

# Legal Malpractice in Texas – The Basics

**Paul Koning**  
**Brent Basden**  
K&L Gates LLP  
1717 Main Street, Ste. 2800  
Dallas, Texas 75201  
(214) 939 5500  
paul.koning@klgates.com

**Last Revision April 2010**

## LEGAL MALPRACTICE IN TEXAS – THE BASICS

**Paul Koning**  
**Brent Basden**  
K&L Gates LLP  
1717 Main Street, Suite 2800  
Dallas, Texas 75201  
(214) 939 5500  
paul.koning@klgates.com

### **1. INTRODUCTION.**

Texas courts have always recognized a cause of action for legal malpractice. *See, e.g., Morrill v. Graham*, 27 Tex. 646, 651 (1864). Before the 1980s, however, claims against attorneys were relatively rare. Today, legal malpractice actions are a common and prominent feature of the legal landscape, and Texas courts have become increasingly active in defining the rules and limits of lawyer liability.

Legal malpractice claims are unique. Claims against attorneys raise special public policy issues because of the fiduciary nature of the attorney-client relationship and the related concerns of confidentiality and privilege. Further, legal malpractice cases frequently involve thorny, multi-layered issues of causation and damages. These special considerations have led courts to impose privity restrictions, to prohibit the assignment of legal malpractice claims, to impose additional rules for tolling the statute of limitations, and to require the plaintiff to prove the “case within a case.” Lawyers who prosecute or defend legal malpractice claims must carefully consider these special doctrines in assessing and handling cases.

This general outline covers the fundamentals of Texas law regarding legal malpractice and other claims against lawyers. By necessity it is incomplete, and there may be exceptions or contrary authority to the general points discussed. Rulings in common law cases are often fact-specific and may not be followed in cases involving different facts. The article is not a legal opinion or legal advice and you should consult with an attorney about any specific concerns you may have in this area.

### **2. NATURE OF CLAIM.**

“An attorney malpractice action in Texas is based on negligence.” *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989). Although in some circumstances a plaintiff may allege other causes of action against an attorney, it is well established that a traditional legal malpractice claim sounds in tort.

A plaintiff in a legal malpractice claim must prove the following elements: (1) there is duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) that the breach proximately caused the plaintiff injury; and (4) that damages occurred. *Cosgrove v. Grimes*, 774 S.W.2d at 665.

### 3. DUTY.

In general, to establish the element of duty the plaintiff must prove that an attorney-client relationship existed with respect to the matter at issue. With the limited exceptions discussed below, a person who was not a client may not sue an attorney for legal malpractice. See *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996). The plaintiff's burden of proving the existence of any attorney-client relationship is commonly referred to as the "privity" requirement. The determination of whether an attorney-client relationship exists must be based on an objective standard, not on the parties' subjective beliefs. See *Span Enters. v. Wood*, 274 S.W.3d 854, 858 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *SMWNPF Holdings, Inc. v. Devore*, 165 F.3d 360, 364-65 (5th Cir. 1999).

There are two major exceptions to the privity requirement in legal malpractice cases:

i) A non-client may sue a lawyer for negligence if, under the circumstances, the lawyer should have reasonably expected that the non-client would believe the lawyer represented him, and the lawyer failed to advise of the non-representation. *Burnap v. Linnartz*, 914 S.W.2d 142, 148-49 (Tex. App.—San Antonio 1995, writ denied).

ii) An excess carrier may bring a legal malpractice claim against the lawyer for the insured, based on the theory of equitable subrogation. *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 484 (Tex. 1992).

The privity rule applies to bar claims by constituents of client organizations. For example, a lawyer for a corporation ordinarily is not subject to a malpractice claim by the corporation's officers, directors or shareholders. See *Gamboa v. Shaw*, 956 S.W.2d 662, 665 (Tex. App.—San Antonio 1997, no pet.).

The Texas Supreme Court has addressed privity in the estate-planning context in a trilogy of opinions. In *Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex. 1996), the Court held that the beneficiaries of a decedent's estate may not sue the decedent's attorney for negligent estate planning. In *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 786-87 (Tex. 2006), the Court held that an estate's personal representative may maintain a legal malpractice claim on behalf of the estate against the decedent's estate planners. Finally, in *Smith v. O'Donnell*, 288 S.W.3d 417, 419 (Tex. 2009), the Court held that the executor of an estate may bring suit against a decedent's attorney for legal malpractice outside of the estate planning context.

#### 4. BREACH OF DUTY/STANDARD OF CARE.

To establish a breach of duty giving rise to a claim for legal malpractice, the client must show that the lawyer failed to comply with the applicable standard of care. In general terms, an attorney breaches the duty of care when the lawyer does something an ordinarily prudent lawyer would not have done, or fails to do something an ordinarily prudent lawyer would have done, under the same or similar circumstances. The Texas Supreme Court has expressed the standard of care in this way:

A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney. The jury must evaluate his conduct based on the information the attorney has at the time of the alleged act of negligence. . . . If an attorney makes a decision which a reasonably prudent attorney could make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable. Attorneys cannot be held strictly liable for all of their clients' unfulfilled expectations. An attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect.

*Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989). *Cosgrove* rejected the concept of judgmental immunity, which protects lawyers who exercise professional judgment in subjective good faith. *Id.* at 664-665.

***The Locality Rule.*** Although the locality rule has been criticized, Texas law still requires the trier of fact to compare the lawyer's conduct to the standard of care in the lawyer's community. See *Tijerina v. Wennermark*, 700 S.W.2d 342, 347 (Tex. App.—San Antonio 1985, no writ); *Cook v. Irion*, 409 S.W.2d 475, 478 (Tex. Civ. App.—San Antonio 1966, no writ).

***Specialization.*** A lawyer who holds herself out as a specialist is generally expected to possess a higher degree of skill and learning than a general practitioner, and accordingly may be judged by an equivalently higher standard of care. *Rhodes v. Batilla*, 848 S.W.2d 833, 842 (Tex. App.—Houston [14th Dist.] 1993, writ denied); see also *Streber v. Hunter*, 221 F.3d 701, 722 (5th Cir. 2000).

#### 5. PROXIMATE CAUSE.

As in traditional negligence cases, the plaintiff in a legal malpractice case must prove that the alleged malpractice was the proximate cause of injury. *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989). Proximate cause consists of two elements: (1) cause in fact, and (2) foreseeability. *McClure v. Allied Stores of Tex., Inc.*, 608 S.W.2d 901, 903 (Tex. 1980).

“Cause in fact means that the act or omission was a substantial factor in bringing about the injury and without which no harm would have occurred.” *McClure v. Allied Stores of Tex., Inc.*, 608 S.W.2d 901, 903 (Tex. 1980). The cause in fact requirement has also been referred to as the “but for” test, because the plaintiff must show that the injury would not have occurred “but for” the alleged breach of duty. But the Texas Supreme Court has made clear that a “but for” showing alone is not enough; to qualify as cause in fact the negligence must also have been a

*substantial factor* in bringing about the plaintiff's harm. *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995).

The foreseeability element of proximate cause requires proof that the defendant, as a person of ordinary intelligence, should have anticipated the danger to others by his negligent act. *See, e.g., Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.*, 779 S.W.2d 474, 478 (Tex. App.—El Paso 1989, writ denied) (bankruptcy of client was not reasonably foreseeable).

Mere speculation or surmise is not sufficient evidence of proximate cause. *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995). Proximate cause may be decided as a matter of law if the attorney establishes that his conduct was not the cause of the damages in question. *Id.*

***The “Case Within a Case” Requirement.*** When the alleged malpractice relates to a claim that was litigated, the plaintiff must prove that a more favorable judgment would have resulted if the case had been handled competently. This is known as the “case within a case” requirement. In litigation malpractice cases, therefore, the trial of the legal malpractice case actually involves proving *two* cases: 1) the malpractice case against the lawyer, and 2) the hypothetical, malpractice-free underlying case. *See Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948, 949 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.). The case within a case requirement means that when the legal malpractice case is tried, the jury must decide how a reasonable jury would have resolved the issues in the underlying case if the alleged malpractice had not occurred. This can lead to some difficult evidentiary issues, some of which have not been conclusively resolved in Texas.

Some commentators have suggested that a client should be allowed to circumvent the case within a case requirement by proving that the case had a certain “settlement value” that was impaired by the malpractice. Texas courts have not yet embraced this concept, possibly because proof of settlement value is inherently speculative. *See, e.g., Keck, Mahin & Cate v. National Union Fire Ins. Co.*, 20 S.W.3d 692, 703 (Tex. 2000) (to prove damages due to allegedly excessive settlement, plaintiff must show that if case had been tried with a reasonably competent, malpractice-free defense, judgment amount would have been less than actual settlement).

Similarly, Texas courts will not apply the “loss of chance” doctrine in legal malpractice cases. The “loss of chance” theory would allow a client to sue for the loss of a cause of action regardless of whether the client would have won in a negligence-free trial. In *Kramer v. Lewisville Memorial Hospital*, the Texas Supreme Court rejected the loss of chance doctrine in medical malpractice cases. 858 S.W.2d 397, 406-07 (Tex. 1993). The *Kramer* Court reasoned that if it adopted the loss of chance doctrine in medical malpractice cases it would then have to apply the doctrine to legal malpractice cases as well. “If, for example, a disgruntled or unsuccessful litigant loses a case that he or she had a less than 50 percent chance of winning, but is able to adduce expert testimony that his or her lawyer negligently reduced this chance by some degree, the litigant would be able to pursue a cause of action for malpractice under the loss of chance doctrine.” 858 S.W.2d at 406.

**“Collectibility.”** When the claim is that a lawyer improperly represented the client as a plaintiff in litigation, the client must prove the amount of damages that would have been recoverable and collectible if the case had been properly prosecuted. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Dev. & Research Corp.*, 299 S.W.3d 106, 109, 112 (Tex. 2009). The amount that would have been collectible with regard to an underlying judgment – providing the judgment is not dormant or preempted – is:

the greater of either (1) the fair market value of the underlying defendant’s net assets that would have been subject to legal process for satisfaction of the judgment as of the date the first judgment was signed or at some point thereafter, or (2) the amount that would have been paid on the judgment by the defendant or another, such as a guarantor or insurer. (*Id.* at 115)

A plaintiff must prove collectibility by competent evidence. In general, evidence that a defendant in an underlying case could have satisfied the judgment at a time prior to the signing of the judgment is not relevant, unless accompanied by evidence showing that the defendant’s ability to satisfy the judgment was not diminished by the passage of time. *Id.* at 113-14.

**Malpractice in Criminal Representation.** A plaintiff alleging malpractice in a criminal matter that resulted in conviction must show that he or she has been exonerated on direct appeal, through post-conviction relief or otherwise. *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 495 (Tex. 1995).

## 6. DAMAGES.

A plaintiff in a legal malpractice case may seek to recover foreseeable damages proximately caused by the negligent act or omission. In the litigation context, this is usually the amount that the client would have collected, or would have avoided paying, if the litigation had been properly handled. *See, e.g., Keck, Mahin & Cate v. National Union Fire Ins. Co.*, 20 S.W.3d 692, 703 (Tex. 2000) (damages were to be calculated by comparing amount paid to settle case with amount that would have been lost at competently defended trial); *Cosgrove v. Grimes*, 774 S.W.2d 662, 666 (Tex. 1989) (jury should have been asked to determine the amount of damages “collectible from Stephens if the suit had been properly prosecuted”).

**Mental Anguish Damages.** When a legal malpractice plaintiff’s alleged mental anguish is a consequence of economic losses caused by an attorney’s negligence, the plaintiff may not recover damages for that mental anguish. *Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999); *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 784-85 (Tex. 2006) (holding client may not recover damages for mental anguish when attorney’s malpractice only results in financial loss).

In *Douglas v. Delp*, the Texas Supreme Court left open the question of whether mental anguish damages are recoverable in non-economic loss cases, such as when the client alleges loss of liberty, or in cases involving egregious misconduct. 987 S.W.2d at 885. The San Antonio Court of Appeals upheld an award of mental anguish damages based on the jury’s finding that the defendant attorney had acted with malice in assisting a fiduciary breach during a dispute over trust assets. *Parenti v. Moberg*, No. 04-06-00497-CV, 2007 WL 1540952, at \*3

(Tex. App.—San Antonio May 30, 2007, pet. denied) (holding mental anguish damages are recoverable for intentional or malicious conduct).

**Exemplary Damages.** Exemplary damages are only recoverable in a legal malpractice case if the plaintiff proves by “clear and convincing evidence” that the harm resulted from fraud, malice or gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003. “Malice” means a specific intent to cause the plaintiff substantial injury or harm. *Id.* § 41.001(7). “Gross negligence” means an act or commission involving an “extreme degree of risk,” carried out with actual, subjective awareness of the risk and conscious indifference to the rights, safety or welfare of others. *Id.* § 41.001(11). Exemplary damages may be awarded only if the jury was unanimous in finding liability for and the amount of exemplary damages.

TEX. CIV. PRAC. & REM. CODE § 41.008 limits the amount of exemplary damages available in most cases. Unless the alleged malpractice also constitutes a felony listed in § 41.008(c), exemplary damages are capped at two times the economic damages or \$200,000, whichever is greater. (Additional amounts are available if non-economic damages are recovered).

On the motion of the defendant, courts must bifurcate trials into compensatory and exemplary damages phases. *Id.* § 41.009. The net worth of the defendant is admissible in the exemplary damages phase. *Id.* § 41.011.

**Attorneys’ Fees.** In Texas, attorneys’ fees are recoverable only when authorized by statute, and are not recoverable in common law tort cases such as suits for legal malpractice. *See Huddleston v. Pace*, 790 S.W.2d 47, 49 (Tex. App.—San Antonio 1990, writ denied). Attorneys’ fees are recoverable in breach of contract claims, statutory fraud claims and claims under the Texas Deceptive Trade Practices Act, to the extent such claims may be legitimately asserted against lawyers. *See Section 9 infra.*

However, a legal malpractice plaintiff may seek to recover attorneys’ fees *as damages*, for example when the plaintiff alleges that as a result of malpractice the plaintiff was required to incur additional or unnecessary fees in the underlying litigation. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Dev. & Research Corp.*, 299 S.W.3d at 119-124. A plaintiff who seeks to recover attorneys’ fees as damages must prove that the fees were proximately caused by the attorney’s negligence. *Id.* at 122. If the attorneys’ fees would have been incurred regardless of the attorney’s performance, they are not recoverable. *Id.* at \*122-23 (refusing to allow recovery of appellate attorneys’ fees without showing that there would not have been an appeal but for the attorney’s negligence).

**Recovery for “Lost Punitive Damages.”** No modern Texas precedent addresses whether a plaintiff may recover “lost punitive damages,” *i.e.*, an amount equal to the punitive damages that would have been awarded in the underlying case but for the plaintiff’s attorney’s negligence. Other states are split on this issue, which raises a number of public policy and damages theory issues. *Compare Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 69 P.3d 965, 974 (Cal. 2003) (client may not recover lost punitive damages) *with Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 101 (D.D.C. 2002) (lost punitive damages allowed). A 1904 Texas court of civil appeals’

decision allowed the recovery of lost punitive damages without any policy analysis. *Patterson & Wallace v. Frazer*, 79 S.W. 1077, 1083 (Tex. Civ. App.—San Antonio 1904, no writ).

**Contingent Fee Offset.** In *Akin, Gump, Strauss, Hauer & Feld, L.L.P v. National Development & Research Corp.*, the Texas Supreme Court declined to review the holding of the Dallas Court of Appeals regarding the question of “contingent fee offset.” The Dallas Court had held that an attorney-defendant is not entitled to an offset in the amount of the contingent fee the attorney would have earned if the underlying case been successful. *Akin, Gump, Strauss, Hauer & Feld, L.L.P v National Dev. & Research Corp.*, 232 S.W.3d 883, 899 (Tex. App.—Dallas 2007), *rev’d on other grounds*, 299 S.W.3d 106 (Tex. 2009). The Texas Supreme Court opted not to write on the contingent fee offset issue because it had reversed the entire judgment on other grounds. *Akin Gump*, 299 S.W.3d at 118-19. The contingent fee offset issue remains a controversial question that will receive further judicial scrutiny before it is settled in Texas.

## 7. DEFENSES.

**Limitations.** The statute of limitations for legal malpractice claims in Texas is two years. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). If the claim is one for legal malpractice, the two-year limitations period applies whether the plaintiff pleads the claim in tort, contract, fraud or some other theory. *Streber v. Hunter*, 14 F. Supp. 2d 978, 985 (W.D. Tex. 1998); *Burnap v. Linnartz*, 914 S.W.2d 142, 148 (Tex. App.—San Antonio 1995, writ denied). The two-year limitation period applies not only to causes of action labeled as negligence, but to all causes of action arising from injuries suffered because the lawyer’s representation allegedly fell below the quality required under the law. *Murphy v. Gruber*, 241 S.W.3d 689, 696-98 (Tex. App.—Dallas 2007, pet. denied) (“[W]e are not bound by the labels the parties place on their claims. . . . [C]haracterizing conduct as “misrepresentation” or “conflict of interest” does not alone transform what is really a professional negligence claim into either a fraud or breach-of-fiduciary-duty claim.”); *see also* Section 9 *infra*.

A legal malpractice claim accrues when the client suffers legal injury, meaning that facts have come into existence that authorize a claimant to seek a judicial remedy. *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 120 (Tex. 2001). A person suffers legal injury from faulty professional advice when the advice is taken. *Murphy v. Campbell*, 964 S.W.2d 265, 271 (Tex. 1997). Nevertheless, in many cases the limitations period is extended by one of two tolling doctrines. First, the “discovery rule” delays accrual of a cause of action until the plaintiff knows or should know of the wrongfully-caused injury. *See Apex Towing Co. v. Tolin*, 41 S.W.3d at 120-21; *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 749 (Tex. 1999). Second, when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on a malpractice claim against the attorney is tolled until all appeals on the underlying claims are exhausted or the litigation is otherwise concluded. *Apex Towing Co. v. Tolin*, 41 S.W.3d at 119; *Hughes v. Mahaney & Higgens*, 821 S.W.2d 154, 157 (Tex. 1991). The latter tolling doctrine, known as the “*Hughes* tolling rule,” does not apply to malpractice claims based on errors committed by attorneys in the course of conducting transactional work. *The Vacek Group, Inc. v. Clark*, 95 S.W.3d 439, 447 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

Texas courts continue to allow tolling of limitations due to fraudulent concealment, even though there is a significant overlap between that theory and the discovery rule. *See, e.g., Trousdale v. Henry*, 261 S.W.3d 221, 235 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (holding estoppel effect of fraudulent concealment, like the discovery rule, ends when a party learns of facts that would cause a reasonably prudent person to make inquiry); *Bankruptcy Estate of Harrison v. Bell*, 99 S.W.3d 163, 168-70 (Tex. App.—Corpus Christi 2002), *appeal dism'd as moot*, No. 13-01-049-CV, 2003 WL 194999 (Tex. App.—Corpus Christi Jan. 30, 2003, no pet.) (observing the two theories have “much the same effect,” but exist for different reasons).

Texas does not recognize the continuous representation doctrine, which in some states tolls limitations until the attorney-client relationship ends. *Brennan v. Manning*, No. 07-06-0041-CV, 2007 WL 1098476, at \*2 (Tex. App.—Amarillo April 12, 2007, pet. denied) (“The existence of an attorney-client relationship does not, standing alone, toll limitations in a legal malpractice cause of action”).

**“Attorney Immunity.”** There is a growing body of case law holding that lawyers may not be sued by third parties, under any cause of action, for conduct engaged in as part of the discharge of the attorneys’ duties in representing a party in a lawsuit. In *Bradt v. West*, 892 S.W.2d 56, 71-72 (Tex. App.—Houston [1st Dist.] 1994, writ denied), the court held that attorneys are not subject to claims by opposing counsel from a prior lawsuit who allege misconduct in the prosecution of the underlying suit. Other courts have extended the rule to claims by opposing parties. *See Renfroe v. Jones & Assocs.*, 947 S.W.2d 285, 286 (Tex. App.—Fort Worth 1997, writ denied) (affirming summary judgment in wrongful garnishment claim); *Taco Bell Corp. v. Cracken*, 939 F. Supp. 528, 532 (N.D. Tex. 1996); *White v. Bayless*, 32 S.W.3d 271, 274-77 (Tex. App.—San Antonio 2000, pet. denied). The attorney immunity rule is not limited to claims based on litigation conduct, but applies whenever the conduct involves “the office, professional training, skill and authority of an attorney.” *Reagan Nat’l Advertising of Austin, Inc. v. Hazen*, No. 03-05-0069-CV, 2008 WL 2938823, at \*3 (Tex. App.—Austin July 28, 2008, no pet); *Miller v. Stonehenge/FASA-Texas, JDC, L.P.*, 993 F. Supp. 461, 464 (N.D. Tex. 1998).

In determining whether attorney immunity should be applied, courts focus on the type of conduct rather than whether the conduct was meritorious in the context of the underlying lawsuit. If the conduct is of the type that an attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit, a qualified immunity applies. *See Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 406-08 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (immunity barred claims of aiding and abetting client’s breach of fiduciary duty, tortious interference with fiduciary duty, and conspiracy to defraud); *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.) (immunity applied to multiple claims); *Chapman Children’s Trust v. Porter & Hedges L.L.P.*, 32 S.W.3d 429, 442 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (immunity barred fraud and civil conspiracy claims by trusts when all acts or omissions were undertaken in discharge of lawyers’ duties); *Taco Bell v. Cracken*, 939 F. Supp. at 533 (immunity barred theories of fraud, abuse of process, conspiracy and negligent entrustment). *But see Mendoza v. Fleming*, 41 S.W.3d 781, 787-88 (Tex. App.—Corpus Christi 2001, no pet.) (refusing to apply attorney immunity because plaintiff alleged that wrongful garnishment was carried out with “wrongful and malicious motive” of interfering with plaintiff’s judicial campaign). This qualified immunity “generally applies even if conduct is wrongful in

the context of the underlying litigation.” *Alpert*, 178 S.W.3d at 406; *Toles*, 113 S.W.3d at 910 (noting remedies, such as sanctions, exist to deter attorney misconduct).

However, an attorney’s immunity is limited and does not shield attorneys from liability for knowing participation in a fraud or conspiracy to defraud a third person, regardless of whether the tortious conduct occurs in the litigation context. A lawyer who participates in independently fraudulent activities engages in action “foreign to the duties of an attorney.” *Toles*, 113 S.W.3d at 911 (quoting *Houston & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)); *Alpert*, 178 S.W.3d at 406. For example, Texas courts have held that attorneys who participate in the wrongful conversion of assets in the litigation context or assist a client in a fraudulent business scheme are not entitled to immunity. *Querner v. Rindfuss*, 966 S.W.2d 661, 666 (Tex. App.—San Antonio 1998, pet. denied) (holding fraudulent actions by attorney in litigation context are not absolutely privileged); *Likover v. Sunflower Terrace II, Ltd.* 696 S.W.2d 468, 472-73 (Tex. App.—Houston [1st Dist.] 1985, no writ) (attorney engaged in civil conspiracy to defraud).

**Contributory Negligence/Proportionate Responsibility.** The common law doctrine of contributory negligence has been replaced in Texas with a statutory scheme currently known as “proportionate responsibility.” TEX. CIV. PRAC. & REM. CODE §§ 33.001-.017. Under this scheme, the jury is asked to assess the relative responsibility of each plaintiff, defendant, settling party, and “responsible third party.” *Id.* § 33.003(a). If the plaintiff fails to sue a party whose wrongful act or omission contributed in any way to the alleged harm, a defendant may, with leave of court, designate that party as a “responsible third party.” *Id.* § 33.004. Based on the jury’s allocation of responsibility:

- a) a plaintiff who is more than 50% responsible recovers nothing;
- b) if the plaintiff is less than 50% responsible, the amount of damages the plaintiff may recover is reduced by:
  - i) a percentage equal to the plaintiff’s responsibility, and
  - ii) the amount of all settlements;
- c) each liable defendant is responsible only for that percentage of damages equal to its own percentage of responsibility, *unless* that percentage is more than 50%. (In other words, liability is joint and several only for defendants who are found more than 50% responsible.) Alternatively, joint and several liability may exist if the misconduct violated certain provisions of the Texas Penal Code.

*Id.* §§ 33.001, 33.012, 33.013.

**Assignment.** It is now well established that, for public policy reasons, legal malpractice claims may not be assigned in Texas. *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref’d); *City of Garland v. Booth*, 895 S.W.2d 766, 769 (Tex. App.—Dallas 1995, writ denied); *see also Britton v. Seale*, 81 F.3d 602, 603-05 (5th Cir. 1996) (applying Texas law). The prohibition against assignment applies to all legal malpractice claims, not merely claims arising from litigation. *See Britton v. Seale*, 81 F.3d at 604; *Vinson &*

*Elkins v. Moran*, 946 S.W.2d 381, 394-96 (Tex. App.—Houston [14th Dist.] 1997, pet. dismissed by agr.); *City of Garland v. Booth*, 895 S.W.2d at 771. Moreover, the prohibition against assignment extends to all causes of action arising from the attorney-client relationship, however denominated, and not merely to negligence claims. See *City of Garland v. Booth*, 971 S.W.2d 631, 634-35 (Tex. App.—Dallas 1998, pet. denied) (claims for breach of contract/restitution, breach of express warranty under DTPA, and unconscionability under DTPA could not be assigned); *Vinson & Elkins v. Moran*, 946 S.W.2d at 396 (claims against attorneys for conspiracy, violations of the DTPA and “other intentional torts” could not be assigned).

Although it has not been conclusively decided, it appears that the prohibition against assignment also extends to the assignment of proceeds from a legal malpractice claim if the assignee is also given substantial control over the litigation. See *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 633-34 (Tex. App.—Dallas 2000, pet. denied); see also *Mallios v. Baker*, 11 S.W.3d 157, 159-72 (Tex. 2000) (four justice concurrence would hold that proceeds assignment is invalid, even though majority declined to address the issue). In *Mallios v. Baker*, the Texas Supreme Court held that a legal malpractice defendant should not have obtained summary judgment based on the invalidity of a partial proceeds assignment, because the lawyer’s client remained the proper plaintiff in the malpractice suit whether or not the assignment was valid. 11 S.W.3d at 159.

## 8. PROCEDURAL ISSUES.

***Admissibility of Disciplinary Rules.*** A violation of the Texas Disciplinary Rules of Professional Conduct (the “Disciplinary Rules”) does not give rise to a private cause of action for malpractice. See *Adams v. Reagan*, 791 S.W.2d 284, 291 (Tex. App.—Fort Worth 1990, no writ). Indeed, the Disciplinary Rules themselves provide:

These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. . . . Accordingly, nothing in these rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

TEX. DISCIPLINARY R. PROF’L CONDUCT preamble ¶ 15.

While the Texas Supreme Court has not ruled on the issue of whether trial courts may allow evidence of the Disciplinary Rules in order to prove the standard of care, Texas courts of appeals have reached differing conclusions. Compare *Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896, 905 (Tex. App.—Dallas 2001), *rev’d on other grounds*, 145 S.W.3d 150 (Tex. 2004) (stating that a trier of fact can use the Disciplinary Rules as evidence of an existing duty of care for claims of legal malpractice or breach of fiduciary duty) with *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 96-97 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding trial court erred in admitting expert testimony that “the standard of care for attorneys is based on Texas disciplinary rules” because liability cannot be based on rule violations); *Izen v. Law*, No. B-14-97-00599-CV, 1998 WL 831594, at \*2 (Tex. App.—Houston [14th Dist.] Dec. 30,

1998, no pet.) (unpublished) (trial court did not err in refusing to allow expert testimony that lawyer violated disciplinary rules).

Some courts look to the Disciplinary Rules when determining the scope of attorneys' fiduciary duties. A Texas federal court held the Disciplinary Rules "may be considered evidence and significantly inform the analysis" of attorneys' fiduciary duties. *Sealed Party v. Sealed Party*, No. Civ. A. H-04-2229, 2006 WL 1207732, at \*8 (S.D. Tex. May 4, 2006) (unpublished). Although the *Sealed Party* court admitted the Rules are not dispositive and do not create a cause of action, the court concluded Texas Rule 1.05(b) imposes a continuing fiduciary duty of confidentiality on attorneys. *Id.* at \*9-10 (conducting an extensive analysis of that the Texas confidentiality rules). On the other hand, several Texas courts have concluded that the "substantial relationship" test for former client conflicts of interest applies only to disciplinary and disqualification actions, and does not apply to private causes of action for breach of fiduciary duty. *See* Section 9, *infra*.

**Expert Testimony Requirement.** As in most jurisdictions, in Texas it is essential for the plaintiff to offer competent expert testimony regarding the standard of care. *Hall v. Rutherford*, 911 S.W.2d 422, 424 (Tex. App.—San Antonio 1995, writ denied); *see also Geiserman v. MacDonald*, 893 F.2d 787, 792-93 (5th Cir. 1990). The requirement of expert testimony is excused only in very limited circumstances in which the negligence is egregious and would be obvious to a layperson. *Geiserman v. MacDonald*, 893 F.2d at 794; *James V. Mazuca & Assocs. v. Schumann*, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied).

When the causal connection between the attorney's acts and the client's injuries is neither obvious nor a matter within the common understanding of laypersons, the client must also introduce expert testimony to establish causation. *Alexander v. Turtur & Assocs.*, 146 S.W.3d 113, 119 (Tex. 2004). It is also likely that expert testimony will be required to prove that an attorney's negligence proximately caused attorneys' fees that the plaintiff seeks to recover as damages, as allowed by the recent decision of *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Dev. & Research Corp.*, 299 S.W.3d at 119-24.

**Appellate Malpractice.** When a plaintiff accuses a lawyer of malpractice in connection with appellate representation, the trial court rather than the jury decides the issue of causation. *Millhouse v. Wiesenthal*, 775 S.W.2d 626, 628 (Tex. 1989). This is because deciding whether a properly handled appeal would have succeeded necessarily involves a question of law. *Id.*

## 9. ALTERNATIVE CAUSES OF ACTION.

**Breach of Fiduciary Duty.** Lawyers owe fiduciary duties to their clients and may be held liable for breaching those duties. Although there have been many attempts to define a lawyer's fiduciary duties, in general the duties require honesty, candor, confidentiality, and the obligation to deal fairly and in good faith with the client.

When the essence of the client's claim is that the lawyer mishandled the representation, courts will treat the claim as one for negligence rather than breach of fiduciary duty. *Murphy v. Gruber*, 241 S.W.3d 689 (Tex. App.—Dallas 2007, pet. denied). In *Murphy v. Gruber*, the court held that "claims regarding the quality of the lawyer's representation of the client are

professional negligence claims.” *Id.* at 696-97. The court observed that “characterizing conduct as ‘misrepresentation’ or ‘conflict of interest’ does not transform what is really a professional negligence claim into either a fraud or breach of fiduciary duty claim.” *Id.* at 697. “[W]e are not bound by the labels parties place on their claims” and “look at the language in the . . . petition to determine whether the [plaintiffs] are really complaining about the services the [I]awyers performed or something else.” *Id.* at 697-98.

Other courts have commented that a claim for breach of fiduciary duty “refers to unfairness in the contract” between the client and the lawyer. *E.g., Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 506-07 (Tex. App.—Houston [1st Dist.] 1995, no writ) (claim of improper disclosure of confidences treated as legal malpractice claim). Others have held that a claim for fiduciary duty exists when the focus of the claim is whether the attorney obtained an improper benefit from representing a client. *Aiken v. Hancock*, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, pet. denied) (“allegations [that] do not amount to self-dealing, deception, or express misrepresentations . . . do not support a separate cause of action for breach of fiduciary duty”); *Trousdale v. Henry*, 261 S.W.3d 221, 228 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). The clearest examples of breach of fiduciary duty claims include entering into an unfair transaction with a client, unfairly modifying the fee agreement during the course of the representation, and failing to deliver client funds. *See Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied).

However, some Texas courts have permitted breach of fiduciary duty claims against attorneys who commit express misrepresentations or other egregious conduct, even if the case does not involve self-dealing. *See, e.g., Trousdale*, 261 S.W.3d at 229-33 (attorney failed to disclose to client that cases had been dismissed for want of prosecution, continued to collect fees from the client, and refused to return client’s file).

When a former client’s suit for breach of fiduciary duty arises from the lawyer’s representation of a new client adverse to the former client, the “substantial relationship” test for conflicts of interest does not apply. The “substantial relationship” test is a presumption of confidence-sharing that is to be used only for purposes of disciplinary actions and disqualification motions. *See Brown v. Green*, No. 14-08-00592-CV, -- S.W.3d --, 2009 WL 4573451, at \*5 (Tex. App.—Houston [14th Dist.] Sept. 1, 2009 no pet.); *Capital City Church of Christ v. Novak*, No. 03-04-00750-CV, 2007 WL 1501095, at \*3-4 (Tex. App.—Austin May 23, 2007, no pet.); *City of Garland v. Booth*, 895 S.W.2d 766, 772-73 (Tex. App.—Dallas 1995, writ denied). In a private action for breach of fiduciary duty for adverse representation by a former lawyer, the former client must produce evidence of actual misuse or disclosure of confidential information, as well as damages proximately caused by that misuse or disclosure. *See generally Brown v. Green*, 2009 WL 4573451, at \*5.

The statute of limitations claims for breach of fiduciary duty claims in Texas is four years. TEX. CIV. PRAC. & REM. CODE § 16.004(a)(5). Nevertheless, courts will apply a two-year statute of limitations when the claim is about the quality of the lawyer’s representation. *Murphy v. Gruber*, 241 S.W.3d at 697-98; *Norman v. Yzaguirre & Chapa*, 988 S.W.2d 460, 461 (Tex. App.—Corpus Christi 1999), *overruled on other grounds, Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 122 (Tex. 2001).

In *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999), the Texas Supreme Court held that a client may seek the remedy of fee forfeiture in a suit against an attorney for breach of fiduciary duty, whether or not the client suffered actual damages from the conduct. The *Burrow* court held that fee forfeiture was an equitable remedy, and, as such, the trial court would decide whether fee forfeiture was appropriate and, if so, how much of the fees would be forfeited. The *Burrow* court listed a number of factors for trial courts to consider in the fee forfeiture analysis, and limited fee forfeiture to instances of “clear and serious” violations of duty. Note that fee forfeiture is not available in ordinary negligence cases, but only in true breach of fiduciary duty cases.

**Breach of Contract.** Courts will not recognize a breach of contract claim that is, at bottom, a claim for legal malpractice. *Sledge v. Alsup*, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ); *Black v. Wills*, 758 S.W.2d 809, 814 (Tex. App.—Dallas 1988, no writ).

**Fraud.** A non-client may sue a lawyer for fraud if the lawyer’s actions meet the test for fraud through misrepresentation. *Bernstein v. Portland Sav. & Loan Ass’n*, 850 S.W.2d 694, 701-05 (Tex. App.—Corpus Christi 1993, writ denied). An attorney may not, however, be sued by a non-client for fraudulent non-disclosure. “An attorney has no duty to reveal information about a client to a third party when that client is perpetrating a nonviolent, purely financial fraud through silence.” *Lesikar v. Rappeport*, 33 S.W.3d 282, 319-20 (Tex. App.—Texarkana 2000, pet. denied). Further, an attorney making representations on behalf of a client does not have a duty to correct those representations should they prove to be false. *Id.*; *Bernstein v. Portland Sav. & Loan Ass’n*, 850 S.W.2d at 704. *But see* *McCamish, Martin, Brown & Loeffler v. F.E. Applying Interests*, 991 S.W.2d 787 (Tex. 1999) (discussing liability for negligent misrepresentation).

Clients may not assert a cause of action for fraud when the claim is really one for professional malpractice. *See, e.g., Burnap v. Linnartz*, 914 S.W.2d 142, 148 (Tex. App.—San Antonio 1995, writ denied). Nevertheless, when the alleged fraud relates to matters concerning the attorney-client contract, such a billing or fee-related representations, a client may sue a lawyer for fraud. *See Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 482-83 (Tex. App.—Dallas 1995, writ denied).

As discussed above in Section 7, several courts have held that lawyers may not be sued by non-clients for fraud based on conduct engaged in as part of the discharge of the lawyers’ duties in representing a client.

In addition to common law fraud, Texas recognizes statutory causes of action for fraud in connection with the sales of real estate or securities. TEX. BUS. & COMM. CODE § 27.01 (allowing treble damages and attorney’s fees); TEX. REV. CIV. STAT. ANN. art. 581-33 (Vernon Supp. 2009).

The statute of limitations for fraud in Texas is four years. TEX. CIV. PRAC. & REM. CODE § 16.004. The discovery rule applies to fraud cases in Texas. *Berkley v. American Cyanamid Co.*, 799 F.2d 995, 998 (5th Cir. 1986).

**Negligent Misrepresentation.** Non-clients may sue lawyers for negligent misrepresentation. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999). The privity requirement does not apply to this claim. *Id.* at 795.

Texas has adopted the standard for negligent misrepresentation described by RESTATEMENT (SECOND) OF TORTS § 552 (1977):

One who, in the course of his business, profession or employment, or in any transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

The *McCamish* court noted that attorney liability under § 552 was limited to the narrow situation in which the attorney providing information is both *aware* of the non-client and *intends* for the non-client to rely on the information, and also observed that the attorney can avoid liability by written limitations and disclaimers. Further, liability under § 552 requires that the non-client's reliance be justified, a circumstance that cannot exist when the relationship between attorney and non-client is adversarial, and a non-client cannot rely on an attorney's statement unless the attorney "invites" that reliance. *McCamish*, 991 S.W.2d at 794-95.

The statute of limitations for negligent misrepresentation in Texas is two years. *See, e.g., Texas Am. Corp. v. Woodbridge Joint Venture*, 809 S.W.2d 299, 303 (Tex. App.—Fort Worth 1991, writ denied).

**Deceptive Trade Practices Act.** It is possible to sue attorneys for violations of the Texas Deceptive Trade Practices Act, TEX. BUS. & COMM. CODE §§ 17.41-.63 (the "DTPA"). However, attorneys' potential liability under the DTPA has been severely curtailed by statutory amendments. The DTPA's § 17.49(c) provides:

(c) 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. This exemption does not apply to:

- (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;
- (2) a failure to disclose information in violation of Section 17.46(b)(24);
- (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion;
- (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or

(5) a violation of Section 17.46(b)(26).

The listed exceptions to § 17.49(c) thus allow a DTPA claim to be brought against an attorney for misrepresentations or “unconscionable actions” that are not part of the lawyer’s advice, judgment or opinion. *See Latham v. Castillo*, 972 S.W.2d 66, 68-69 (Tex. 1998) (court allowed DTPA unconscionability claim when lawyer affirmatively misrepresented that suit had been filed, but court did not analyze professional exemption because suit was filed under prior version of statute).

“Unconscionable action or course of action” is defined as “an act or practice which, to a consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.” DTPA § 17.45(5). It requires a showing that the resulting unfairness was “glaringly noticeable, flagrant, complete, and unmitigated.” *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985).

There are many important differences between a DTPA claim and a negligence claim, including the following:

- The DTPA is not available to very large business consumers (\$25 million or more in assets). DTPA § 17.45(4).
- The DTPA does not apply to claims arising from transactions involving consideration by the consumer of more than \$500,000, other than claims involving the consumer’s residence. *Id.* § 17.49(g). A limit of \$100,000 applies if the consumer was represented in the transaction by independent counsel. *Id.* § 17.49(f).
- DTPA claims must be brought within two years after the date of the consumer discovered or in the exercise of reasonable diligence should have discovered the deceptive practice. (The deadline may be extended 180 days if the attorney fraudulently concealed the claims.) *Id.* § 17.565. Unlike legal malpractice claims, however, the statute of limitations on a DTPA claim against a lawyer is *not* tolled during the pendency of the underlying litigation. *Underkofler v. Vanasek*, 53 S.W.3d 343 (Tex. 2001).
- Privity is not required to assert a DTPA claim. *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 625 (Tex. App.—Houston [1st Dist.] 1993, writ denied). Nevertheless, a party does not qualify for a consumer status unless he “seeks or acquires by purchase or lease” goods or services, and courts will scrutinize the relationship of the parties in determining whether consumer status exists. *See Vinson & Elkins v. Moran*, 946 S.W.2d 381, 407 (Tex. App.—Houston [14th Dist.] 1997, writ dism’d by agr.) (estate beneficiaries were not consumers as to legal services provided by attorneys for executor); *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 268 (Tex. App.—Corpus Christi 1991, writ denied) (employee was consumer of legal services purchased by employer for employee’s benefit); *Rayford v. Maselli*, 73 S.W.3d 410 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (client who receives gratuitous legal services is not a DTPA consumer).

- The proximate cause standard for proving causation does not apply in DTPA actions. A successful DTPA claimant may recover all economic losses for which the deceptive act was the *producing cause*. Producing cause does not require proof of foreseeability, but is defined as “an efficient, exciting or contributory cause that, in a natural sequence,” produces damages. *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995).
- If the consumer can show the deceptive act was done knowingly, the jury may also award (1) mental anguish damages and (2) up to three times the amount of economic damages. (If the act was done intentionally, mental anguish damages may also be trebled). § 17.50(b)(1).
- Unlike in a legal malpractice claim, a consumer who prevails in a legal malpractice claim is entitled to reasonable and necessary attorney’s fees. § 17.50(d).

***Aiding and Abetting (e.g., client’s breach of fiduciary duty; fraud).*** Under the immunity doctrine described *infra* Section 7, an attorney is not liable for aiding and abetting a client’s breach of fiduciary duty to a third party, unless the attorney commits fraudulent conduct independent of his representation of the client. *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 406-07 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see also Kastner v. Jenkins & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.); *Span Enters. v. Wood*, 274 S.W.3d 854, 859 (Tex. App.—Houston [1st Dist.] 2008, no pet.). The Houston Court of Appeals expressly declined “to extend Texas law to allow a non-client to bring a cause of action for ‘aiding and abetting’ a breach of fiduciary duty based upon the rendition of legal advice to an alleged tortfeasor client.” *Alpert*, 178 S.W.3d at 407; *Alpert v. Riley*, No. H-04-CV-3774, 2008 WL 304742, at \*17-18 (S.D. Tex. Jan. 31, 2008) (extending qualified immunity to legal services provided outside the litigation context). *But see Toles v. Toles*, 113 S.W.3d 899, 911-12 (Tex. App.—Dallas 2003, no pet.) (aiding and abetting claim permitted because plaintiff’s claims arguably involved fraudulent conduct by attorney-defendant).

Because aiding and abetting is a derivative tort theory, an attorney may assert failure of the underlying claim of the client’s breach of fiduciary duty as a defense. *Cf. Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 (Tex. 2001) (failure of claim for fraud defeated dependent aiding and abetting claim); *Kline v. O’Quinn*, 874 S.W.2d 776, 786-87 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (finding no joint tortfeasor liability for breach of fiduciary duty claim because no underlying fiduciary duty existed).

It is unsettled whether under Texas law “aiding and abetting fraud” is a viable cause of action, separate and apart from a claim of conspiracy to commit fraud. *See, e.g., Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 n.7 (Tex. 2001) (declining to rule on the issue); *Span Enterprises*, 274 S.W.3d at 859. The Texas Supreme Court has indicated that, if it were to recognize a cause of action imposing vicarious liability for “substantially assisting and encouraging” a tortfeasor, it would require an allegation of specific intent to commit an unlawful act. *Juhl v. Airington*, 936 S.W.2d 640, 644-45 (Tex. 1996) (considering, but declining to adopt a “concert of action” theory of liability). The Texas Supreme Court has observed that the purpose of this theory of liability is “to deter antisocial or dangerous behavior,” casting doubt as

to whether a defendant's mere assistance in a fraud will support vicarious liability, absent an alleged conspiracy. *See id.* (conduct at issue was not a "highly dangerous, deviant, or anti-social group activity" likely to cause serious injury or death); *III Forks Real Estate, L.P. v. Cohen*, 228 S.W.3d 810, 815-17 (Tex. App.—Dallas 2007, no pet.) (rejecting concert of action in a fraud case).

***Malicious Prosecution/Abuse of Process.*** Although causes of action for malicious prosecution and abuse of process exist under Texas law, a plaintiff faces several hurdles when asserting such claims against an attorney. A plaintiff alleging malicious prosecution must prove (1) the defendant caused a suit to be filed; (2) the prior filing was motivated by malice; (3) no probable cause supported the filing of the suit and (4) defendant suffered a "special injury" in the form of actual interference with his person or property. *Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 127-28 (Tex. App.—Houston [14th Dist.] 1994, no writ). The special injury requirement prevents a plaintiff from prevailing on this claim "unless there was actual physical detention of his person or actual seizure of his property by some legal process." *Id.* (affirming summary judgment for defendants and their counsel). The special injury requirement is designed "to assure every potential litigant free and open access to the judicial system without fear of a counter suit for malicious prosecution." *Martin v. Trevino*, 578 S.W.2d 763, 767 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). Business damages and defense costs resulting from "the mere fact that a suit was filed" do not constitute a recoverable "special injury." *Ross*, 892 S.W.2d at 131.

While a malicious prosecution cause of action addresses maliciously-filed lawsuits that cause special injury, an abuse of process claim requires an illegal or improper use of legal process. The defendant must use legal process in a manner or purpose for which it was not intended, such as engaging in the wrongful use of a writ or in some abuse in the execution or service of a citation. *Detenbeck v. Koester*, 886 S.W.2d 477, 480-81 (Tex. App.—Houston [1st Dist.] 1994, no writ). The mere filing of a lawsuit, even when done with malicious intent or without probable cause, does not give rise to an abuse of process claim absent an improper use of legal process. *Id.* (affirming dismissal of claim against plaintiff and attorney who filed medical malpractice suit without probable cause and attempted to coerce settlement by threatening to distract doctor from his practice).

Texas courts have also dismissed abuse of process and malicious prosecution claims against attorneys on the basis of the attorney's qualified immunity. *See, e.g., Bradt v. West*, 892 S.W.2d 56, 71-72 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (malicious prosecution); *Renfroe v. Jones & Assocs.*, 947 S.W.2d 285, 287-88 (Tex. App.—Fort Worth 1997, writ denied) (wrongful garnishment); *Taco Bell Corp. v. Cracken*, 939 F. Supp. 528, 532-33 (N.D. Tex. 1996) (abuse of process); *Toles*, 113 S.W.3d at 912 (abuse of process). This immunity even provides protection from allegations that an attorney's actions in defending a client were "fraudulent" or part of a conspiracy to defraud. *Lewis v. American Exploration Co.*, 4 F. Supp. 2d 673, 679 (S.D. Tex. 1998) (rejecting allegation that improper discovery conduct constituted fraud).

***Conspiracy.*** An attorney can be liable for civil conspiracy if he or she knowingly agrees to defraud a third party. *Bernstein v. Portland Sav. & Loan Ass'n*, 850 S.W.2d 694, 706 (Tex. App.—Corpus Christi 1993, writ denied); *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ). Evidence of an attorney's knowledge of the

fraudulent nature of his and others' actions and intent to share the fruits of that fraud can defeat a claim that the attorney was ignorant of the fraud and acting solely at the clients' direction and can expose the attorney to liability for conspiracy. *Bernstein*, 850 S.W.2d at 706. Mere knowledge and silence, however, are not enough to prove conspiracy; because of the attorney's duty to preserve client confidences, there must be indications that the attorney agreed to the fraud. *Id.*; see also *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 82 (Tex. App.—Houston [14th Dist.] 2004, no pet.).