

Legal Malpractice
by
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1. **Scope.** I am going to discuss the various theories of legal malpractice that can be asserted against an attorney by both clients and nonclients. This paper is just an outline, along with references to the book you received today, *O'Connor's Texas Causes of Action (2006) (the "COA")*.
2. **COA reference.** Legal Malpractice is covered in Chapter 16 of the COA, beginning on page 339.
3. **General Concepts of Legal Malpractice.**
 - In suits by clients, the attorney-client relationship begins with a contract to provide legal services. Once the relationship is established, the attorney's obligations to a client are actionable under the laws of contract, tort, and fiduciary relationship.
 - In suits by nonclients, the rule of privity generally precludes suits against attorneys for negligence. However, when an attorney participates with a client in a wrongful activity that injures a nonclient, the attorney is liable to the nonclient because the attorney's wrongful act is foreign to the attorney's duties to the client. COA, p. 340. In addition, a nonclient can sue for negligent misrepresentation, fraud, DTPA, and violation of the Debt Collection Act under certain circumstances. COA, p. 341-344.
 - Legal malpractice is categorized by many Texas courts as a negligence-based claim only and these courts do not allow recovery under other theories of liability. Under this view, a cause of action for legal malpractice should not be "fractured" into other claims. Other Texas courts take a broader view. COA, p. 340.
4. **Types of Causes of Action**
 - Negligence
 - Breach of Contract
 - Breach of Fiduciary Duty
 - Fraud
 - Violation of DTPA
 - Negligent Misrepresentation
 - Violation of Debt Collection Act
 - Collusive-action claims
5. **Negligence by an Attorney.** The elements of a claim for negligence are the following:
 1. The attorney owed the plaintiff a duty;
 2. The attorney's negligent act or omission breached that duty; and
 3. The breach proximately caused the plaintiff's injury.
 - **Duty.** In order for the attorney to owe a duty, the plaintiff must prove there was an agreement or a meeting of the minds to create an attorney-client relationship.
 - If the attorney-client relationship is disputed, the plaintiff will frequently plead in the alternative that the attorney was negligent in failing to tell the plaintiff there was no attorney-client relationship.
 - A nonspecialist attorney is held to the standard of care that would be exercised by a reasonably prudent attorney. COA, p. 351.

- Although Texas courts have not yet decided the issue of whether an attorney who is board-certified will be held to a higher standard, an attorney who holds himself out as a specialist should be held to the standard of care for a reasonably prudent expert attorney in that field.
- **Breach of duty of care.** An attorney may be held liable for a number of acts or omissions that result in damages to the client. Examples of possible breaches of the standard of care are listed on pages 352-53 of the **COA**.
- **Proximate Cause.** Both cause-in-fact and foreseeability must be proved to show proximate cause.
 - When the attorney's negligence occurred in litigation, the plaintiff typically has to prove "a suit within a suit."
 - In criminal cases, a convicted defendant generally cannot maintain a cause of action for negligence unless the defendant is exonerated of the conviction. **COA**, p. 354-55.
- **Remedies.** A plaintiff can recover economic damages such as failure to prevail at trial or failure to make the best settlement. Additionally, when the plaintiff's mental anguish is not purely the result of economic loss, but rather stems from an injury more personal in nature, the plaintiff may be able to recover mental anguish damages.
 - Other remedies include: exemplary damages, equitable relief – fee forfeiture and reimbursement, interest, and court costs. Attorney's fees are not normally recoverable unless they are a part of the client's damages for the representation. **COA**, p. 356-357.
- **Limitations.** When an attorney is sued for negligence, the statute of limitations is two years. The client has the burden of pleading and proving facts suspending the operation of the statute of limitations.
 - The **legal injury rule** generally applies, unless the client pleads and proves facts suspending the operation of the statute of limitations.
 - The **discovery rule** may extend the statute of limitations in a negligence suit against an attorney. Under the discovery rule, a cause of action for negligence accrues on the date the client discovers or should have discovered through the exercise of reasonable care the facts establishing the elements of the cause of action.
 - The **Hughes tolling rule** applies when a negligence claim results in litigation. The rule allows the statute of limitations for negligence to be tolled until all appeals on the underlying claim are exhausted or the litigation is finally concluded. **COA**, p. 358.
 - The statute of limitations for a negligence claim can also be tolled if the client pleads and proves the affirmative defense of **fraudulent concealment**.
- **Defenses.** An attorney can raise the following defenses against a legal malpractice claim: plaintiff's fault, standing, release, and objective good faith.
- **Invalid Defenses.** The following defenses are invalid against a claim of legal malpractice: subjective good faith, attorney's earlier negligence, and settlement of the underlying suit.