

“Fracturing” of Legal Malpractice Claims

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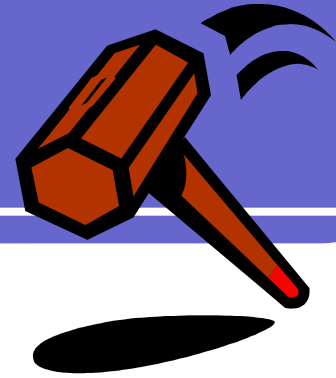


Clients' Claims Against Lawyers

- Legal malpractice/negligence
- Breach of fiduciary duty
- Fraud
- Breach of contract
- Violations of DTPA



What is “fracturing?”



"Nothing is to be gained by fracturing a cause of action arising out of bad legal advice or improper representation"

Sledge v. Alsup, 759 S.W.2d 1 (Tex. App.-
-El Paso 1988, no writ)

So Why Do Plaintiffs Fracture?

- Statute of limitations
 - Negligence – 2 years
 - Breach of fiduciary duty – 4 years
 - Fraud – 4 years
 - Breach of contract – 4 years

So Why Do Plaintiffs Fracture?

- Damages:
 - Negligence – actual
 - Exemplary for gross negligence
 - Breach of fiduciary duty – actual, exemplary, fee forfeiture
 - Fraud – actual, exemplary
 - Breach of contract – actual, attorneys' fees
 - DTPA – actual, mental anguish, treble

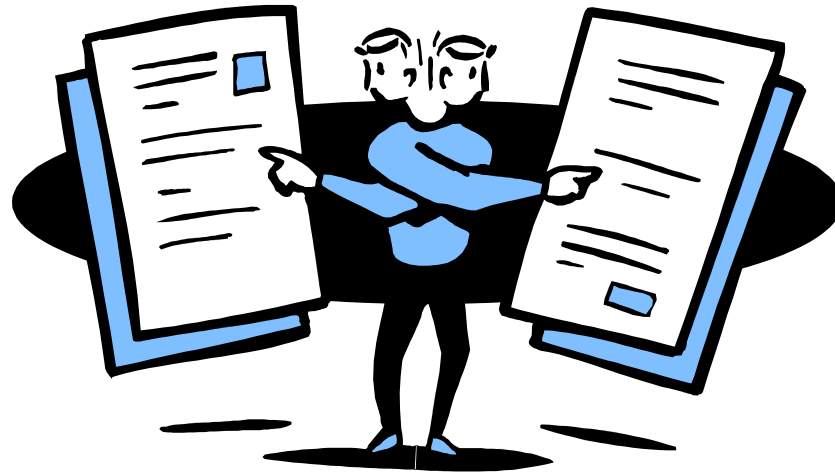


Negligence vs. Other Claims

- Negligence - whether the legal representation was adequate.
- What type of claim is available under the facts pled is a question of law.

Defending Fractured Claims

- Special Exceptions
- Motion for Summary Judgment



Negligence - Elements

- (1) a legal duty;
- (2) a breach of that duty;
- (3) actual damages that are
- (4) proximately caused by the breach of duty.

Western Invs v. Urena, 162 S.W.3d 547, 550 (Tex. 2005)

Negligence - Elements

- When a professional negligence claim arises from representation in prior litigation, the plaintiff must show that they would have won and been entitled to judgment.

Greathouse v. v McConnell, 982 S.W.2d 165, 172 (Tex.App.—Houston [1st Dist.] 1998, pet. denied.)

Negligence - Damages

- Actual Damages
 - Recoverable - P must prove amount of damages it would have recovered if the suit or appeal had been properly litigated
 - Collectible - Also must prove damages would have been collectible

Negligence – Damages – Attorneys' Fees

- “[T]he general rule as to recovery of attorneys’ fees from an adverse party in litigation does not bar a malpractice plaintiff from claiming damages in the malpractice case *for fees it paid its attorneys in the underlying suit.*”
- May recover additional attorneys’ fees proximately caused by attorney’s negligence
- No recovery if caused by plaintiff’s negligence
- Cannot recover fees for pursuing legal malpractice claims

Akin, Gump, v. National Dev. & Research Corp, 299 S.W.3d 106, 119 (Tex. 2009)

Negligence - Damages

- Exemplary Damages
 - P must prove “gross negligence” by clear and convincing evidence
- Mental Anguish
 - Not recoverable if consequence of economic loss
 - Must show injury is more personal in nature (e.g., loss of child custody, loss of liberty)
- Interest
 - Prejudgment and postjudgment
- Court costs

Negligence - Limitations



“A cause of action for legal malpractice **accrues when the client sustains a legal injury or**, in cases governed by the discovery rule, **when the client discovers or should have discovered the facts** establishing the elements of a cause of action.”

Hughes v. Mehaney & Higgins,
821 S.W.2d 154 (Tex. 1991).

Negligence - Jury Question

PJC 61.5 Negligence of Nonmedical Professional

QUESTION _____

Did the negligence, if any, of those named below proximately cause the [occurrence] [injury] [occurrence or injury] in question?

Answer "Yes" or "No" for each of the following:


- a. *Dora Dotson* _____
- b. *Paul Payne* _____
- c. *Sam Settlor* _____
- d. *Responsible Ray* _____
- e. *Connie Contributor* _____

Negligence - General Examples

- Giving an erroneous legal opinion or advice;
- Delaying or failing to handle a matter entrusted to the attorney's care; and/or
- Not using ordinary care in preparing, managing, and prosecuting a case.


Murphy v. Gruber, 241 S.W.3d 689, 693
(Tex.App.-Dallas 2007, pet. denied).

Negligence – Cases

- Clients alleged the lawyers failed to properly advise, inform, and communicate with them about the case
- Sued for breach of fiduciary duty and fraud
- Court found client's complaint was about quality of representation - legal malpractice
- Barred by 2 year limitations 


Murphy v. Gruber, 241 S.W.3d 689, 698-99
(Tex. App.--Dallas 2007, pet. denied)

Negligence – Cases

- Involved workers' comp retaliation claim
- Client agreed only to settle for \$200k
- After 3 years, client alleged misrepresentation by lawyer of present value of settlement
- Court held that claim was for legal malpractice
- Barred by 2 year limitations 

Longoria v. Whitehurst, No. 12-03-00298-CV, 2005 WL 465527, at *1 (Tex.App.-Tyler 2005, pet. denied) (mem.op.)


Negligence – Cases

- Client sued lawyer related to handling and documentation of a sale
- Lawyer admitted in related lawsuit that he had a conflict – he represented buyer and seller in that transaction
- Court found that only claim available to clients was negligence
- Barred by 2 year limitations 

Isaacs v. Schleier, 356 S.W.3d 548

(Tex.App.—Texarkana, rehearing overruled Jan. 24, 2012)

Negligence – Cases

- Client hired lawyer to pursue EEOC claim
- Lawyer missed the deadline to file
- Client sued and won judgments for negligence and breach of contract
- On appeal, court ruled contract claim was fractured and barred by the 2 year limitations 

Cooper v. Harris, 329 S.W.3d 898 (Tex.App.—Houston [14th Dist.], review denied Sep. 30, 2011)

Negligence – Reprehensible Acts Not Fraud or DTPA

- An attorney representing a client in a custody battle against client's first wife is sleeping with client's current (second) wife.
- Bad outcome on custody case.
- Court said failure to disclose the affair to client was not fraud or DTPA
- Claim was for negligence because complaint was quality of lawyer's representation

Kahlig v. Boyd, 980 S.W.2d 685 (Tex.App.-San Antonio 1998, pet. denied)

When Might a Plaintiff Have a Separate Claim?

- “When the facts of a case support claims against a lawyer for something other than professional negligence,” the claims may be allowed. - *Murphy v. Gruber*, 241 S.W.3d 689, 695 (Tex.App.--Dallas 2007, pet.denied)
- “The plaintiff must present a claim that goes beyond what traditionally has been characterized as legal malpractice.” - *Duerr v. Brown*, 262 S.W.3d 63, 70 (Tex.App.—Houston [14th Dist.] 2008, no pet.)

Breach of Fiduciary Duty - Elements

- (1) fiduciary relationship
- (2) the defendant breached its fiduciary duty to the plaintiff; and
- (3) the defendant's breach resulted in:
 - (1) injury to the plaintiff or
 - (2) benefit to the defendant

Johnston v. Kruse, 261 S.W.3d 895, 902 (Tex. App.—Dallas 2008, no pet.)

Breach of Fiduciary Duty - Facts

“Breach of fiduciary duty by an attorney most often involves the attorney's **failure to disclose conflicts** of interest, **failure to deliver funds** belonging to the client, placing **personal interests** over the client's interests, **improper use of client confidences**, **taking advantage** of the client's trust, engaging in **self-dealing**, and making **misrepresentations.**”

*Gibson v. Ellis, 126 S.W.3d 324, 330
(Tex. App.--Dallas 2004, no pet.).*

Breach of Fiduciary Duty – Damages

- Fee Forfeiture
 - Jury decides fact issues
 - Court decides if and how much
 - Only available only if a plaintiff has proven a “clear and serious” breach of a duty, determined by the Court
 - Damages are not necessary to prevail

Burrow v. Arce, 997 S.W.2d 229, 246 (Tex. 1999).

Breach of Fiduciary Duty – Fractured Legal Malpractice Claim

- Representation involved will contest
- Plaintiff alleged breach of fiduciary duty
 - Attorney did not properly prepare for trial
 - Attorney misled clients into believing case had been properly prepared for trial
 - Attorney abandoned client at trial
- Court found these allegations constitute no more than a claim for legal malpractice
Goffney v. Rabson, 56 S.W.3d 186 (Tex. App.—Houston [14th Dist] 2001, pet. denied)

Breach of Fiduciary Duty – Fractured Legal Malpractice Claim

- Alleged lawyer was not prepared for trial, did not tell client expert witness was not prepared
- Asserted DTPA violations, breach of fiduciary duty, breach of contract and legal malpractice
- Only claim available was for legal malpractice

Aiken v. Hancock, 115 S.W.3d 26, 28
(Tex.App.--San Antonio 2003, pet. denied)

Breach of Fiduciary Duty – It Depends on the Facts

- Misrepresented the quality of work the attorneys would perform
- Promised but did not deliver heavy involvement in the appeal
- Misrepresented that they would or did carefully review the record
- Although the claims fell into the category of “misrepresentations,” they are “so closely related to issue of work quality as to be claims for professional negligence...”


In re Frazin, 02-32351-BJH-13, 2008 WL 5214036 (Bankr. N.D. Tex. Sept. 23, 2008)

Not Disclosing Alcoholism? Not Breach of Fiduciary Duty

An independent “breach-of-fiduciary-duty” claim for “failure to disclose” Terry’s [the attorney’s] “alcohol and substance abuse addictions” or any other antecedent condition bearing on the Terry Defendants’ competence would merely fracture a professional negligence claim, permitting separate submissions (and liability) regarding whether the Terry Defendants breached the standard of care and the reasons why they breached it.


Beck v. Terry, 284 S.W.3d 416, 432
(Tex. App.--Austin 2009, no pet.)

Breach of Fiduciary Duty-Allowed

- Medical malpractice claim against a doctor
- Jury verdict against client (reversed on appeal)
- Doctor sued insurer and lawyer for refusal to settle underlying claim against her
- No liability for negligence because of reversal
- Stated breach of fiduciary duty claims 

Archer v. Medical Protective Co. of Fort Wayne, 197 S.W.3d 422 (Tex. App.—Amarillo 2006, pet denied.)

Breach of Fiduciary Duty-Allowed

- Lawyer sued client for unpaid attorneys' fees
- Counterclaim for failure to advise regarding conflicts and to withdraw
- Gives rise to breach of fiduciary claim 
- Directed verdict on fee forfeiture claim was error, jury to decide fact issues

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

Breach of Fiduciary Duty – Jury Question

PJC 104.2 Question and Instruction—Breach of Fiduciary Duty with Burden on Fiduciary

QUESTION _____

Did *Don Davis* comply with *his* fiduciary duty to *Paul Payne*?

[Because a relationship of trust and confidence existed between them,] [As Paul Payne's attorney,] [Because they were partners,] [As Paul Payne's agent,] Don Davis owed Paul Payne a fiduciary duty. To prove he complied with his duty, Don Davis must show—

- a. the transaction[s] in question *[was/were]* fair and equitable to *Paul Payne*; and
- b. *Don Davis* made reasonable use of the confidence that *Paul Payne* placed in *him*; and
- c. *Don Davis* acted in the utmost good faith and exercised the most scrupulous honesty toward *Paul Payne*; and
- d. *Don Davis* placed the interests of *Paul Payne* before *his* own, did not use the advantage of *his* position to gain any benefit for *himself* at the expense of *Paul Payne*, and did not place *himself* in any position where *his* self-interest might conflict with *his* obligations as a fiduciary; and
- e. *Don Davis* fully and fairly disclosed all important information to *Paul Payne* concerning the transaction[s].

Answer “Yes” or “No.”

Answer: _____

Breach of Contract & Fraud



- Breach of Contract

- A valid, enforceable contract exists
- The Plaintiff performed, tendered performance, or was excused from performing their own obligations under the contract
- The Defendant breached the contract
- The Defendant's breach caused the plaintiff injury

- Fraud

- A material, false, and knowing or reckless misrepresentation of facts; or failure to disclose material facts in face of duty to do so and knowledge other party ignorant of or unable to discover the facts
- Intent that other party act or refrain from acting
- The Plaintiff relied on the misrepresentation or non-disclosure, and it caused the Plaintiff injury

Billing Related Cases



- Claim related to billing practices
- Stated claim for fraud
- Subject to 4 year statute of limitations

Sullivan v. Bickel & Brewer, 943 S.W.2d 477 (Tex. App.–Dallas 1995, writ denied).

Billing Related Cases



- Alleged that shortly before settlement of a personal injury case, attorney changed the fee deal
- Found actions related to fees were subject to longer limitations under fraud and breach of contract

Jampole v. Matthews, 857 S.W.2d 57
(Tex. App.—Houston [1st Dist.] 1993, writ denied)

Deceptive Trade Practices Act

- Focus is whether attorney engaged in a false, misleading or deceptive act or practice.
 - Express misrepresentation of material fact
 - Failure to Disclose known information
 - Unconscionable action
 - Breach of express warranty
 - Selling or illegally promoting annuity contracts
- Basis of suit may not be attorney's advice, judgment or opinion

Deceptive Trade Practices Act

- Clients sued attorney who failed to timely file medical malpractice action within statute of limitations
- Court found some evidence that attorney affirmatively misrepresented to clients that medical malpractice action was timely filed
- Texas Supreme Court reversed directed verdict in favor of attorney on DTPA claims
- May recover damages for mental anguish
Latham v. Castillo, 972 S.W.2d 66 (Tex. 1998)

Why Else Do Plaintiffs Fracture?

- Bolster Settlement Value
- To Survive Summary Judgment
- To Avoid Needing Experts
- Leverage



The Purpose of the Rule?

- “The rule also serves to ‘prevent legal malpractice plaintiffs from opportunistically transforming a claim that sounds only in negligence into other claims’ to avail themselves of longer limitations periods, less onerous proof requirements, or other tactical advantages.”

Beck v. Terry, 284 S.W.3d 416, 427 (Tex. App.--Austin 2009, no pet.) (quoting *Deutsch v. Hoover*, 97 S.W. 3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002, no pet.)

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