

¹¹⁷ *Id.* at 119.

¹¹⁸ *Id.* at 119-20.

¹¹⁹ *Id.* at 122.

¹²⁰ *Id.* Because of the impracticalities of obtaining expert testimony on this issue, many jurisdictions require a literal “trial within a trial” and require the plaintiff to actually re-try the underlying case during the malpractice case. See, e.g., *Kearns v. Horsley*, 522 S.E.2d 1, 7-9 (N.C. Ct. App. 2001).

¹²¹ 198 S.W.3d 217 (Tex. App.—Eastland 2005, no pet.).

severed and made into a final judgment. The Eastland Court of Appeals affirmed a no-evidence summary judgment in the malpractice case based on the client's failure to designate an expert witness on causation. The court held that expert testimony on causation was required because the effect of the underlying defendant's bankruptcy filing, if any, on F.W.'s claims is not something within a jury's common knowledge.¹²² "For example, the effect of the bankruptcy stay and whether the stay could have been lifted are not matters within a jury's common knowledge."¹²³

The San Antonio Court of Appeals also recently affirmed a summary judgment in a legal malpractice case on the grounds that the plaintiff had failed to raise an issue of fact regarding causation. *Collins v. Snow*¹²⁴ arose from Mr. Snow's allegedly negligent representation of Mr. Collins in a medical malpractice action. Plaintiff alleged that the lawyer failed to adequately plead, prove, and submit a claim for lack of informed consent in connection with a medical procedure that resulted in his wife's death. The court of appeals affirmed the trial court's grant of summary judgment on the grounds that the plaintiff had failed to establish an issue of fact with regard to one of the elements of the underlying medical malpractice claim – that is that the patient would have refused the treatment had she been informed of the undisclosed risks.¹²⁵ Because the plaintiff could not establish the merits of his underlying claim, he could not prove causation in the malpractice case.

Courts and commentators have recognized the problems that can be created by requiring a malpractice plaintiff to effectively try her underlying case.¹²⁶ First, in a case like *Alexander*, it would be very difficult, if not impossible, to accurately re-create the original trial such that the effect of different trial strategies could be measured. Also, some have opined that it is unfair to require the client to litigate her case against her own lawyer, who has "superior knowledge about the strengths and weaknesses of the case, including knowledge obtained from the client's own confidences."¹²⁷ In addition, it may be difficult to conduct adequate discovery into the merits of the underlying case, because the original defendant will not be a party to the malpractice action. Finally, it can be unfair to the defendant attorney that all of the optimistic statements and high-damage estimates he made in the underlying lawsuit may now be used against him as admissions by a party-opponent. Nevertheless, as evidenced by the cases discussed above, Texas continues to follow the suit within a suit requirement.

As demonstrated by the cases discussed in this article, Texas courts are continuing to struggle to find the fairest and most efficient way to resolve legal malpractice cases. Given the complexity of the issues and the difficulties of proof involved, these debates likely will continue for some time.

¹²² *Id.* at 221.

¹²³ *Id.*

¹²⁴ 2006 WL 2955478.

¹²⁵ *Id.* at *1.

¹²⁶ See *Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C.*, 845 A.2d 602, 612 (N.J. 2004); *Thomas v. Bethea*, 718 A.2d 1187, 1197, 1201 (Md. 1998) (both citing to numerous secondary sources).

¹²⁷ *Thomas*, 718 A.2d at 1201.

VI. Other Recent Cases of Note

Magten Asset Management Corp. v. Paul Hastings Janofsky & Walker, LLP, Civil Action No. 04-1256-JJf, District of Delaware, Opinion Issued January 10, 2007

Court granted Motion for Judgment on the Pleadings in favor of defendant law firm on the ground that Magten lacked standing to pursue malpractice and other claims against Paul Hastings. Magten attempted to bring derivative claims against Paul Hastings on behalf of one of Paul Hastings's clients, Clark Fork and Blackfoot, LLC. The court dismissed those claims, however, finding that because Magten was not a creditor of Clark Fork at the time of the alleged malpractice, it did not have standing to bring a derivative malpractice claim against Paul Hastings.

Kaye v. Hughes & Luce, LLP, Cause No. 3: 06-CV-01863-B, Northern District of Texas, Dallas Division

Dallas court analyzed the effect of the Fifth Circuit's decision in *Andres & Kurth, LLP v. Family Snacks, Inc. (In re Pro-Snax Distribs, Inc.)*, 157 F.3d 414, 420 (5th Cir. 1998) on Hughes & Luce's fee application in connection with Gadzooks' bankruptcy. The court held that the bankruptcy court had erred in considering whether H&L's services were beneficial to the estate at the time they were performed as opposed to looking at whether those services actually resulted in a material benefit to the estate, which involves a hind-sight analysis. The court stated that even if it were "inclined to disagree with the Fifth Circuit's adoption of such a stringent standard, *Pro-Snax* remains the law of this circuit unless and until it is overruled." It accordingly remanded the case to the bankruptcy court for reconsideration of H&L's fee application under the "material benefit" standard.