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# The Impending Wave of Legal Malpractice Litigation - Predictions, Analysis, and Proposals for Change.

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# THE IMPENDING WAVE OF LEGAL MALPRACTICE LITIGATION—PREDICTIONS, ANALYSIS, AND PROPOSALS FOR CHANGE

GARY N. SCHUMANN*
SCOTT B. HERLIHY**

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## I. INTRODUCTION

Historically, popular culture has viewed attorneys and the legal profession in antithetical terms—at times with scorn and disdain and at other times with reverence and admiration.[1] Although many people subscribe to the stereotype of attorneys as greedy and all too willing to warp the truth,[2] people also tend to view attorneys they know personally with respect and admiration.[3] A peculiar ex-

1. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2.1, at 35 (3d ed. 1989) (asserting that "[p]ublic perception of attorneys has been greatly influenced" in a negative manner by Watergate, as evidenced by the findings of a 1976 Gallup Poll wherein only about one-quarter of the persons polled found honesty and ethical integrity of attorneys to be high or very high); Steven K. Ward, *Legal Malpractice in Texas*, 19 S. TEX. L. REV. 587, 587 (1978) (stating that "[t]he legal profession fulfills many prominent duties in society and has vested itself with vast amounts of political and economic power," but at the same time, lawyers are also becoming increasingly unpopular); Katherine A. LaRoe, Comment, *Much Ado About Barratry: State Regulation of Attorneys' Targeted Direct-Mail Solicitation*, 25 ST. MARY'S L.J. 1513, 1514 (1994) (mentioning the public's negative perception of lawyers, which has led to tougher barratry laws). *See generally* Nancy Marshall, Jurors and Lawyer Defendants—What Do Jurors Really Think About Lawyers (unpublished manuscript, on file with *St. Mary's Law Journal*) (describing the special problems associated with handling legal malpractice lawsuits in light of jury perception).

2. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1682 (1994) (reporting that greed is one of the most common reasons cited by academic and lay writers for legal malpractice); Katherine A. LaRoe, Comment, *Much Ado About Barratry: State Regulation of Attorneys' Targeted Direct-Mail Solicitation*, 25 ST. MARY'S L.J. 1513, 1515-16 (1994) (detailing money-making tactics employed by attorneys that have been "met with varying degrees of outrage by the public, the media, and even segments of the legal profession itself"); Thomas E. Zehnle, *Study Finds Legal Malpractice Claims on the Rise: Lawyers Suing Lawyers More Commonplace*, LITIG. NEWS, Sept. 1997, at 4 (noting that "given the low esteem in which lawyers are held by the public today . . . any deference that might once have been given to members of the bar has now vanished").

3. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2.1, at 36 (3d ed. 1989) (stating that "notwithstanding general impressions of the legal profession, most individual clients have a reasonably high regard for their current attorneys"); *cf.*

perience common to newly licensed attorneys is that they suddenly receive deference from family and friends upon passing the bar; however, new lawyers are likewise bombarded with jokes disparaging the character and integrity of the profession at every social gathering.[4]

Given this odd mixture of respect and disdain, attorneys are fortunate to have generally avoided being targeted as potential defendants,[5] quite unlike doctors, insurers, manufacturers, and other traditional "defendant groups."[6] However, circumstances in Texas have changed, creating a new legal climate wherein attorneys may soon become defendants of choice.[7]

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David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 1 (1991) (detailing how professional independence and leadership roles of American lawyers provide the profession with strength, character, and integrity). *But see* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1682 (1994) (discussing a study that found that the more contact people had with lawyers, the greater the likelihood that they would come away with a negative perception of lawyers in general).

4. *Cf.* Harrison Sheppard, *It's Time for the Legal Profession to Clean Up Its Act*, BUFF. NEWS, June 9, 1996, at F7 (opining that although the lawyer as counselor, problem solver, and planner used to be a model of professionalism in this country, "American lawyers have become, in the eyes of most people, bad jokes"), *available in* 1996 WL 5847171.

5. *See* David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 43 (1991) (concluding that legal malpractice has only recently begun to develop as a substantive area of law); Ronald E. Mallen, *Foreword* to David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1 (1991) (stating that "[t]he exposure of lawyers to legal malpractice claims and the consequent judicial resolution of those claims is relatively recent"); *cf.* DUKE NORDLINGER STERN & JO ANN FELIX-RETZE, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE 2 (1983) (stating that little was done to analyze malpractice claims until the 1970s because of a lack of activity and awareness of any impending problem); Steven K. Ward, *Legal Malpractice in Texas*, 19 S. TEX. L. REV. 587, 587 (1978) (noting that the legal profession was once "virtually immune" from lawsuits, but such days are increasingly numbered). *But see* CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 3 (2d ed. 1997) (stating that liability for lawyers has risen during the last fifteen years, reaching unprecedented levels).

6. *See* Steven K. Ward, *Developments in Legal Malpractice Liability*, 31 S. TEX. L. REV. 121, 122 (1990) (asserting that the erosion of a protectionist attitude towards lawyers is due in part to increased liability for other professions); Steven K. Ward, *Legal Malpractice in Texas*, 19 S. TEX. L. REV. 587, 587-88 (1978) (reporting that several commentators have tried to explain why legal malpractice claims have risen dramatically in recent years, citing, among other examples, the fact that malpractice cases against other professionals, such as accountants and doctors, have "served as models from which plaintiffs derive theories" upon which to sue attorneys); Karen Wagner, *More Lawyers Being Sued for Malpractice: Suing the Client for Fees Is a Common Trigger*, ILL. LEGAL TIMES, June 1996, at 1 (reporting that although the number of legal malpractice suits has grown, there are still more suits filed against doctors than lawyers).

7. *See* David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 43 (1991) (reporting that in the period between 1976 and 1991 there were nearly twice as many re-

If, as predicted, the number of legal malpractice claims rises substantially in the next few years, attorneys will have difficulty obtaining professional liability insurance, and the threat of malpractice suits will fundamentally affect the nature of the profession.[8] Undoubtedly, attorneys in Texas are at a significantly greater risk of becoming the subject of a malpractice suit today than in the past.[9] In fact, in the past decade, there has been a definite and significant increase in legal malpractice claims throughout

ported legal malpractice decisions in Texas than in the entire history of Texas jurisprudence); Lauren Beck, Note, Cosgrove v. Grimes*: Abrogation of the Subjective Good Faith Exception in Legal Malpractice Actions*, 42 BAYLOR L. REV. 601, 601 (1990) (explaining how Texas lawyers have traditionally been shielded from malpractice actions due to certain defenses, but that these defenses are starting to erode).

8. *Cf.* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1663 (1994) (predicting that "[p]ublic recognition of the high frequency and seriousness of legal malpractice claims and lawsuits may be the fatal blow to the legal profession's efforts to continue to self-regulate").

9. *See* CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 3-4 (2d ed. 1997) (stating that in recent years, liability and disciplinary risks for Texas lawyers have risen to all-time highs and claiming that hazards of practicing law are higher than ever before); DUKE NORDLINGER STERN & JO ANN FELIX-RETZKE, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE 20-21 (1983) (warning that every law firm has malpractice risks); Lauren Beck, Note, Cosgrove v. Grimes*: Abrogation of the Subjective Good Faith Exception in Legal Malpractice Actions*, 42 BAYLOR L. REV. 601, 601 (1990) (reporting that in recent years, the number of malpractice claims against lawyers has increased); Ronald E. Mallen, *Foreword* to David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1 (1991) (stating that the risk of being subject to malpractice claims is now much greater, and that the average attorney will be subject to three such claims in his or her career); Alison Bass, *Lawyers Reluctant to Go After Peers*, BOSTON GLOBE, Aug. 6, 1995, at 1 (discussing studies showing that lawyers in Texas are more likely to be sued than lawyers in some other states), *available in* 1995 WL 5949330.

Our research reveals that the trend of legal malpractice claims in Texas has been increasing, and is likely to escalate in the future, as indicated by the following chart:

the United States,[10] although such trends vary widely from jurisdiction to jurisdiction.[11]

Nevertheless, simply because statistics indicate an increase in the number of malpractice claims, this does not mean that more mal-

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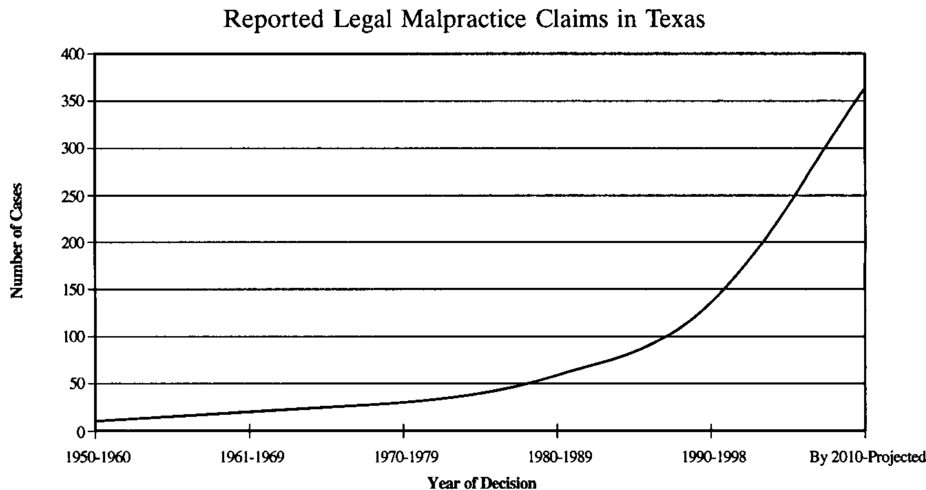


Our searches, dating back to the first reported cases against attorneys and running through 1997, included all suits against attorneys under the heading of "malpractice," and in the earlier cases, suits not brought explicitly under the term "malpractice," because the term was not in common usage at the time. In these earlier cases, searches were conducted for all appellate cases brought against an attorney. We excluded: (1) mandamus cases; (2) cases that tangentially dealt with attorney malpractice, but in which no issues involving the law of legal malpractice were enunciated (such as cases dealing strictly with procedural issues); (3) collateral estoppel cases wherein the plaintiff was estopped from asserting a malpractice claim; (4) cases involving the negligence of a district attorney acting in his official capacity; (5) compulsory counterclaims filed out of necessity because an attorney sued for recovery of his fees and the counterclaim was not an issue on appeal; (6) disbarment proceedings; and (7) cases wherein the lawyer sued his malpractice carrier for insurance coverage.

10. *See* ABA Standing Comm. on Lawyers' Prof'l Liab., Legal Malpractice Claims in the 1990s 20 (1996) (discussing the frequency and severity of malpractice claims throughout the United States, and stating that such statistics illustrate "the truly cyclical nature of legal malpractice claims"); Karen Wagner, *More Lawyers Being Sued for Malpractice: Suing the Client for Fees Is a Common Trigger*, Ill. Legal Times, June 1996, at 1 (reporting that the number of legal malpractice cases nationwide has increased about one and a half times faster than the number of lawyers between 1984 and 1994).

11. *See* ABA Standing Comm. on Lawyers' Prof'l Liab., Legal Malpractice Claims in the 1990s 20 (1996) (stating that jurisdictional variances may be due to several factors, including recession in a certain area or region or more bankruptcies in a given area); Richard Perez-Pena, *When Lawyers Go After Peers: The Boom in Malpractice*, J. Rec. (Okla. City), Aug. 6, 1994, at 5 (stating that although pinpointing the exact number of malpractice suits nationwide is difficult, the consensus in the profession is that they are on the rise).

practice is being committed or that attorneys are less competent than in previous years.[12] Rather, a variety of factors can explain the statistics revealing more malpractice claims.[13] For instance, insurance company statistics indicate that more claims have been filed against attorneys concerning the commencement of lawsuits, pre-trial activities, and settlement negotiations.[14] These statistics also reveal an increase in claims relating to preparing and transmitting documents, title opinion work, and work involving other written opinions.[15] Furthermore, these figures show that, unlike in the past when "malpractice" claims against lawyers were for actions such as missing deadlines, defrauding the client, or committing an error in the handling of the client's case, plaintiffs' claims today are more fact-specific, more detailed, and based on a myriad of legal theories spanning the entire spectrum of the attorney's representation.

This Article discusses some of the factors that will contribute to the impending wave of suits against attorneys. One such factor is the change in legal mores, as demonstrated by the disappearance of the traditional congeniality of the bar and the willingness of law-

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12. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 6 (1996) (claiming that to argue that the rise in legal malpractice claims is due to attorneys' decreasing quality of work is "utter nonsense"). The authors make the following analogy:

> Consider the analogy of automobile insurance. Just because all drivers carry auto insurance (and just because there are always auto accidents) does not mean that all drivers are bad, or even that drivers with occasional accidents are bad. The very act of driving a car puts the driver and others at risk, and even excellent drivers can be expected to have an accident from time to time. The same is true for lawyers and other professionals.

*Id.*

13. For example, the simple fact that there are more lawyers practicing today than ever before may partially explain the increase in malpractice claims. This concept is explained more fully in Part IV.C. of this Article. Other factors may also help to explain the incidence and severity of malpractice claims. *See* Manuel R. Ramos, *Legal Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 878-79 (1996) (explaining that a variety of factors have been linked to legal malpractice claims, including "law schools attended, practice area, firm size, Martindale-Hubbell rating, age, experience, disciplinary history, and rural or urban practice").

14. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 10 (1996) (comparing statistically the number of claims with the types of activity performed by lawyers).

15. *See id.* at 11 (showing the percentage of claims by the type of activity).

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yers to bring suits against each other.[16] Another factor is the increased difficulty faced by plaintiffs when attempting to bring suit against typical defendant groups. Various actions by the Texas Legislature and state courts have abrogated some of the lucrative causes of action previously available against manufacturers, insurers, and the medical profession, forcing plaintiffs' attorneys to look elsewhere for deep pockets.[17] Attorneys, typically heavily insured and usually not judgment proof, are an obvious and logical choice to replace the defendant groups on which the plaintiffs' bar had previously relied.

A third factor is the rising number of inexperienced attorneys. A large number of graduating law students are not being absorbed by established law firms, resulting in many solo practitioners working without the supervision of more seasoned attorneys.[18] This

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16. *See* Manuel R. Ramos, *Legal Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 878 (1996) (acknowledging the substantial increase as well as the severity of malpractice); Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1681 (1994) (stating that "[m]ore lawyers are willing to sue lawyers"); Milo Geyelin, *Their Own Petard: Many Lawyers Find Malpractice Lawsuits Aren't Fun After All,* WALL ST. J., July 11, 1995, at A1 (exploring the idea that lawyers are viewed today as merely deep pockets to look to "when things go wrong").

17. *See, e.g.*, Cook v. Brundidge, Fountain, Elliot & Churchill, 533 S.W.2d 751, 752 (Tex. 1976) (addressing a suit brought for fraud and breach of fiduciary duty); F.E. Appling Interests v. McCamish, Martin, Brown & Loeffler, 953 S.W.2d 405, 408 (Tex. App.—Texarkana 1997, pet. granted) (permitting an action against an attorney for negligent misrepresentation absent privity between the attorney and plaintiff); Hall v. Stephenson, 919 S.W.2d 454, 460 (Tex. App.—Fort Worth 1996, writ denied) (analyzing a suit in which the client argued that her attorneys were liable on theories of negligence and gross negligence); Moiel v. Sandlin, 571 S.W.2d 567, 568 (Tex. Civ. App.—Corpus Christi 1978, no writ) (reviewing a suit against an attorney for malicious prosecution, barratry, abuse of process, and negligence); John F. Bales, III, *Medical Malpractice Developments* 563, 580-81 (PLI Comm. Law & Practice Course Handbook Series No. A4-4455, 1994) (listing Texas as one state exacting significant reformatory measures in the medical malpractice arena); Charles B. Camp, *Texas House OKs Malpractice Tort Reform; Bill Makes It Expensive to File Meritless Medical Suits,* DALLAS MORNING NEWS, Apr. 13, 1995, at 1D (outlining proposed limitations that would adversely affect plaintiffs' ability to pursue medical malpractice suits), *available in* 1995 WL 7486118.

18. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 23 (1996) (describing downsizing's effect on many law firms as creating less intra-firm supervision and greater individual responsibility); Manuel R. Ramos, *Legal Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor,* 57 OHIO ST. L.J. 863, 885-86 (1996) (discussing the sink-or-swim mentality of law schools and firms with respect to new lawyers).

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lack of supervision raises the likelihood that malpractice will be committed.[19]

A fourth factor which may contribute to a rise in legal malpractice suits is the inevitable decline in the business cycle. Although the Texas economy is currently strong, its history of "boom-or-bust" growth and decline is evidence that this strength cannot last.[20] When the inevitable decline comes, the plaintiff pool will likely expand and increase the chances that attorneys involved in failed deals or transactions will be treated as potential defendants.

Perhaps the most significant factor that will contribute to an increase in legal malpractice claims is the development of new liability and damage theories. For example, the long-held common-law privity requirement, most recently discussed and explicitly upheld by the Texas Supreme Court in *Barcelo v. Elliot*,[21] has indirectly come under siege.[22] Additionally, in *Arce v. Burrow*,[23] a Houston court of appeals specifically identified the "breach of fiduciary duty" as constituting a separate and independent cause of action that may be maintained against attorneys.[24] Under this theory, proximate cause of damages is not required, and an attorney may

19. *Cf.* CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 3 (2d ed. 1997) (citing recent State Bar of Texas surveys indicating that 48 percent of attorneys or law firms responding to that survey were subjected to legal malpractice claims).

20. *See* Tom R. Rex, *Peak Population Growth Likely in 1995,* ARIZ. BUS. J., Feb. 1, 1995, at 1 (describing "[t]he boom and subsequent crash of the Texas economy in the 1980s"), *available in* 1995 WL 8416501; *Texas Jobless Rate Up 0.7%,* SAN ANTONIO EXPRESS-NEWS, Sept. 2, 1995, at 1C (quoting Bill Luker, chief regional economist with the U.S. Bureau of Labor Statistics in Dallas, as stating, "It's very hard to determine where things are going in Texas. . . . There's a lot of different forces moving in different directions.").

21. 923 S.W.2d 575 (Tex. 1996).

22. *See* F.E. Appling Interests v. McCamish, Martin, Brown & Loeffler, 953 S.W.2d 405, 409-10 (Tex. App.—Texarkana 1997, pet. granted) (recognizing for the first time that a cause of action may be brought against attorneys for negligent misrepresentation in the absence of attorney-client privity). A legal malpractice case in which negligent misrepresentation could not be pled is unimaginable; thus, *Appling* may go a long way toward changing the landscape in litigating legal malpractice cases.

23. 958 S.W.2d 239 (Tex. App.—Houston [14th Dist.] 1997, pet. granted).

24. *See* Arce v. Burrow, 958 S.W.2d 239, 245 (Tex. App.—Houston [14th Dist.] 1997, pet. granted) (permitting a breach of fiduciary duty cause of action with a remedy of fee forfeiture).

have his fees disgorged without a showing of damages by the client.[25]

Although the foregoing list is by no means exhaustive, it highlights some of the main factors that may influence the trend toward more malpractice lawsuits. Inevitably, this trend will reshape the legal system and the way that lawyers will practice and function within that system. This Article offers feasible solutions to the dilemmas posed by the impending wave of legal malpractice claims in Texas. Part II discusses the practical problems associated with defending attorneys in malpractice suits and outlines inherently unique issues involved in legal malpractice litigation. Part III reviews the history of legal malpractice claims in Texas, particularly identifying factors that have tended to discourage such claims in the past and demonstrating how these factors and related court decisions have changed over time. Part IV identifies some of the main factors that, when combined, create a climate that is ripe for an explosion of legal malpractice suits in Texas in the near future. Part V offers concrete proposals for addressing the impending legal malpractice wave that could potentially save the profession from fundamental and detrimental change. The Article's main proposal is the enactment of legislation at the state level to regulate and oversee the manner in which legal malpractice claims are brought, addressed, and handled in the judicial system. Such legislation is necessary to protect the bar as a whole and to maintain the integrity and proper functioning of the legal system. Finally, as a more utopian solution, the Article discusses the need to decrease the flood of inexperienced and unmentored attorneys practicing in Texas.

## II. The Attorney As a Defendant

The notion that attorneys are unique defendants is an underlying theme of this Article. When addressing the issue of legal malpractice, courts and legislatures must consider existing factors that justify treating attorneys differently from any other type of defendant in the courtroom.[26] Attorneys who specialize in defending profes-

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25. *See id.* at 251 (holding that causation and damages are not prerequisites for the remedy of fee forefeiture).

26. *See* Lauren Beck, Note, Cosgrove v. Grimes: *Abrogation of the Subjective Good Faith Exception in Legal Malpractice Actions*, 42 BAYLOR L. REV. 601, 615 (1990) (stating

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sionals, whether accountants, insurance agents, medical practitioners, or architects, typically agree that one of the most difficult professionals to defend in a jury trial is an attorney.[27] After a recent highly publicized case in Dallas in which a huge verdict was rendered against the attorney defendant, *Texas Lawyer* reported that after the trial, the jurors explained "that they hate lawyers and don't believe a word they say."[28] The defense counsel, Dallas attorney James Cowles stated, "What makes me afraid is that jurors have a bad feeling about lawyers. I have seen this a bunch. It is a monumental task to defend lawyers."[29]

In addition to preconceived notions that jurors may have about the attorney-defendant, evidence will likely be presented to the jury about the relatively large legal fees that attorneys command.[30] As noted by one of the authors in an article on the difficulties of defending attorneys:

> A juror who is making $8.00 an hour working as a bus driver will not be overly sympathetic to the attorney-defendant who was billing his client $195.00 an hour for simply talking on the telephone. The average juror probably does not appreciate that much of the practice of law involves judgment calls about what may or may not occur in the future. The juror is also unlikely to appreciate the attorney-defendant's testimony when the attorney attempts to explain the "other strategic concerns" that were motivating his or her actions which ultimately gave rise to the malpractice claim. And since the standard of care issues in a legal malpractice case require the testimony of an expert, the jury is going to hear every explanation offered by the

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that any distinction between lawyers and other professionals regarding the standard of care to which they are subjected can be justified because of their dissimilarities as professionals).

27. *See* Guy M. Hohmann & Gary N. Schumann, *Defending the Legal Malpractice Lawsuit: A Unique Strategy for Insurers*, NEWS & VIEWS (Prof'l Liab. Underwriting Soc'y, Minneapolis, Minn.), June 1996, at 1 (stating that "[o]f all the professionals a liability carrier must defend whether medical practitioners, accountants, insurance agents, architects, or others, few professionals are more difficult to defend before a jury than an attorney").

28. Nathan Koppel, *Dallas Jury Finds Lawyer Liable for Libel—Parties Settle for $800,000 After Jurors Return $8.5 Million Verdict*, TEX. LAW., Sept. 21, 1998, at 4.

29. *Id.*

30. *See* Guy M. Hohmann & Gary N. Schumann, *Defending the Legal Malpractice Lawsuit: A Unique Strategy for Insurers*, NEWS & VIEWS (Prof'l Liab. Underwriting Soc'y, Minneapolis, Minn.), June 1996, at 1, 6 (recognizing the difficult task of representing an attorney because not only will jurors have preconceived notions regarding attorneys but will also hear evidence of the large legal fees that they receive).

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attorney/insured soundly ridiculed by another attorney of great repute.[31]

Given these difficulties in defending attorneys, the fact that attorneys are not sued more frequently is surprising.

However, one cannot simply argue that attorneys should be treated differently in the courtroom solely because they are unpopular defendants. Generally, attorneys are afforded special protection when they are defendants in malpractice litigation because of the unique posture they hold in the judicial system.[32] Unlike other defendants whose rights are only adjudicated by the system, attorneys are an integral part of the system itself.[33] In other words, the very system that determines an attorney's liability is a system in which the attorney plays a role; no other defendant is also an officer of the court. Due to this involvement, courts recognize the special nature of lawsuits brought against attorneys.

To this end, Texas courts have treated claims against attorneys as unique and provided attorneys with specialized defenses not commonly available to all defendants.[34] For example, the Texas Supreme Court has held that claimants must be in privity with the attorney whom they are suing.[35] Additionally, Texas has recently chosen to adopt the common-law doctrine prohibiting the assignment of malpractice claims.[36] In *Vinson & Elkins v. Moran*,[37] wherein the assignment of legal malpractice claims was prohibited,

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31. *Id.*

32. *See* Lauren Beck, Note, Cosgrove v. Grimes: *Abrogation of the Subjective Good Faith Exception in Legal Malpractice Actions*, 42 BAYLOR L. REV. 601, 615 (1990) (arguing that an attorney should be treated differently than other professionals because of his obligation to the court).

33. *See id.* (arguing that attorneys should be treated differently than other professionals because a lawyer has a dual obligation to the court and to his client and operates in a uniquely competitive environment which magnifies any mistakes).

34. *See, e.g.*, Barcelo v. Elliot, 923 S.W.2d 575, 577 (Tex. 1996) (upholding the privity requirement in suits against attorneys); Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1995, writ ref'd) (prohibiting the assignment of legal malpractice claims).

35. *See Barcelo*, 923 S.W.2d at 577; *cf. id.* at 581 (Cornyn, J., dissenting) (asserting that the hypothetical evidentiary problems raised by the majority to support the retention of the privity requirement are "subject to proof, *as in all other cases*") (emphasis added).

36. *See Zuniga*, 878 S.W.2d at 318 (concluding that legal malpractice claims cannot be assigned); Vinson & Elkins v. Moran, 946 S.W.2d 381, 389 (Tex. App.—Houston [14th Dist.] 1997, pet. dism'd by agr.) (holding that "legal malpractice claims are not assignable").

37. 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, pet. dism'd by agr.)

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the court quoted extensively from a seminal California case in order to justify the adoption of unique doctrines for attorney-defendants:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any proper connection with the assignor or his rights. The commercial aspect of assignability of choses in actions arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing [sic] such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden not only on the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.[38]

This common-law recognition of the necessity for affording attorney-defendants special treatment has greatly influenced the evolution of legal malpractice jurisprudence.[39] As legal malprac-

38. *See Moran*, 946 S.W.2d at 393 (quoting Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 87 (1976)).

39. *See* Doe v. Statewide Grievance Comm., 694 A.2d 1218, 1221 (Conn. 1997) (stating that "[a]n attorney as an officer of the court in the administration of justice, is continually accountable to it for the manner in which he exercises the privilege which has been accorded him .... This unique position as officers and commissioners of the court ... casts attorneys in a special relationship with the judiciary and subjects them to its discipline" (quoting Statewide Grievance Committee v. Rozbicki, 558 A.2d 986 (Conn. 1989))); Lauren Beck, Note, Cosgrove v. Grimes: *Abrogation of the Subjective Good Faith Exception in Legal Malpractice Actions*, 42 BAYLOR L. REV. 601, 615-16 (1990) (describing an attorney's "dual obligation[s] to both the court and to his client," which justifies subjecting lawyers to a "much lower level of care").

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tice has developed and evolved in the State of Texas, the judiciary and the Legislature have been mindful of the impact of legal malpractice on the attorney's role as an officer of the court and on the legal profession as a whole.[40] This notion that attorneys are unique defendants, therefore, cannot be ignored when crafting additional measures that must be taken in order to avert a crisis in legal malpractice litigation.

## III. The Evolution of Legal Malpractice in Texas

Any study of the potential malpractice crisis would be incomplete without a brief overview of the development of the law of legal malpractice in Texas. Only by understanding past trends and developments in the law can the impending legal malpractice crisis be fully appreciated.

### A. *Early Malpractice Issues*

In early legal malpractice cases, Texas courts held attorneys to less exacting standards, as compared to those employed today.[41] In 1864, in one of the earliest known "legal malpractice" cases, *Morrill v. Graham*,[42] the Texas Supreme Court established a standard whereby the attorney would be liable to his client for all damages arising out of "his gross ignorance of the profession which he professes to practice and understand, or . . . for the want of . . . such plain and obvious principles as every lawyer is presumed to understand."[43] In *Morrill*, the supreme court held that it did not agree

40. *See, e.g.*, Woodruff v. Tomlin, 616 F.2d 924, 931-32 (6th Cir. 1980) (determining that the attorney's actions were not malpractice but rather a matter of professional judgment); Wabaunsee v. Harris, 610 P.2d 782, 784 (Okla. 1980) (finding that the attorneys exercised their judgment in good faith and in their clients' best interest); Stricklan v. Koella, 546 S.W.2d 810, 812 (Tenn. Ct. App. 1976) (granting deference to the attorney and refusing to find malpractice where the lawyer failed to change venue or conduct depositions).

41. *See* Steven K. Ward, *Legal Malpractice in Texas*, 19 S. Tex. L.J. 587, 590 (1978) (discussing nineteenth century cases in which the Texas Supreme Court addressed the duty of care for attorneys and explaining that the court generally held that attorneys were not liable to clients unless the attorney's actions were "grossly lacking in professional skill").

42. 27 Tex. 646, 651 (1864).

43. Morrill v. Graham, 27 Tex. 646, 651 (1864). Our research into the earliest malpractice cases revealed cases prior to *Morrill* in which attorneys were sued; however, these cases are not discussed substantively in this Article because they did not establish or elucidate any controlling legal standards for actions against attorneys. *See generally* Croft v. Hicks, 26 Tex. 383 (1862) (reviewing a motion against an attorney for refusing to return his

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that the attorney "manifested such a gross want of legal knowledge and professional skill as to render him responsible" to the client.[44]

This relaxed standard was short-lived, however, as the Texas Supreme Court held in 1866 that an attorney was required to exercise reasonable care and diligence in his efforts on behalf of his client.[45] This "ordinary care" standard was subsequently followed, in one form or another, by several Texas courts.[46] One appellate court even noted that "the rule which seems to hold an attorney liable only for gross negligence can hardly be reconciled with more recent American authorities."[47] That same court reached the conclusion that:

> Whether the want of such skill, prudence, and diligence as are possessed and commonly exercised by lawyers of ordinary skill and capacity, versed in the particular practice of the particular locality or subject, be regarded as gross negligence or not, it seems to us that the failure of a lawyer to possess and exercise them, when by such failure his client is damaged, by the great weight of modern authori-

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client's money upon demand); Austin v. Talk, 26 Tex. 127 (1861) (considering a lower court's finding of fraud in an attorney-client relationship); Trammell v. Shropshire, 22 Tex. 327 (1858) (contemplating a motion against the plaintiff's attorney for not paying the client the money recovered in a suit); Boone v. Thompson, 17 Tex. 605 (1856) (reviewing a case that involved a suit filed against the representatives of a deceased attorney to recover the value of a note).

44. *Morrill*, 27 Tex. at 651.

45. *Cf.* Oldham v. Sparks, 28 Tex. 425, 429 (1866) (explaining that an attorney's failure to exercise reasonable care "would render him liable to his client for the amount of the damages consequent upon such negligence").

46. *See, e.g.*, Patterson & Wallace v. Frazer, 79 S.W. 1077, 1079 (Tex. Civ. App. 1904, no writ) (posing the issue as being "what is the rule as to an attorney's liability for negligence and want of skill in the conduct and management of his client's case"); Fox v. Jones, 4 Willson 48, 49, 14 S.W. 1007, 1007 (Tex. Ct. App. 1889, no writ) (stating, in a suit against an attorney for the failure to collect on a note, that "[a]n attorney is responsible . . . for the want of ordinary skill, ordinary care, and reasonable diligence, . . . the skill required has reference to the . . . business he has undertaken to do . . . . The attorney is held to the exercise of reasonable care and diligence, and the want of either constitutes gross negligence" (quoting *Oldham*, 28 Tex. at 428)); Morgan v. Giddings, 1 S.W. 369, 370-71 (Tex. 1886) (holding, in a case against attorneys for their failure to pursue certain claims, that "[i]f [the attorneys] had reasonable doubts as to the propriety or expediency of instituting legal proceedings, and having exercised reasonable care, diligence, and skill in and about the matter, they would not be liable for failing to institute such proceeding"). In *Patterson*, the attorney contended that he could be held liable only for gross negligence. *See Patterson*, 79 S.W. at 1079. The court cited *Morrill* as support for the attorney's position; the court also cited *Oldham, Morgan,* and *Fox* as the only Texas cases that the court was aware had dealt with attorney liability. *See id.* at 1080.

47. *Patterson*, 79 S.W. at 1080.

> ties in America, renders the lawyer liable for such damages as proximately flow from such negligence, and that the rule as to a lawyer's liability, applicable to cases like the one under consideration, cannot be better stated than is announced by the trial judge in . . . his charge. Therefore the court did not err in refusing to charge the jury . . . that, in order for plaintiff to recover on account of negligence or ignorance of defendants they must believe that such negligence or ignorance on defendants' part was gross negligence. . . .[48]

In addition, in 1939, the Amarillo court of appeals added a subjective element to the ordinary negligence standard.[49] In *Great American Indemnity Co. v. Dabney*,[50] the court stated that "[a]n attorney does not necessarily incur liability by giving a client erroneous advice provided he acts in good faith . . . ."[51] This subjective good faith standard established in *Dabney* remained a consistent part of legal malpractice claims for some time.

In 1966, in *Cook v. Irion*,[52] the San Antonio court of appeals reaffirmed the adoption of the subjective good faith analysis for legal malpractice actions.[53] The court explained that an "attorney is not liable . . . for an error in judgment if he acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client."[54] Thus, under the subjective standard, decisions based on the sound discretion of the attorney, such as whether to join additional defendants to his client's lawsuit, would not be seen as negligent if such decisions were based on the attorney's experience and good faith.[55]

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48. *Id.* at 1080-81. The trial court's charge read as follows: "An attorney is liable to his client for damages proximately flowing from his failure to possess and exercise such skill, prudence, and diligence as are possessed and commonly exercised by lawyers of ordinary skill and capacity." *Id.* at 1077.

49. *See* Great Am. Indem. Co. v. Dabney, 128 S.W.2d 496, 501 (Tex Civ. App.—Amarillo 1939, writ dism'd judgm't cor.) (noting that an attorney will not incur liability, provided that the attorney acts in good faith).

50. 128 S.W.2d 496 (Tex. Civ. App.—Amarillo 1939, writ dism'd judgm't cor.).

51. *Dabney*, 128 S.W.2d at 501.

52. 409 S.W.2d 475 (Tex. Civ. App.—San Antonio 1966, no writ).

53. *See* Cook v. Irion, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ) (stating that attorneys are not liable for malpractice if they act in good faith and in the best interests of their clients).

54. *Id.*

55. *Cf. id.* at 477-78 (deferring to the attorney's judgment, in light of the situation and the attorney's background, regarding how the attorney would handle trial tactics).

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In 1989, in *Cosgrove v. Grimes*, the Texas Supreme Court finally addressed the standard applicable to attorneys. The court held that the key inquiry was whether the attorney objectively exercised professional judgment, not whether the attorney subjectively acted in good faith.[56] As the court explained:

> There is no subjective good faith excuse for attorney negligence. 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. In some instances an attorney is required to make tactical or strategic decisions. Ostensibly, the good faith exception was created to protect this unique attorney work product. However, allowing the attorney to assert his subjective good faith, when the acts he pursues are unreasonable as measured by the reasonably competent practitioner standard, created too great a burden for wronged clients to overcome.[57]

This objective standard set by the supreme court in *Cosgrove* continues to be applied.[58] Typically, the result of this "objective" standard is that at trial, the attorney's rationale for his acts becomes less important than the testimony of the expert witnesses on the issue of whether the attorney acted "reasonably." Of course, in every legal malpractice case, the plaintiff can hire an expert attorney who will adamantly testify that the defendant's behavior did not meet the acceptable standard. Because the plaintiff can always find an expert who will assert that the defendant attorney acted unreasonably, the types of circumstances where malpractice can be established at trial has become much more varied.

### B. *Trends in Texas Legal Malpractice Jurisprudence*

Although older court decisions viewed legal malpractice in fairly absolute terms, plaintiffs may now bring legal malpractice claims under the rubric of several different causes of action.[59] In fact,

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56. *See* Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989).

57. *Id.*

58. *See, e.g.*, Simpson v. James, 903 F.2d 372, 377 (5th Cir. 1990); Schlager v. Clements, 939 S.W.2d 183, 186 (Tex. App.—Houston [14th Dist.] 1996, writ denied); Hall v. Rutherford, 911 S.W.2d 422, 424 (Tex. App.—San Antonio 1995, writ denied); Mosaga, S.A. v. Baker & Botts, 780 S.W.2d 3, 5 (Tex. App.—Eastland 1989, no writ).

59. *See* Jim Arnold Corp. v. Bishop, 928 S.W.2d 761, 768 (Tex. App.—Beaumont 1996, no writ) (stating that legal malpractice actions include breach of fiduciary duty,

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modern Texas jurisprudence does not provide a precise definition of "legal malpractice."[60] The Texas Supreme Court provided some guidance in *Willis v. Maverick*,[61] by dictating that "[a] cause of action for legal malpractice is in the nature of a tort . . . ."[62] Nevertheless, courts have continually emphasized that, regardless of the actual type of cause of action, "[t]he real issue remains one of whether the attorney exercised that degree of care, skill and diligence as lawyers of ordinary skill and knowledge commonly possess and exercise."[63] In other words, the ordinary care standard forms the basis of almost all the legal malpractice theories.

### 1. The Increase of Legal Malpractice Theories

Around the turn of the century, the reported "legal malpractice" cases were all phrased, pled, and decided in fairly monolithic terms.[64] Until 1920, the reported legal malpractice cases primarily involved alleged negligence by an attorney handling routine client matters,[65] or alleged fraud or undue influence exercised by an attorney in a transaction between the attorney and the client.[66]

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breach of contract, breach of warranty, negligence, and fraud); *see also* Roger M. Baron, *The Expansion of Legal Malpractice in Texas*, 29 S. TEX. L. REV. 355, 368-69 n.102 (1987) (stating that in addition to traditional theories of liability, attorneys may be subject to liability on theories based on advertising and warranties).

60. *See* CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 27 (2d ed. 1997).

61. 760 S.W.2d 642 (Tex. 1988).

62. Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988).

63. Sledge v. Alsup, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ) (citing Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988), and Cook v. Irion, 409 S.W.2d 475 (Tex. Civ. App.—San Antonio 1966, no writ)).

64. For background on our research methodology into early legal malpractice cases, see *supra* note 9.

65. *See, e.g.*, Porter v. Kruegel, 106 Tex. 29, 31-32, 155 S.W. 174, 175 (1913) (containing a discussion of legal principles involved when an attorney negligently fails to prosecute on the client's behalf); Patterson & Wallace v. Frazer, 100 Tex. 103, 103-04, 94 S.W. 324, 325-26 (1906) (discussing the alleged negligence of an attorney in allowing a case to be dismissed for the failure to post a cost bond); Botsford, Deatherage, Young & Creason v. Hamner, 166 S.W. 378, 381-82 (Tex. Civ. App.—Fort Worth 1914, no writ) (addressing allegations of the attorney's failure to pay to the clients funds collected on their behalf).

66. *See, e.g.*, Padgett v. Hines, 192 S.W. 1122, 1124 (Tex. Civ. App.—Beaumont 1917, writ dism'd w.o.j.) (permitting an action involving the alleged misappropriation of the client's notes entrusted to the attorney); Morris v. Brown, 173 S.W. 265, 268-70 (Tex. Civ. App.—El Paso 1915, writ ref'd) (discussing the attorney's alleged improper use of his position as a fiduciary in order to exercise undue influence when purchasing a client's property); Home Inv. Co. v. Strange, 152 S.W. 510, 514 (Tex. Civ. App.—San Antonio 1912)

These were "bright line" cases, and as a general matter, liability was not imposed unless the attorney committed a clear error or engaged in blatantly improper behavior.[67]

By the 1950s and 1960s, however, the reported decisions reflected more complicated fact situations, more specific allegations against attorneys, and an expansion of the legal theories upon which attorneys were being sued and held liable.[68] Courts also elaborated upon the standards that the new, as well as the old, theories rested.[69] This trend of expanding legal theories slowly contin-

(holding that the attorney who, in violation of his duty to the client, acquired title to real estate and then sold it for his own profit, was liable to the client for the value of the property), *rev'd on other grounds*, 109 Tex. 342, 195 S.W. 849 (1913); Barnes v. McCarthy, 132 S.W. 85, 87 (Tex. Civ. App.—1910, no writ) (reviewing a case in which the attorney allegedly used his position to gain an advantage over the client in a transaction between them); Hames v. Stroud, 51 Tex. Civ. App. 562, 567, 112 S.W. 775, 778 (1908, writ ref'd) (dictating certain standards of good faith by which the attorney must abide when dealing with clients in the context of a fraud claim); Jinks v. Moppin, 80 S.W. 390, 391-93 (Tex. Civ. App.—Dallas 1904, no writ) (discussing a case involving alleged fraud and undue influence in the conveyance of a deed from the client to the attorney); Tippett v. Brooks, 28 Tex. Civ. App. 107, 111, 67 S.W. 512, 513-14 (1902, writ ref'd) (holding that a conveyance by the client to the attorney is valid as long as undue influence is not exerted by the attorney).

67. *See, e.g., Barnes*, 132 S.W. at 87 (reciting that to counter a charge of undue influence in a transaction with a client, the attorney need only demonstrate the fairness and reasonableness of the transaction); *Hames*, 51 Tex. Civ. App. at 567, 112 S.W. at 778 (holding that an attorney acted in compliance with the established rules of conduct that required the attorney to act "with the utmost fairness, and in perfect good faith" when dealing with clients); *Tippett*, 28 Tex. Civ. App. at 111, 67 S.W. at 513-14 (holding that a conveyance from a client to an attorney will be considered valid and not set aside absent clear evidence of unfairness or undue influence exerted by the attorney in obtaining the property).

68. *See, e.g.,* Thomas v. Mandell & Wright, 433 S.W.2d 219, 226-27 (Tex. Civ. App.—Houston [1st Dist.] 1968) (reviewing a suit to rescind the attorney's employment contract and discussing the attorney's duties and obligations under the contract), *rev'd*, 441 S.W.2d 841 (Tex. 1969); Cook v. Irion, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ) (stating that an attorney will not be liable for errors in judgment as long as he acts in good faith and with an honest belief that his advice is in the best interest of the client); Morris v. Bailey, 398 S.W.2d 946, 947-48 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (affirming a grant of summary judgment in which the appellant sued an assistant attorney general for bringing excessive suits against him and seeking numerous delays); Weatherly v. Longoria, 292 S.W.2d 139, 140 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.) (examining a breach of contract action brought by a client over the amount of fees an attorney could withhold for sums collected by the attorney for the client); Spicknall v. Panhandle State Bank, 278 S.W.2d 622, 623 (Tex. Civ. App.—Amarillo 1954, no writ) (discussing a conversion claim against an attorney who was acting not only in that capacity but also as an agent and for himself).

69. *Cf., e.g.,* Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964) (stating, in a suit to set aside a conveyance executed by a client to her attorney, that such transactions are allowed, but courts should "scrutinize with jealousy all contracts between [an attorney and a client]

ued through the 1970s.[70] However, by the 1980s, an unprecedented expansion of attorney liability in Texas began.

By the early to mid-1980s, attorneys and law firms were being sued under a dizzying array of theories and causes of action.[71] This expansion resulted from the increased number of claims being

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for compensation which are made while the relation exists"); Jacobs v. Middaugh, 369 S.W.2d 695, 698 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.) (noting, in an action to set aside a conveyance, that "[e]very transaction between an attorney and client is not absolutely void, but where the relationship . . . exists a suspicion is cast upon *any* transaction between attorney and client, and the burden is cast upon the attorney . . . to show that the transaction was . . . above board" and that the attorney, by virtue of his involvement in the transaction, did not take advantage of the client) (emphasis added); Waters v. Bruner, 355 S.W.2d 230, 233 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.) (acknowledging the duty of an attorney to his or her client *after* employment has been terminated). In *Waters v. Bruner,* the court of appeals stated that if "there is no breach of confidence or use of information or knowledge previously acquired in his professional relations," an attorney is free to enter into a transaction with a third party with whom a client had previously dealt. *Id.*

70. *See, e.g.,* Cook v. Brundidge, Fountain, Elliot & Churchill, 533 S.W.2d 751, 752 (Tex. 1976) (addressing a suit brought for breach of fiduciary duty and fraud); Moiel v. Sandlin, 571 S.W.2d 567, 568 (Tex. Civ. App.—Corpus Christi 1978, no writ) (examining a suit against an attorney for malicious prosecution, barratry, abuse of process, and negligence); Friend v. Beard, 567 S.W.2d 79, 80 (Tex. Civ. App.—Waco 1978, writ dism'd) (deciding a case brought under a malpractice rubric for the attorney's failure to determine the proper parties through the discovery process and to keep the client properly informed of the status of the case); Yarbrough v. Cooper, 559 S.W.2d 917, 919 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (examining a suit for legal malpractice in which the defendant alleged that the attorney failed to provide the client with a tax shelter); Fireman's Fund Am. Ins. Co. v. Patterson & Lamberty, Inc., 528 S.W.2d 67, 69 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (deciding a case brought by a client who alleged that his attorney exceeded the authority that the client granted to the attorney); Franke v. Zimmerman, 526 S.W.2d 257, 257 (Tex. Civ. App.—Austin 1975, no writ) (reviewing a case by a client against the attorney for negligence in giving "erroneous advice" as to the client's right to rescind an agreement with a third party); Dillingham v. Lynch, 516 S.W.2d 694, 696 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.) (addressing a client's suit brought against her attorney for wrongful withholding of monies in an escrow account); *see also* Ames v. Putz, 495 S.W.2d 581, 583 (Tex. Civ. App.—Eastland 1973, writ ref'd) (describing the relationship between an attorney and a client as "highly fiduciary in nature" and explaining that "there is a presumption of unfairness or invalidity attaching to a contract between an attorney and his client").

71. *See* Ogle v. Fuiten, 466 N.E.2d 224, 226-27 (Ill, 1984) (permitting a cause of action by non-clients against an attorney for negligently drafting a will); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472-74 (Tex. App.—Houston [1st Dist.] 1985, no writ) (holding an attorney liable for conspiracy and duress); Blanton v. Morgan, 681 S.W.2d 876, 878 (Tex. App.—El Paso 1984, writ ref'd n.r.e.) (permitting a cause of action against an attorney for abuse of process); DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (allowing a cause of action against an attorney under the DTPA).

brought against attorneys and the increased scrutiny applied to attorneys and their handling of cases.[72] Today, Texas attorneys see potential liability at every turn and with every action taken, no matter how small. Thus, the trend that began in the early 1980s continues in full force today, as lawyers are exposed to liability under a multitude of theories, including negligence,[73] gross negligence,[74] breach of fiduciary duty,[75] malicious prosecution,[76] conspiracy,[77] the DTPA,[78] duress,[79] abuse of process,[80]

72. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 20 (1996) (describing generally the frequency and severity of malpractice claims over the last decade).

73. *See, e.g.*, Barcelo v. Elliott, 923 S.W.2d 575, 576 (Tex. 1996) (describing the plaintiffs' allegations that Elliott's negligence caused their trust to be invalid); Bell v. Manning, 613 S.W.2d 335, 336 (Tex. App.—Tyler 1981, writ ref'd n.r.e.) (appealing a summary judgment rendered in favor of the attorney in a suit seeking damages for negligent misrepresentation); Cook v. Irion, 409 S.W.2d 475, 476 (Tex. Civ. App.—San Antonio 1966, no writ) (detailing the plaintiff's allegations of negligence against an attorney in handling a claim for damages).

74. *See, e.g., In re* Legal Econometrics Inc., 191 B.R. 331, 345 (Bankr. N.D. Tex. 1995) (addressing a case in which several millions of dollars were awarded as punitive damages for gross negligence of attorneys who failed to disclose conflicts of interest to clients); Hall v. Stephenson, 919 S.W.2d 454, 460 (Tex. App.—Fort Worth 1996, writ denied) (reviewing a case in which the client alleged that her attorneys were liable on theories of negligence and gross negligence); Judwin Properties, Inc. v. Griggs & Harrison, 911 S.W.2d 498, 500 (Tex. App.—Houston [1st Dist.] 1995, no writ) (addressing a claim of gross negligence against an attorney and his firm); Holland v. Hayden, 901 S.W.2d 763, 767 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (reforming a damage award in a case involving clients who sued their attorney for gross negligence and violation of the DTPA); Peterson v. White, 877 S.W.2d 62, 63 (Tex. App.—Tyler 1994, no writ) (evaluating a case that involved allegations of gross negligence against an attorney).

75. *See, e.g.*, Willis v. Maverick, 760 S.W.2d 642, 644-46 (Tex. 1988) (discussing the statute of limitations in the context of a legal malpractice claim based on breach of fiduciary duty); Cantu v. Butron, 921 S.W.2d 344, 347, 355 (Tex. App.—Corpus Christi 1996, writ denied) (affirming a judgment against the attorney based, in part, on the breach of fiduciary duty); Perez v. Kirk & Carrigan, 822 S.W.2d 261, 264-65 (Tex. App.—Corpus Christi 1991, writ denied) (reviewing the summary judgment in a case in which the client sued his attorneys for the breach of fiduciary duty).

76. *See* Martin v. Trevino, 578 S.W.2d 763, 765 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (discussing a case in which the attorney and client were sued for, among other claims, malicious prosecution, abuse of process, and negligence).

77. *See, e.g.*, Vinson & Elkins v. Moran, 946 S.W.2d 381, 386 (Tex. App.—Houston [14th Dist.] 1997, pet. dism'd by agr.) (reviewing claims of conspiracy against attorneys); McKnight v. Riddle & Brown, P.C., 877 S.W.2d 59, 61 (Tex. App.—Tyler 1994, writ denied) (implying that lawyers may be liable to a client or others for engaging in civil conspiracy); Coppock & Teltschik v. Mayor, Day & Caldwell, 857 S.W.2d 631, 639 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (permitting a suit against a firm for alleged civil conspiracy by one of its attorneys when converting estate assets); Bernstein v. Portland Sav. & Loan Ass'n, 850 S.W.2d 694, 699 (Tex. App.—Corpus Christi 1993, writ denied) (involving

fraud,[81] breach of contract,[82] and negligent misrepresentation.[83]

Despite the variety of theories available, the most common basis of legal malpractice remains negligence.[84] As the Texas Supreme

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a suit by the Portland Savings and Loan Association against an attorney for civil conspiracy); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472-74 (Tex. App.—Houston [1st Dist.] 1985, no writ) (discussing the alleged civil conspiracy by a lawyer).

78. *See, e.g.*, Delp v. Douglas, 948 S.W.2d 483, 496 (Tex. App.—Fort Worth 1997, pet. granted) (addressing DTPA claims against an attorney for the attorney's alleged misrepresentations regarding the nature and quality of his services); Sample v. Freeman, 873 S.W.2d 470, 475 (Tex. App.—Beaumont 1994, writ denied) (examining DTPA claims against an attorney rendering legal services); Barnard v. Mecom, 650 S.W.2d 123, 127 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (analyzing alleged DTPA violations by an attorney); DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Civ. App.—Houston [1st Dist.] 1980) (allowing a cause of action under the DTPA against an attorney), *writ ref'd n.r.e.*, 612 S.W.2d 924 (Tex. 1981).

79. *See Likover*, 696 S.W.2d at 472-73 (noting that the attorney may be held liable to the client for duress if the attorney induces the client to perform an act against the client's will that the client was not legally obligated to perform).

80. *See, e.g.*, Bossin v. Towber, 894 S.W.2d 25, 33-34 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (deciding a case where suit was brought against an attorney in part on theory of abuse of process regarding writ of attachment); Detenbeck v. Koester, 886 S.W.2d 477, 480 (Tex. App.—Houston [1st Dist.] 1994, writ withdrawn) (discussing an action against an attorney for abuse of process based upon bringing a frivolous medical malpractice suit); Lozano v. Tex-Paint, Inc., 606 S.W.2d 40, 43 (Tex. Civ. App.—Tyler 1980, no writ) (assessing an attorney's alleged abuse of writ of attachment process); *Martin*, 578 S.W.2d at 769 (discussing the allegations of abuse of process by an attorney).

81. *See, e.g.*, Sullivan v. Bickel & Brewer, 943 S.W.2d 477, 481 (Tex. App.—Dallas 1997, pet. denied) (determining the viability of fraud claim for billing practices); Chachere v. Drake, 941 S.W.2d 193, 194-95 (Tex. App.—Corpus Christi 1996, pet. denied) (discussing a fraud claim brought by one attorney against another attorney); Adamo v. State Farm Lloyds Co., 853 S.W.2d 673, 675 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (reviewing a fraud claim against the attorney for advising the client to illegally transfer assets); *cf.* Whitaker v. Huffaker, 790 S.W.2d 761, 763 (Tex. App.—El Paso 1990, writ denied) (discussing the allegations of fraud by the attorney against the client).

82. *See, e.g.*, Peeler v. Hughes & Luce, 909 S.W.2d 494, 499 (Tex. 1995) (leaving open the possibility of a breach of contract claim against the attorney); Izen v. Nichols, 944 S.W.2d 683, 683 (Tex. App.—Houston [14th Dist.] 1997, no pet. h.) (discussing the allegations that included, among other claims, breach of contract against a law firm).

83. *See* F.E. Appling Interests v. McCamish, Martin, Brown & Loeffler, 953 S.W.2d 405, 408 (Tex. App.—Texarkana 1997, pet. granted) (allowing a cause of action against an attorney for negligent misrepresentation absent privity between the plaintiff and the attorney).

84. *See* CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 37 (2d ed. 1997) (reporting that legal malpractice claims are typically based on a negligence cause of action); *Lawyers' Responsibilities to the Client: Legal Malpractice and Tort Reform*, 107 HARV. L. REV. 1557, 1558 (1994) (asserting that allegations of professional negligence comprise a predominate portion of legal malpractice litigation); *see also* Steven K. Ward, *Legal Malpractice in Texas*, 19 S. TEX. L.J. 587, 596 (1978) (explaining that

Court stated in *Cosgrove v. Grimes*,[85] "An attorney malpractice action in Texas is based on negligence."[86] Texas courts interpreting this theory have concluded that the traditional elements of a negligence suit apply to claims brought against an attorney.[87] Yet, Texas courts have also frequently addressed cases in which the plaintiff is seeking to hold an attorney liable under the theories of fraud,[88] breach of contract,[89] and DTPA violations.[90]

Another important theory upon which attorneys have traditionally been held liable is the breach of fiduciary duty.[91] Although breach of fiduciary duty is a viable claim against attorneys in

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"the most frequent area of legal malpractice involves technical mistakes on the part of the attorney which do not meet the required standard of care").

85. 774 S.W.2d 662 (Tex. 1989).

86. Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989).

87. *See, e.g.*, Schlager v. Clements, 939 S.W.2d 183, 186 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (stating that "[a] lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney"); Judwin Properties, Inc. v. Griggs & Harrison, 911 S.W.2d 498, 507 (Tex. App.—Houston [1st Dist.] 1995, no writ) (detailing the "well-known" elements of negligence upon which the attorney malpractice action is based); Byrd v. Woodruff, 891 S.W.2d 689, 700-01 (Tex. App.—Dallas 1994, writ dism'd by agr.) (explaining the plaintiff's burden in maintaining a negligence action against a lawyer).

88. *See, e.g.*, Sullivan v. Bickel & Brewer, 943 S.W.2d 477, 481 (Tex. App.—Dallas 1997, pet. denied) (addressing a fraud claim brought against an attorney for billing practices); Adamo v. State Farm Lloyds Co., 853 S.W.2d 673, 675 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (discussing a fraud claim brought against an attorney for advising a client to transfer assets illegally); Hennigan v. Harris County, 593 S.W.2d 380, 383 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (allowing the opposing party to maintain an action against an attorney who failed to inform the opposing party that the case against that party was moot).

89. *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995) (holding that a plaintiff who was convicted of a criminal offense may have a breach of contract claim against the attorney if the attorney's conduct was illegal); Fellbaum v. Mitchell, 277 S.W. 175, 176-77 (Tex. Civ. App.—San Antonio 1925, writ dism'd w.o.j.) (affirming a judgment for a client on a breach of contract theory in which the attorney who agreed to file suit on behalf of the client ultimately failed to do so).

90. *See* Latham v. Castillo, 972 S.W.2d 66, 68 (Tex. 1998) (indicating that attorneys may be sued by their clients for DTPA violations); Wayne Clawater & Martin S. Schexnayder, *Can Lawyers Still Be Sued Under the DTPA?*, 59 TEX. B.J. 944, 944 (1996) (stating that "[c]lients have been able to sue their attorneys for violation of the [DTPA] for many years").

91. *See, e.g.*, Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (stating that "[a] fiduciary relationship exists between attorney and client . . . [and as] a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation"); Cantu v. Burtron, 921 S.W.2d 344, 347, 355 (Tex. App.—Corpus Christi 1996, writ denied) (affirming a judgment against an attorney based, in part, on the breach of a fiduciary duty).

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Texas,[92] Texas courts have historically struggled over whether it can provide an independent basis for a legal malpractice action.[93] Today, however, an attorney may be held liable for breach of fiduciary duty, even in the absence of a final agreement to represent the client.[94]

Accordingly, allegations that an attorney has breached his fiduciary duty have become key to a number of plaintiffs' victories[95] and provide recent examples of the trend toward expanding legal malpractice theories. For example, in *Arce v. Burrow*,[96] the Fourteenth Court of Appeals held that fee forfeiture is a viable remedy in Texas when an attorney breaches his fiduciary duty to his client.[97] Although Texas case law permits fee disgorgement in cases involving breach of the fiduciary relationship for conflict of interest,[98] *Arce* is the first case to hold that fee disgorgement is a viable

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92. *See* Vinson & Elkins v. Moran, 946 S.W.2d 381, 381 (Tex. App.—Houston [14th Dist.] 1997, pet. dism'd by agr.) (holding the attorney liable on a breach of fiduciary duty claim but not on malpractice claim); McClung v. Johnson, 620 S.W.2d 644, 647 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) (stating that the lawyer has a duty to disclose facts material to his representation of client); State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (stating that the relationship between attorney and client is one of utmost faith and confidence, and that the attorney must disclose all material information to the client).

93. *See* David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 44 (1991) (stating that "[a]lthough both negligence and breaches of fiduciary obligations may be characterized as 'legal malpractice,' courts have recognized a difference between the competence required by the standard of care and the fiduciary obligations required by the standard of conduct").

94. *See* Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 n.4 (Tex. App.—Corpus Christi 1991, writ denied) (stating that "[a]n attorney's fiduciary responsibilities may arise even during preliminary consultations regarding the attorney's possible retention if the attorney enters into a discussion of the client's legal problems with a view toward undertaking representation" (citing Nolan v. Foreman, 665 F.2d 738, 739 n.3 (5th Cir. 1982))); *see also* Castillo v. First City Bancorporation, 43 F.3d 953, 958 (5th Cir. 1994) (stating that a fiduciary duty may exist even in absence of an attorney-client relationship).

95. *See Moran*, 946 S.W.2d at 381 (holding the attorney liable on breach of fiduciary claim).

96. 958 S.W.2d 239 (Tex. App.—Houston [14th Dist.] 1997, pet. granted).

97. *See* Arce v. Burrow, 958 S.W.2d 239, 251 (Tex. App.—Houston [14th Dist.] 1997, pet. granted).

98. *See, e.g., In re* Mflex Corp., 172 B.R. 854, 859 (Bankr. W.D. Tex. 1994) (allowing fee forfeiture because of a firm's undisclosed conflict of interest); Bryant v. Lewis, 27 S.W.2d 604, 608 (Tex. Civ. App.—Austin 1930, writ dism'd w.o.j.) (holding that an attorney could not recover any fees because of a conflict of interest).

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remedy for an attorney's breach of his fiduciary duty *with no showing of causation or damages.*[99]

In *Arce*, the defendant-appellees hired the plaintiff-appellants to represent them in suits against Phillips 66 after a series of explosions at their Pasadena plant killed twenty-three people and injured hundreds more.[100] The appellants alleged that the attorneys did not develop their cases individually and reached an unauthorized aggregate settlement with Phillips.[101] Conversely, the attorneys claimed that the appellants became unhappy with their settlements after hearing of larger settlements obtained by other plaintiffs' attorneys.[102] The appellants filed suit against the attorneys on the basis of breach of fiduciary duty, fraud, violations of the DTPA, negligence, and breach of contract.[103] The court granted the attorneys' motion for summary judgment.[104] The summary judgment proof established that the appellants suffered no damages as a result of a breach of duty. Fee forfeiture, thus, was improper because the jury had not found a breach of a duty resulting in actual damages.[105]

In reviewing the trial court's summary judgment, the appellate court noted that Texas courts have long held that fees may be forfeited in the principal-agent context as a remedy for the breach of fiduciary duty.[106] However, the court could not locate any Texas cases involving fee forfeiture for breach of fiduciary duty in the attorney-client relationship; thus, the court "discern[ed] no reason to carve out an exception for breaches of fiduciary duty in the attorney-client relationship."[107] At that point, the court was left to

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99. *See Arce*, 958 S.W.2d at 251.

100. *See id.* at 239.

101. *See id.* at 244-45.

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.* at 244; *see also* George Flynn, *Judge Tosses out Lawsuit Facing Blast Case Lawyers*, HOUS. CHRON., Feb. 8, 1995, at 20 (reporting that Judge Mark Davidson, the trial judge in *Arce*, told plaintiffs that dissatisfaction itself was an insufficient ground for a lawsuit), *available in* 1995 WL 5879167; Joanne Wojcik, *Mass Tort Case Seeks Legal Fee Forfeiture*, BUS. INS., Sept. 22, 1997, at 40 (explaining that a Houston trial judge dismissed the plaintiffs' case because "there was no evidence the attorneys had harmed their clients by negotiating a lump-sum settlement and then apportioning the amount between them"), *available in* 1997 WL 8295424.

106. *See Arce*, 958 S.W.2d at 246.

107. *Id.*

determine what a plaintiff would be required to prove in order to successfully have an attorney's fees disgorged. In that regard, the court analyzed Texas precedent on the issue of fiduciary breaches in *non-attorney* contexts and reached the conclusion that in those cases, "the breach of the fiduciary relationship inherently damaged the plaintiff, and thus, there was no need to prove causation or damage . . . . The basis for such a rule is clear: there should be a deterrent to conduct which equity condemns and for which it will grant relief."[108] The court cited cases from other jurisdictions as support for its holding that an attorney need not forfeit his entire fee because of the breach of the fiduciary duty, if such complete forfeiture is not appropriate under the circumstances.[109]

The decision in *Arce* suggests that the trend toward expanding legal malpractice theories continues today. In fact, if Texas proceeds in developing the breach of fiduciary duty as an independent legal malpractice cause of action, doing so will contribute to the predicted rise in legal malpractice claims in Texas. Insurers have already observed an increase in claims alleging causes of action for breach of fiduciary duty, which is troubling because damages in such cases tend to be higher than in negligence cases.[110] Some insurers predict that more breach of fiduciary duty claims will be filed in the future, coupled with an increase in the claimed amount of damages.[111]

2. Attacking the Traditional Malpractice Defenses

Although the number of theories upon which an attorney may be sued has increased dramatically, the defenses traditionally available to attorneys have diminished.[112] Historically, Texas jurisprudence has provided a safe harbor for attorneys in relation to legal malpractice cases.[113] Accordingly, an attorney sued for malpractice

108. *Id.* at 248.

109. *See id.* at 249. According to the court, the exact amount of fees to be forfeited would be determined by the trial court. *See id.* at 251.

110. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 22 (1996).

111. *See id.* at 24-25.

112. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1681 (1994) (asserting that traditional legal malpractice defenses are disappearing).

113. *See* Lauren Beck, Note, Cosgrove v. Grimes: *Abrogation of the Subjective Good Faith Exception in Legal Malpractice Actions*, 42 BAYLOR L. REV. 601, 601 (1990) (stating

has been able to utilize the defenses typically available in tort or contract, depending on the theory underlying the malpractice claim.[114] One of the stronger defenses historically available to Texas attorneys was the good-faith standard articulated in *Cook v. Irion*.[115] However, in *Cosgrove v. Grimes*[116] the Texas Supreme Court abolished this defense by holding that "[t]he standard is an objective exercise of professional judgment, not the subjective belief that [the attorney's] acts are in good faith."[117]

Although lawyers still retain other important defenses, such as statute of limitations[118] and comparative negligence,[119] in addition to the less utilized defenses of collateral estoppel and res judicata,[120] perhaps the most powerful malpractice defense is lack of privity.[121] Under this concept, an attorney is not liable to a third party for

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that Texas lawyers have generally "been able to take comfort in the fact that certain defenses . . . offer a modicum of protection").

114. *Cf.* Steven K. Ward, *Legal Malpractice in Texas*, 19 S. TEX. L. REV. 587, 608 (1978) (asserting that Texas attorneys may utilize general tort or contract defenses, depending on the type of malpractice suit).

115. *See* Cook v. Irion, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ) (providing that an attorney would not be liable if he acted in good faith and in his clients' best interests); *see also supra* notes 52-55 and accompanying text.

116. 774 S.W.2d 662 (Tex. 1989).

117. Cosgrove v. Grimes, 774 S.W.2d 662, 664-65 (Tex. 1989) (holding that "there is no subjective good faith excuse for attorney negligence. A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney"); *see also supra* notes 56-57 and accompanying text.

118. *See* TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987) (mandating a two-year statute of limitations period for DTPA claims); Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988) (holding that actions against an attorney for malpractice sound in tort and therefore have a two-year statute of limitations); Burnap v. Linnartz, 914 S.W.2d 142, 148 (Tex. App.—San Antonio 1995, writ denied) (holding that the statute of limitations for a claim against an attorney based on a breach of fiduciary duty is two years).

119. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001-.017 (Vernon 1997) (creating a proprotionate responsibility scheme in which a plaintiff may only recover in a negligence suit if his own negligence equals fifty percent or less).

120. *See* Coppock & Teltschick v. Mayor, Day & Caldwell, 857 S.W.2d 631, 637-38 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (recognizing res judicata and collateral estoppel defenses in a legal malpractice suit); CLS Assoc., Ltd. v. A__B__, 762 S.W.2d 221, 224-25 (Tex. App.—Dallas 1988, no writ) (affirming a summary judgment in favor of the attorney on res judicata grounds); *see also* Steven K. Ward, *Legal Malpractice in Texas*, 19 S. TEX. L. REV. 587, 615 (1978) (discussing the infrequency with which collateral estoppel and res judicata are used in Texas as a defense to legal malpractice suits in comparison to other states).

121. *See* Barcelo v. Elliott, 923 S.W.2d 575, 578-79 (Tex. 1996) (reaffirming the requirement that privity exist between an attorney and a plaintiff before the plaintiff can proceed with a malpractice claim against an attorney).

damages resulting from the performance of his professional duties.[122]

122. *See id.* at 578 (acknowledging that privity must exist between the attorney and the third party in order for that party to proceed with a malpractice claim against the attorney); *see also* Marshall v. Quinn-L Equities, Inc., 704 F. Supp. 1384, 1395 (N.D. Tex. 1988) (not allowing the suit to proceed without privity); Dickey v. Jansen, 731 S.W.2d 581, 582-83 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (declining to overrule "long-standing precedent" that disallowed claims by parties not in privity with the attorney); Berry v. Dodson, Nunley & Taylor, 717 S.W.2d 716, 719 (Tex. App.—San Antonio 1986) (refusing to impose liability on an attorney with intended beneficiaries of a will because of a lack of privity), *judgm't set aside by* 729 S.W.2d 690 (Tex. 1987); First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410, 413 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (refusing to hold an attorney liable to a third party); Graham v. Turcotte, 628 S.W.2d 182, 183-84 (Tex. App.—Corpus Christi 1982, no writ) (determining that liability would not be imposed because the appellees failed to demonstrate privity); Bell v. Manning, 613 S.W.2d 335, 338 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (noting that the attorney dealt at arms length with adverse parties in representing his client, and therefore, should not be held liable to such third parties for his actions); David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 35 (1991) (reporting that Texas follows the traditional view that "an attorney owes no duty to third party non-clients").

Most jurisdictions have abolished the privity requirement. *See Barcelo*, 923 S.W.2d at 579-80 (Cornyn, J., dissenting) (commenting on the court's decision to reject a no-privity rule that is in place in a majority of jurisdictions); *see also* Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961) (in bank) (affirming a holding that an attorney is liable to beneficiaries for negligently drafting a will); Stowe v. Smith, 441 A.2d 81, 83 (Conn. 1981) (allowing a claim by a third-party beneficiary); Needham v. Hamilton, 459 A.2d 1060, 1062 (D.C. App. 1983) (reversing the lower court's holding that an intended beneficiary of a will could not bring suit against an attorney for malpractice in drafting the will); DeMaris v. Asti, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983) (affirming the dismissal of a beneficiary's cause of action, but recognizing the validity of such claims); Ogle v. Fuiten, 466 N.E.2d 224, 226-27 (Ill. 1984) (allowing a cause of action by nonclients against an attorney for negligently drafting a will); Walker v. Lawson, 526 N.E.2d 968, 968 (Ind. 1988) (holding that the cause of action will lie for a third party who is a beneficiary under a will); Schreiner v. Scoville, 410 N.W.2d 679, 682 (Iowa 1987) (holding that the plaintiff stated a cause of action against the attorney, even though not in privity therewith); Pizel v. Zuspann, 795 P.2d 42, 51 (Kan. 1990) (refusing to release an attorney from liability to nonclients); *In re* Killingsworth, 292 So. 2d 536, 542 (La. 1973) (allowing a cause of action without privity); Guy v. Liederbach, 459 A.2d 744, 751-53 (Pa. 1983) (allowing a cause of action by intended beneficiaries); Auric v. Continental Cas. Co., 331 N.W.2d 325, 327 (Wis. 1983) (concluding that the beneficiary of a will may maintain an action against an attorney who negligently drafted or supervised the execution of a will absent printing); *Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1561 (1994) (stating that courts across the country "slowly overcame their concerns regarding third-party liability and instead focused on 'providing a remedy to the victim, placing losses on the responsible attorney, and deterring culpable behavior'" (citing Tom W. Bell, Comment, *Limits on the Privity and Assignment of Legal Malpractice Claims*, 59 U. CHI. L. REV. 1533, 1535 (1992))). According to Bell, "Loosening the privity requirement in some cases was a significant shift in favor of plaintiffs." *Id.* at 1562.

Moreover, in 1996, the Texas Supreme Court explicitly upheld the privity requirement in *Barcelo v. Elliott*.[123]

In *Barcelo*, Frances Barcelo retained attorney David Elliott to draft her will and an inter vivos trust.[124] The will was to devise the residuary of her estate to the inter vivos trust, and the trust income was to be distributed to Barcelo during her lifetime.[125] Upon her death, the trust was to terminate and the assets distributed to her children and siblings, with the remainder passing to her grandchildren.[126]

Unfortunately, however, the probate court declared the trust agreement unenforceable,[127] and Barcelo's grandchildren subsequently filed a malpractice suit against Elliott and his law firm, contending that Elliott's negligence caused the trust to be invalid.[128] The grandchildren further alleged that this negligence forced them to settle for a substantially smaller share of the estate than they would have received under a valid trust.[129] The trial court granted Elliott's summary judgment motion on the sole ground that he had never represented the grandchildren, and thus, owed them no duty.[130] The appellate court affirmed, holding that under Texas law an attorney preparing estate planning documents owes no duty to third party beneficiaries of the estate plan.[131]

On further appeal, the Texas Supreme Court recognized the policy concerns underlying the privity requirement:

> [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 .... Without this "privity barrier," the rationale goes, clients would lose control over the attorney-client relationship, and attorneys would be subject to almost unlimited liability.[132]

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123. *See Barcelo*, 923 S.W.2d at 576 (upholding the privity requirement in a suit brought by the intended beneficiaries of a trust against the attorney who negligently drafted the trust instrument).

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *Id.* at 577 (citations omitted).

In observing that Texas courts have uniformly applied the privity barrier in the estate planning context, the supreme court then expressly rejected the plaintiffs' argument that "the attorney should owe a duty of care to persons who were specific, intended beneficiaries of the estate plan."[133] The court did analyze court decisions from other jurisdictions that rejected and embraced the privity requirement;[134] however, it ultimately reached the decision that "[t]he present case is indicative of the conflicts that could arise" if the privity barrier were removed.[135] Accordingly, the court affirmed the judgment in favor of the attorney.[136]

In 1997, however, the Texarkana court of appeals put a different spin on the privity issue in its decision in *F.E. Appling Interests v. McCamish, Martin, Brown & Loeffler*.[137] In *Appling*, the court held that a claim against an attorney for negligent misrepresentation was not equivalent to a claim for professional malpractice.[138] Therefore, under a negligent misrepresentation cause of action, which includes no privity requirement, a third party could sue an attorney.[139] Obviously, the *Appling* court did not attempt to overrule *Barcelo*, in which the Texas Supreme Court specifically upheld the privity requirement; rather, the *Appling* court attempted to dis-

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133. *Id.*; *see also* Dickey v. Jansen, 731 S.W.2d 581, 582-83 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (noting that "Texas authorities have consistently held that third parties had no standing to sue attorneys on causes of action arising out of their representation of others").

134. *See Barcelo*, 923 S.W.2d at 578-79.

135. *Id.* at 578. The court held that:

> An attorney's ability to render such advice would be severely compromised if the advice could be second-guessed by persons named as beneficiaries under the unconsummated trust. In sum, we are unable to craft a bright-line rule that allows a lawsuit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no real doubt on the testator's intentions, while prohibiting actions in other situations. We believe the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.

*Id.* at 578-79.

136. *See id.* at 579.

137. 953 S.W.2d 405 (Tex. App.—Texarkana 1997, pet. granted).

138. *See* F.E. Appling Interests v. McCamish, Martin, Brown & Loeffler, 953 S.W.2d 405, 408 (Tex. App.—Texarkana 1997, pet. granted).

139. *See id.* (finding that negligent misrepresentation is unlike professional malpractice because it is not based on a breach of duty owed to those in privity).

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tinguish the two causes of action so that it could circumvent the privity requirement.

In *Appling*, F.E. Appling Interests was a managing partner of a Texas joint venture called Boca Chica Development Company.[140] Floyd Appling was both a co-trustee and an income beneficiary of two of the several Appling family trusts comprising F.E. Appling Interests.[141] In order to finance a real estate development, Boca Chica obtained both a loan and a line of credit from Victoria Savings Association.[142] Boca Chica accepted the loan from Victoria on the condition that Victoria later increase the line of credit.[143] Victoria, however, never extended the additional credit, and Boca Chica went bankrupt.[144] F.E. Appling Interests then filed a lender liability claim against Victoria in excess of $15 million, but later settled, fearing that the Federal Savings and Loan Insurance Corporation (FSLIC) would take over Victoria before it could obtain a judgment.[145] Worried that the settlement would not be enforceable against the FSLIC,[146] F.E. Appling Interests also required Victoria's attorneys to represent in writing that the settlement met the statutory requirements.[147]

Eventually, the FSLIC declared Victoria insolvent and placed it under receivership.[148] The Resolution Trust Company was later substituted for the FSLIC, and it argued that the agreement was not binding.[149] The federal court handling F.E. Appling's case against Victoria agreed, concluding that Victoria's board relinquished its settlement authority when it agreed to the "supervisory

140. *See id.* at 406.
141. *See id.*
142. *See id.*
143. *See id.*
144. *See id.*
145. *See id.*
146. *See* 12 U.S.C. § 1823(e) (1994). The statute lists the requirements to render an agreement enforceable against the FSLIC. *See id.* Specifically, to be enforceable, such an agreement must: (1) be in writing; (2) have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank; (3) have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee; and (4) have been continuously, from the time of its execution, an official record of the depository institution. *See id.*
147. *See Appling*, 953 S.W.2d at 406.
148. *See id.* at 406-07.
149. *See id.* at 407.

status."[150] In 1991, F.E. Appling Interests then sued the law firm, alleging both negligence and fraud in connection with the firm's representations that Victoria's board approved the settlement.[151] The firm, however, prevailed on its summary judgment motion as to the negligence claim, which contended that the firm owed no duty to F.E. Appling Interests.[152]

In addressing Appling's claims, the appellate court noted that Appling's allegations included negligent misrepresentation of the statutory requirements for settlement.[153] The firm responded to those allegations by contending that because Appling was raising a legal malpractice claim, the firm should not be held liable.[154] Essentially, the firm argued that in Texas, "an attorney is not liable to third parties for professional malpractice because an attorney does not owe a duty of professional care to nonprivies."[155]

After reciting the holding in *Barcelo* that enunciated the privity barrier, the court of appeals concluded that the firm's argument was "fallacious."[156] The court sidestepped the *Barcelo* holding by stating that:

> The appellant has not brought a professional malpractice claim. Instead, the appellant has brought a negligent misrepresentation claim. Texas recognizes a cause of action for negligent misrepresentation, [defined by Section 552, *Restatement (Second) of Torts*] . . . . A negligent misrepresentation claim is not equivalent to a professional malpractice claim. "Under [a negligent misrepresentation] theory, liability is not based on the breach of duty a professional owes his clients or others in privity, but on an independent duty to plaintiff based on [the defendant's] manifest awareness of plaintiff's reliance [on the misrepresentation] and intention that the *plaintiff* so *rely*."[157]

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150. *See id.*

151. *See id.*

152. *See id.* (noting that the trial court granted the firm's summary judgment motion in regards to Appling's negligence claim, therefore agreeing that the firm owed no duty to Appling). The trial court also dismissed the fraud claim with prejudice. *See id.*

153. *See id.*

154. *See id.*

155. *Id.*

156. *See Appling*, 953 S.W.2d at 408 (stating that the firm's argument was "fallacious" because Appling's claim was based upon negligent misrepresentation, not professional malpractice).

157. *Id.* (emphasis added). Section 552 provides:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the

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The *Appling* court also relied upon two cases from other jurisdictions to justify its holding.[158] In *Mehaffey, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*,[159] the Colorado Supreme Court held that privity was not a required element of a negligent misrepresentation claim.[160] Likewise, in *Horizon Financial, F.A. v. Hansen,*[161] a Georgia court determined that a negligent misrepresentation claim was not equivalent to a professional malpractice claim.[162] These cases enabled the court of appeals to conclude that "an attorney can be subject to a negligent misrepresentation claim in a case in which he is not subject to a professional malpractice claim."[163] In the court's opinion, "recognizing a cause of action for negligent misrepresentation . . . [does] not undermine the requirement of strict privity that is usually required for a third party to assert a claim against an attorney."[164]

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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.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
  (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
  (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

RESTATEMENT (SECOND) OF TORTS § 552 (1997).

158. *See* Mehaffey, Rider, Windholz & Wilson v. Central Bank Denver, N.A., 892 P.2d 230, 236 (Colo. 1995); Horizon Fin., F.A. v. Hansen, 791 F. Supp. 1561, 1574 (N.D. Ga. 1992).

159. 892 P.2d 230, 236 (Colo. 1995).

160. *See Mehaffey*, 892 P.2d at 236 (stating that "[p]rivity is not a necessary element of a claim for negligent misrepresentation").

161. 791 F. Supp. 1561 (N.D. Ga. 1992).

162. *See Horizon Fin.*, 791 F. Supp. at 1574 (articulating that liability is based on an independent duty to the plaintiff rather than the duty a professional owes to his client or those with whom he is in privity).

163. F.E. Appling Interests v. McCamish, Martin, Brown & Loeffler, 953 S.W.2d 405, 408 (Tex. App.—Texarkana 1997, pet. granted) (citing Kirkland Constr. Co. v. James, 658 N.E.2d 699, 700-02 (Mass. App. Ct. 1995)).

164. *Id.* at 409.

The *Appling* court further distinguished *Barcelo* by stating that the plaintiffs in *Barcelo* would not have a claim for legal malpractice because the defendant in that case never made any representation to them.[165] The court also distinguished two earlier Texas cases on point, *First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagin and Stewart,*[166] and *Bell v. Manning,*[167] in establishing its new precedent.[168] The court simply concluded that those cases "failed to recognize that strict privity may not be required in a negligent misrepresentation cause of action. The concerns behind the strict privity requirement are not applicable here."[169]

If other Texas courts choose to follow the decision in *Appling*, it will be all but a foregone conclusion that the number of malpractice claims will increase. Abolishing the privity requirement would clearly contribute to the impeding wave of legal malpractice in Texas. In fact, with the nationwide trend moving *away from* the requirement of privity, many insurers have already noted an increase in the number of lawsuits filed by non-client third parties.[170]

Ultimately, *Appling*, coupled with the decision in *Arce*, signal further change in the state's jurisprudence in the area of legal malpractice. These cases indicate that plaintiffs' attorneys are attempting to develop the law of malpractice in Texas to the extreme. More importantly, though, these cases show that Texas judges are receptive to such arguments and to the idea of stretching the principles of legal malpractice in favor of expanded attorney liability.

## IV. A New Climate for Malpractice Claims

The foregoing description of legal malpractice theories under which a lawyer may be held liable for malpractice, and defenses to

165. *See id.*

166. 648 S.W.2d 410 (Tex. Civ. App.—Dallas 1983, writ ref'd n.r.e.).

167. 613 S.W.2d 335 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

168. *See Appling*, 953 S.W.2d at 410 (stating that neither *First Municipal* nor *Bell* recognized the strict privity requirement in negligent misrepresentation cases).

169. *Id.*; *see also* Roger M. Baron, *The Expansion of Legal Malpractice Liability in Texas*, 29 S. Tex. L. Rev. 355, 360 (1988) (discussing criticisms of the rationale underlying the privity requirement).

170. *See* ABA Standing Comm. on Lawyers' Prof'l Liab., Legal Malpractice Claims in the 1990s 22 (1996) (noting that the law of privity has begun to erode, leading to more claims from non-client third parties, including *pro se* claimants).

those theories, is not exhaustive;[171] rather it is meant to provide one with an idea of the extent, scope, and variety of an attorney's potential for liability in Texas' contemporary legal climate. The proliferation of theories of liability and the erosion of available defenses are just a few of the many factors that may influence and encourage the impending wave of malpractice litigation in Texas.

However, before any changes can be proposed to the system that deals with legal malpractice and the manner in which attorneys are treated as defendants within that system, understanding how recent circumstances may generate a wave of legal malpractice litigation is important. The force that underlies the predicted increase in legal malpractice claims includes the disappearance of the traditional congeniality of the bar as well as the traditional sources of litigation awards, the drastic increase in numbers of new inexperienced attorneys, and the inevitable decline of the strong Texas economy.

### A. *The Disappearance of the Traditional Congeniality of the Bar*

Although every American jurisdiction recognizes that attorneys may be liable for malpractice,[172] such claims have historically encountered reluctance by members of the bar.[173] In fact, that reluc-

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171. *See, e.g.*, Burnap v. Linnartz, 914 S.W.2d 142, 148-49 (Tex. App.—San Antonio 1995, writ denied) (holding a lawyer liable for failing to warn that he was not representing a potential client because the lawyer should have reasonably expected that the potential client could have believed otherwise); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472-74 (Tex. App.—Houston [1st Dist.] 1985, no writ) (holding an attorney liable for conspiracy and duress); Blanton v. Morgan, 681 S.W.2d 876, 878 (Tex. App.—El Paso 1984, writ ref'd n.r.e.) (listing the elements of a cause of action for abuse of process).

172. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 1.1, at 1 & n.1 (3d ed. 1989) (referencing a table that listed decisions from every state in the United States recognizing that attorneys may be held liable for legal malpractice).

173. See id. at 1; *see also* Alison Bass, *Lawyers Reluctant to Go After Peers*, BOSTON GLOBE, Aug. 6, 1995, at 1 (discussing the difficulty in finding an attorney willing to sue another attorney for malpractice and noting that larger firms are especially reluctant to bring suits against other lawyers or law firms because they do not see these types of suits as reliable sources of payment), *available in* 1995 WL 5949330; Milo Geyelin, *Their Own Petard: Many Lawyers Find Malpractice Lawsuits Aren't Fun After All*, WALL ST. J., July 11, 1995, at A1 (telling the story of a woman who went through several plaintiffs' lawyers before she finally found one willing to take her malpractice claim); Richard Perez-Pena, *When Lawyers Go After Peers: The Boom in Malpractice*, J. REC. (Okla. City), Aug. 6, 1994, at 5 (quoting Thomas G. Bosquet, a Houston attorney who represents plaintiffs in legal malpractice cases, who discussed how difficult it can be to find a lawyer to prosecute a claim of legal malpractice because "many large firms 'think suing lawyers is not honorable work, and they don't want to dirty their hands with it'"), *available in* 1994 WL 4767385.

tance was much greater fifty or even twenty-five years ago.[174] Today, members of the legal profession, legal commentators, and even jurists recognize the existence of, and the need to pursue, meritorious claims of legal malpractice.[175]

Nonetheless, companies that write malpractice insurance have noted that less civility currently exists among lawyers.[176] One scholar has even dedicated an entire law review article to the subject of *ad hominem* attacks in the legal profession and the need for

174. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 1.1, at 1-2 (3d ed. 1989) (contending that such "conspiracy of silence" is less of a risk today due to modern codes of professional responsibility that require attorneys to give due consideration to meritorious malpractice claims); DUKE NORDLINGER STERN & JO ANN FELIX-RETZKE, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE 21 (1983) (stating that only a small percentage of members of the bar even purchased malpractice insurance before 1970, in part because of a general feeling among lawyers that there was little risk of being subject to malpractice claims); *see also* Manuel R. Ramos, *Legal Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 878 (1996) (pointing out that the incidence as well as the severity of malpractice has grown exponentially); Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1681 (1994) (asserting that today "[m]ore lawyers are willing to sue lawyers"); Milo Geyelin, *Their Own Petard: Many Lawyers Find Malpractice Lawsuits Aren't Fun After All*, WALL ST. J., July 11, 1995, at A1 (stating that second-guessing of attorneys' trial tactics, such as picking expert witnesses, used to be rare, "[b]ut when things go wrong these days, more and more clients see their lawyer as just another deep pocket," and more lawyers are willing to assist them in bringing malpractice suits); David Segal, *Lawyer vs. Lawyer: The Quiet Bar Fight—Malpractice Suits Grow, but out of Public Eye*, WASH. POST, Mar. 18, 1997, at D1 (discussing the rule in the legal field until the mid-1980s: "Thou shalt not sue other lawyers"), *available in* 1997 WL 10007935; Karen Wagner, *More Lawyers Being Sued for Malpractice: Suing the Client for Fees is a Common Trigger*, ILL. LEGAL TIMES, June 1996, at 1 (reporting that "if there ever was a widespread reluctance to sue other lawyers," such reluctance has evaporated).

175. *See* Universal Film Exchs., Inc. v. Lust, 479 F.2d 573, 577 (4th Cir. 1973) (stating that "[l]awyers are not a breed apart" and that malpractice suits are needed as a remedy for attorneys' negligence or wrongdoing); ABA Comm. on Professional Ethics and Grievances, Formal Op. 144 (1935) (stating that members of the profession should not hesitate "to accept employment to compel another lawyer to honor the just claim of a layman"); RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 1.1, at 2 (3d ed. 1989) (stating that the judiciary agrees that there should not be a reluctance to recognize legal malpractice claims).

176. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 22 (1996) (stating that civility and common courtesy has declined while the general litigiousness of our society has increased). *But see* Karen Wagner, *More Lawyers Being Sued for Malpractice: Suing the Client for Fees is a Common Trigger*, ILL. LEGAL TIMES, June 1996, at 1 (finding that "[l]awyers who oppose each other on [legal malpractice matters] usually remain cordial" to each other).

solutions to this "growing problem."[177] As noted in a recent study published by the American Bar Association Standing Committee on Lawyers' Professional Liability:

> Lawyers are more willing to sue each other, and more willing to assert malpractice claims involving litigation issues and second-guessing of trial strategies or settlements after the conclusion of an underlying matter. Insurers are also seeing more claims intended to embarrass and harass attorneys, more claims seeking punitive damages, and more allegations which the plaintiffs' attorneys know are not covered by insurance (and which are probably drafted in an attempt to pressure the attorney and coerce settlement by the insurer). In this regard, some insurers have observed more claims alleging abuse of process, defamation, and similar torts against lawyers. While many of these claims can be defeated at trial, they tend to increase overall defense costs to insurers.[178]

Furthermore, lawyers representing insurance companies, which are often perceived as loyal institutional clients, are increasingly subject to actions by those clients after bad trial results.[179] In fact, the number of lawsuits against former attorneys for "bad results,"

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177. *See generally* Lydia P. Arnold, Note, *Ad Hominem Attacks: Possible Solutions for a Growing Problem*, 8 GEO. J. LEGAL ETHICS 1075 (1995) (detailing increasing problems of personal attacks by lawyers on other members of the profession). Several cases have addressed this problem as well. *See, e.g.*, Unique Concepts, Inc. v. Brown, 115 F.R.D. 292, 294 (S.D.N.Y. 1987) (sanctioning an attorney for outbursts and personal attacks on opposing counsel in open court); Johnson v. Trueblood, 476 F. Supp. 90, 94-97 (E.D. Pa. 1979) (castigating counsel for crossing over the line from advocacy to insults against opposing counsel), *vacated*, 629 F.2d 302 (3d Cir. 1980); Lebbos v. State Bar, 806 P.2d 317, 324 (Cal. 1991) (in bank) (disbarring attorney for making offensive remarks about opposing counsel); *cf.* Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEX. TECH L. REV. 811, 811-14 (1998) (discussing attacks by attorneys on the judiciary).

178. ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 22 (1996). As noted in a recent issue of the *Litigation News*, which is published by the American Bar Association, "Simply put, as the profession's chummy atmosphere has faded, so has the natural protection that it once provided. Lawyers are more willing to sue other lawyers for their perceived inadequacies." Thomas E. Zehnle, *Study Finds Legal Malpractice Claims on the Rise: Lawyers Suing Lawyers More Commonplace*, LITIG. NEWS (Am. Bar Ass'n, Chicago, Ill.), Sept. 1997, at 4. Ronald Marmer of Chicago, Co-Chair of the ABA Litigation Section's Professional Liability Litigation Committee, stated that "we're living in an increasingly litigious society and that affects everybody, including lawyers." *Id.*

179. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 22 (1996) (stating that such claims by institutional clients against their own lawyers give rise to special problems due to the close nature of the relationship between lawyer and client, the unusual degree of control enjoyed by the client, and the desire of the lawyer to maintain favor with the client).

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not necessarily arising out of any specific instance of misconduct or negligence, is on the rise across the country.[180] As noted by the ABA Standing Committee on Lawyer's Professional Liability, "[t]hese claims [by insurers against their attorneys] present special problems because of the close nature of the relationship between the institutional client and the lawyer, the significant control retained by the institutional client, and the desire of the lawyer to maintain the favor of the institutional client."[181]

This lack of congeniality not only results in "after the fact" malpractice claims, but also can result in claims brought during the course of litigation. Asserting claims in litigation solely to delay, harass, or to create a conflict of interest between the lawyer and the client is quite common.[182] Such deterioration in the relationships among lawyers may very well contribute to the impending legal malpractice crisis.

### B. *The Disappearance of Traditional Sources of Litigation Awards*

The lessened congeniality among lawyers is only one of the many circumstances that signal a continuing rise in legal malpractice suits in Texas. Recently, certain factors have also indicated that the traditional sources of compensation available to plaintiffs are decreasing. These factors include tort-reform efforts, the erosion of the bad-faith cause of action, and the legislative reaction to increasing medical malpractice litigation.

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180. *See* Andrea Gerlin, *A Lawyer's Nightmare: Dallas Firm Feels Wrath of Client in Losing Suit*, WALL ST. J., Oct. 30, 1995, at B5 (detailing the story of a disgruntled client seeking vengeance on a Dallas lawyer after the client lost his suit against a car manufacturer); Milo Geyelin, *Their Own Petard: Many Lawyers Find Malpractice Lawsuits Aren't Fun After All*, WALL ST. J., July 11, 1995, at A1 (reporting that disgruntled clients are now more willing to sue over "everything from soured real-estate deals to disappointing trial outcomes, post-trial judgments and appeals"); *see also* Ronald E. Mallen & Guy D. Calladine, *Legal Malpractice in the 21st Century*, TRIAL, May 1995, at 18 (reporting that many challenges are now being made to lawyers' judgment processes, which can adversely affect the way they practice).

181. ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 22 (1996).

182. *Cf.* Janis Reinken, Editorial, *Hardball Tactics Can Backfire & Leave You Uncovered*, LEGAL MALPRACTICE ADVISORY (Tex. Lawyers' Ins. Exch.) 1997, at 5 (discussing how engaging in questionable litigation tactics can leave an insured attorney in the precarious position of being sued by opposition for sanctionable conduct and left without coverage or defense under his or her professional liability policy).

### 1. Texas Tort Reform

If the number of lawyers in Texas continues to increase and tort reform continues to adversely affect plaintiffs' verdicts, lawyers in Texas will be forced to look to other potential defendants to maintain their income level. Although the 1970s saw a tort-reform movement that led to expanded liability and plaintiff-friendly legislative enactments, the more recent tort-reform movements have curtailed this atmosphere.[183] One commentator has even stated that "nowhere has this modern retreat from a pro-plaintiff atmosphere been more apparent than in Texas."[184]

As a result of those changes, plaintiffs' attorneys are already beginning to feel the impact on their pocketbooks.[185] As noted in a

183. *See* Timothy D. Howell, *So Long "Sweetheart"*—State Farm Fire & Casualty Co. v. Gandy *Swings the Pendulum Further to the Right As the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 52 (1997) (quoting William Prosser for the proposition that in the early 1970s, tort reform was based on enacting laws to assist plaintiffs in recovering, but contending that more recent changes have signaled a retreat from such position); *see also* Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. REV. 1207, 1214-15 (discussing changes in tort law that assisted plaintiffs in their efforts to recover in lawsuits); Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1766 (1996) (detailing movement in the 1960s toward plaintiff-friendly legislation).

184. Timothy D. Howell, *So Long "Sweetheart"*—State Farm Fire & Casualty Co. v. Gandy *Swings the Pendulum Further to the Right As the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 52 (1997); *see* Mary Flood, *Making Dollars and Sense to Insurers—More Personal Injury Cases End Up in Court Because of Tort Reform Outcry, Stingy Juries*, HOUS. CHRON., Mar. 30, 1997, at 4 (saying that Texas jurors, once famous for being pro-plaintiff and awarding large sums "have turned conservative and downright stingy"), *available in* 1997 WL 6548443.

185. *See* Timothy D. Howell, *So Long "Sweetheart"*—State Farm Fire & Casualty Co. v. Gandy *Swings the Pendulum Further to the Right As the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 57 (1997) (asserting that recent tort reform efforts have resulted in across the board cutbacks for plaintiffs in the tort system); Mary Flood, *Making Dollars and Sense to Insurers—More Personal Injury Cases End Up in Court Because of Tort Reform Outcry, Stingy Juries*, HOUS. CHRON., Mar. 30, 1997, at 4 (reporting that a less plaintiff-friendly atmosphere is being felt as part of the 1995 tort reform movement), *available in* 1997 WL 6548443; Mary Flood, *Plaintiffs Bar Takes a Financial Hit from Tort Reform, Survey Shows*, WALL ST. J., Dec. 10, 1997, at T1 (reporting that in a State Bar of Texas survey of more than 2,800 attorneys, almost one-third reported a decline in earnings over the last two years and over one-third saw a decline in their firm's profits). In the 1994 state legislative elections, tort reform was an issue at the forefront of many candidates' platforms. *See* Guy M. Hohmann & Gary N. Schumann, Texas Tort Reform Primer for Insurers 3 (1996) (unpublished manuscript, on file with the *St. Mary's Law Journal*) (detailing the history of Texas tort reform). As many members of the bar and the judiciary, as well as the public at large, became more informed about some of the abuses in the legal system, tort reform was all but a foregone conclusion. *See id.* For instance, in 1992 as a

recent *Wall Street Journal* article on Texas tort reform, "[a]s settlements shrink in personal-injury, medical-malpractice, environmental and other cases, lawyers representing plaintiffs are simply making less money."[186] One malpractice carrier further noted that in jurisdictions with no-fault auto insurance, legal work decreases and more malpractice claims are filed because lawyers begin suing each other in order to fill the void left in their practices.[187] Environmental lawyers, and other attorneys who practice in specialized areas of law, are also impacted by tort reform because the outcome of cases has become increasingly uncertain, therefore causing plaintiffs to question their respective attorney's ability.[188]

The impact of these changes on legal malpractice claims is not difficult to foresee. Past and ongoing tort-reform efforts have made plaintiffs' recoveries under various theories more difficult. Consequently, plaintiffs' attorneys may seek out other targets, such as attorneys, for lawsuits.

2. The Gradual Erosion of the Bad-Faith Cause of Action

Another factor that may lead to an increase in legal malpractice suits is the recent derogation of the bad-faith cause of action. Since the establishment of the common-law cause of action for breach of the duty of good faith and fair dealing, also called bad faith, in *Arnold v. National County Mutual Fire Insurance Co.*,[189] plaintiffs

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whole, Texas reported more $100 million-plus punitive damages cases than the rest of the states in the union combined. *See Business Leaders Lobby to Cut Punitive Damages*, DALLAS MORNING NEWS, Apr. 20, 1994, at 1A, *available in* 1994 WL 6862736.

186. *See* Mary Flood, *Plaintiffs Bar Takes a Financial Hit from Tort Reform, Survey Shows*, WALL ST. J., Dec. 10, 1997, at T1 (stating that according to plaintiffs' lawyers, the lower profit margin is a result of "tough tort-reform legislation and restrictive rulings by the Texas Supreme Court").

187. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 22 (1996) (noting that added competitive pressure has resulted in more malpractice claims against other lawyers, including doubtful claims).

188. *See* Mary Flood, *Plaintiffs Bar Takes a Financial Hit from Tort Reform, Survey Shows*, WALL ST. J., Dec. 10, 1997, at T3 (quoting Houston environmental lawyer Dennis Reich as stating that "[l]ots of lawyers are becoming unwilling to take on the challenge" of fronting such huge costs now that there is greater uncertainty as to the outcome of a case). However, unlike the complexity involved in environmental litigation, a legal malpractice claim is usually much simpler to pursue and can frequently be tried with a single expert. *See id.*

189. 725 S.W.2d 165 (Tex. 1987). The bad-faith cause of action arises out of the special relationship between the insurer and the insured, the parties' unequal bargaining power, and the nature of insurance contracts. *See id.* at 167. These factors allow for over-

and their attorneys have had a powerful tool against insurance companies that has often resulted in unusually large judgments.[190] In *State Farm Lloyds v. Nicolau,*[191] Justice Hecht of the Texas Supreme Court commented on how the law of bad faith developed over the years into a "gold mine" for plaintiffs and their attorneys:

> For plaintiffs, bad faith is . . . like Hollywood television's Wheel of Fortune, or closer to home, like the Texas lottery: it costs almost nothing to play, you can play whenever you want, and if you win you hit the jackpot—tens, maybe hundreds, of thousands of dollars for the awful mental anguish that invariably seems to accompany denial of even the smallest insurance claim, and millions in punitive damages.[192]

Of course, the supreme court never intended such a result when it established the bad-faith cause of action years ago.

Under the *Arnold* test, an insurer was liable for bad faith if it had "no reasonable basis" for denying or delaying payment of a claim *or* if it failed to determine whether there was any reasonable basis for the denial or delay.[193] However, this test simply led to too

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reaching, unscrupulous, and unequal power in the settlement or resolution of claims. *See id.* As established by *Arnold*, a cause of action for the breach of the duty of good faith and fair dealing is proper when the plaintiff alleges "that there is no reasonable basis for denial of a claim or delay in payment." *Id.*

190. *See* William S. Anderson, *Placing a Check on an Insured's Bad Faith Conduct: The Defense of "Comparative Bad Faith,"* 35 S. TEX. L. REV. 485, 486 (1994) (describing the proliferation of bad-faith lawsuits against insurers in recent years); Lee Shidlofksy, Comment, *The Changing Face of First-Party Bad Faith Claims in Texas*, 50 SMU L. REV. 867, 867 (1997) (asserting that "[d]uring the mid- to late-1980s, the judicial pendulum in Texas appeared to favor insureds, resulting in both a large quantity of claims and large recoveries for plaintiffs"). Suits for bad faith have been such a boon for plaintiffs' attorneys that Texas Supreme Court Justice Nathan L. Hecht was prompted to imply in his dissent in *State Farm Lloyds v. Nicolau* that every competent lawyer should include a claim for bad faith in its suit against an insurer. *See* State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 454 (Tex. 1997) (Hecht, J., dissenting). Justice Hecht stated, "Every lawsuit in Texas by an insured against an insurer almost always includes an allegation of bad faith—at least every one filed by a competent lawyer. Why? . . . [I]t is because the odds of recovery are always decent and the stakes—unlimited tort liability—are always high." *Id.*

191. 951 S.W.2d 444 (Tex. 1997).

192. *Nicolau*, 951 S.W.2d at 453-54 (Hecht, J., dissenting); *see also* William S. Anderson, *Placing a Check on an Insured's Bad Faith Conduct: The Defense of "Comparative Bad Faith,"* 35 S. TEX. L. REV. 485, 486 (1994) (discussing the fact that bad-faith claims are often very financially rewarding for plaintiffs).

193. *See* Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (discussing the elements necessary to state a cause of action for the breach of the duty of good faith and fair dealing).

many judgments in favor of plaintiffs, who found it easy to satisfy the test.[194] As a result, just one year after *Arnold*, the supreme court held that a bad-faith claimant "must establish the absence of a reasonable basis for denying or delaying payment of the benefits of the policy *and* that the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim."[195] This simple change in the wording of the test "set the stage for an effective dismantling of the bad faith cause of action."[196] This decision, however, was merely a precursor to further erosion of the bad-faith standard.

After years of confusion in the lower courts regarding bad faith,[197] the Texas Supreme Court attempted to clarify the bad-faith

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194. *See, e.g.*, St. Paul Guardian Ins. Co. v. Luker, 801 S.W.2d 614, 618 (Tex. App.—Texarkana 1990, no writ) (holding that a third-party beneficiary is owed the same duty of good faith and fair dealing by insurers as owed to the purchaser of the insurance); Allied Gen. Agency, Inc. v. Moody, 788 S.W.2d 601, 607 (Tex. App.—Dallas 1990, writ denied) (finding enough evidence to support the jury's finding of breach of good faith and fair dealing).

195. Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 213 (Tex. 1988). The court elaborated by stating that:

> The first element of this test requires an objective determination of whether a reasonable insurer under similar circumstances would have delayed or denied the claimant's benefits. The second element balances the right of an insurer to reject an invalid claim and the duty of the carrier to investigate and pay compensable claims. This element will be met by establishing that the carrier *actually knew* there was no reasonable basis to deny the claim or delay payment, or by establishing that the carrier, based on its duty to investigate, should have known that there was no reasonable basis for denial or delay. Under the test, carriers will maintain the right to deny invalid or questionable claims and will not be subject to liability for an erroneous denial of a claim.

*Id.* (emphasis added). The insurer's burden is further lightened in that once the insurer shows a reasonable basis upon which to deny a claim, its duty to investigate ceases. *See* Columbia Universal Life Ins. Co. v. Miles, 923 S.W.2d 803, 807 (Tex. App.—El Paso 1996, writ denied).

196. *Columbia*, 923 S.W.2d at 807; *see also* Southland Lloyds Ins. Co. v. Tomberlain, 919 S.W.2d 822, 833 (Tex. App.—Texarkana 1996, writ denied) (holding that to submit two elements and to require both to be satisfied by the plaintiff in order to recover was reversible error).

197. *See Columbia*, 923 S.W.2d at 808 (discussing the "divergence of opinion over the bad faith cause of action" in appellate courts); *see also* Lee Shidlofksy, Comment, *The Changing Face of First-Party Bad Faith Claims in Texas*, 50 SMU L. Rev. 867, 868 (1997) (reporting that Texas courts have "grappled with a host of issues that continue to plague the insurance law practitioner" in the bad-faith context). *Compare* State Farm Fire & Cas. Co. v. Simmons, 857 S.W.2d 126, 136-37 (Tex. App.—Beaumont 1993, writ granted) (rejecting the "bona fide dispute" rule and holding an insurer liable for mere negligence in investigating claim), *with* State Farm Lloyds, Inc. v. Polasek, 847 S.W.2d 279, 283-87 (Tex. App.—San Antonio 1992, writ denied) (discussing the good faith standard and holding that

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standard. In 1993, the court endeavored to state a workable test by holding that although an insured may provide evidence of coverage, no bad faith will exist unless the insurer unreasonably disregards such evidence.[198] Texas appellate courts, however, continued to struggle with the parameters of the bad-faith cause of action, causing the supreme court to acknowledge in 1997 that its previous attempts at clarification had failed.[199] Consequently, the court established a new bright line test for what constitutes bad faith; that test, according to the court in *United States Fire Insurance Co. v. Williams*,[200] provided that:

> An insurer does not breach its duty merely by erroneously denying a claim. Evidence that only shows a bona fide dispute about the insurer's liability on the contract does not rise to the level of bad faith. Thus, U.S. Fire was entitled to summary judgment if its summary

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an insurer's duty extends only so far as establishment of a bona fide dispute). Some courts have even held that when the record shows that the carrier possessed evidence reasonably indicating that the insured's claim might not be valid, there could be no bad faith. *See, e.g.*, *Luker*, 810 S.W.2d at 618; National Union Fire Ins. Co. v. Hudson Energy Co., 780 S.W.2d 417, 426 (Tex. App.—Texarkana 1989), *aff'd*, 811 S.W.2d 552 (Tex. 1991); Fuentes v. Texas Employers' Ins. Ass'n, 757 S.W.2d 31, 34 (Tex. App.—San Antonio 1988, no writ). Other courts have held that the threshold is whether there is "some evidence" that there was not a reasonable basis for denial of the claim. *See, e.g.*, Commonwealth Lloyds Ins. Co. v. Thomas, 825 S.W.2d 135, 144 (Tex. App.—Dallas 1992), *judgm't set aside by* 843 S.W.2d 486 (Tex. 1993); Automobile Ins. Co. v. Davila, 805 S.W.2d 897, 905-06 (Tex. App.—Corpus Christi 1991, writ denied).

198. *See* Lyons v. Millers Cas. Ins. Co., 866 S.W.2d 597, 600 (Tex. 1993) (stating that when reviewing a bad-faith claim, the evidence presented "must be such as to permit the logical inference that the insurer had no reasonable basis to delay or deny payment of the claim, and that it knew or should have known it had no reasonable basis for its actions").

199. *See* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 51 (Tex. 1997). The court defined the problem as follows:

> A plaintiff in a bad-faith case must prove the *absence* of a reasonable basis to deny the claim, a negative proposition. Yet, under our no-evidence standard of review, an appellate court must . . . draw all inferences in favor of a bad-faith finding.

*Id.* The court recognized that no judgment will ever be reversed for want of evidence because evidence of a reasonable basis will always be lacking. *See id.* The court established a new test, whereby an insurer will be liable if it knew or should have known that it was reasonably clear that the claim was covered. *See id.* at 55-56.

On the same day that the court issued its opinion in *Giles*, it also handed down *United States Fire Insurance Co. v. Williams*. In *Williams*, the court upheld the trial court's summary judgment in favor of the insurer and reiterated the standard for a bad-faith cause of action. *See* United States Fire Ins. Co. v. Williams, 955 S.W.2d 267, 268 (Tex. 1997). Thus, summary judgment would likely be proper upon submitting evidence that the insurer's basis for its position was "not legally groundless." *Id.* at 269.

200. 955 S.W.2d 267 (Tex. 1997).

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judgment proof established that there was no more than a good faith dispute . . . .[201]

Since its establishment in 1987, it appeared that bad faith would be the death knell for insurers.[202] However, Texas courts have continued to impose restrictions on the cause of action and now consistently uphold summary judgments in favor of defendants.[203] Likewise, courts are becoming more and more receptive to specific defenses, such as limitations,[204] res judicata,[205] lack of privity,[206] *Stowers*,[207] limitation of scope,[208] and lack of coverage,[209] asserted by insurers in efforts to escape bad-faith lawsuits. As the cause of

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201. *Id.* at 268 (citations omitted).

202. *See* Kenneth S. Abraham, *The Natural History of the Insurer's Liability for Bad Faith*, 72 TEX. L. REV. 1295, 1295 (1994) (stating that bad faith seemed to be expanding with no end in sight after numerous million dollar judgments in favor of insureds); Lee Shidlofksy, Comment, *The Changing Face of First-Party Bad Faith Claims in Texas*, 50 SMU L. REV. 867, 867 (1997) (reporting that during the mid- to late 1980s, nothing struck more fear in the hearts of insurance companies than the threat of bad-faith claims.).

203. *See, e.g.*, State Farm Fire & Cas. Co. v. Woods, 925 F. Supp. 1174, 1180 (E.D. Tex. 1996); Saunders v. Commonwealth Lloyds Ins. Co., 928 S.W.2d 322, 324 (Tex. App.—San Antonio 1996, no writ); Garrison Contractors, Inc. v. Liberty Mut. Ins. Co., 927 S.W.2d 296, 303 (Tex. App.—El Paso 1996), *aff'd*, 966 S.W.2d 482 (Tex. 1998); Two Pesos, Inc. v. Gulf Ins. Co, 901 S.W.2d 495, 499 (Tex. App.—Houston [14th Dist.] 1995, no writ); Ramirez v. Transcontinental Ins. Co., 881 S.W.2d 818, 821-22 (Tex. App.—Houston [14th Dist.] 1994, writ denied); Rogers v. Cigna Ins. Co., 881 S.W.2d 177, 186 (Tex. App.—Houston [1st Dist.] 1994, no writ); Packer v. Travelers Indem. Co., 881 S.W.2d 172, 176 (Tex. App.—Houston [1st Dist.] 1994, no writ). Undoubtedly, Texas' new "no evidence" summary judgment rule will also have an enormous impact on bad-faith cases in the future. *See* TEX. R. CIV. P. 166a (establishing the new "no evidence" summary judgment standard). *See generally* Robert W. Clore, Comment, *Texas Rule of Civil Procedure 166a(i): A New Weapon for Texas Defendants*, 29 ST. MARY'S L.J. 813 (1998) (analyzing Texas' new "no evidence" summary judgment standard).

204. *See, e.g.*, Merriman v. Security Ins. Co., 100 F.3d 1187, 1193 (5th Cir. 1996) (upholding the limitations defense by an insurer); Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 829 n.2 (Tex. 1990) (approving the notion that the limitations period is to be determined on a case-by-case basis in the absence of an outright denial of coverage).

205. *See* Patin v. Allied Signal, Inc., 77 F.3d 782, 789 (5th Cir. 1996) (holding that an employee's state court action against the carrier seeking compensation benefits had a res judicata effect, thereby precluding a claim for breach of the duty of good faith and fair dealing).

206. *See* Traver v. State Farm Mut. Auto Ins. Co., 930 S.W.2d 862, 870 (Tex. App.—Fort Worth 1996) (requiring privity between plaintiff and defendant in order for the bad-faith claim to proceed), *rev'd on other grounds*, 41 Tex. Sup. Ct. J. 1343, 1998 WL 531685 (Aug. 25, 1998) .

207. *See, e.g.*, Maryland v. Head, 938 S.W.2d 27, 27-29 (Tex. 1996) (holding that if a *Stowers* claim is available, a bad-faith cause of action will not be permitted); Dear v. Scottsdale Ins. Co., 947 S.W.2d 908, 914 (Tex. App.—Dallas 1997, writ denied) (refusing to allow a bad-faith claim when a *Stowers* claim was also available to plaintiff).

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action continues to erode, plaintiffs' lawyers will continue to realize that they must look elsewhere for judgment sources. Thus, although attorneys do not have the same "deep pockets" as insurance companies, the plaintiffs' bar will face difficulty identifying a class of defendants less judgment proof.

3. Article 4590i and Medical Malpractice Reform

An additional factor contributing to the decline in traditional sources of litigation awards is the reformation of medical malpractice law in Texas. In 1995, the Texas Legislature amended the Medical Liability and Insurance Improvement Act, which is contained in Article 4590i of the Texas Revised Civil Statutes and governs the bringing and administration of medical malpractice claims.[210] This new statute restricted the assignability of malpractice claims, imposed a cap on noneconomic damages at $500,000, and required plaintiffs to either submit an expert report within 90 days of filing suit or post a $5,000 bond, which if not done, could result in sanctions against the plaintiff.[211] The plaintiff's burden of proof was also increased to a "clear and convincing evidence" standard from the previous, more relaxed standard of "preponderance of the evidence."[212]

In its findings and purposes, the Texas Legislature recited that the new legislation was introduced in response to the "inordinate" increase in the number of health care liability claims since 1972.[213] The changes the statute sought to bring about were also attributable to the fact that "the amounts being paid out by insurers in judgments and settlements . . . have likewise increased inordinately in

208. *See, e.g., Garrison Contractors*, 927 S.W.2d at 302 (holding that the tort of bad faith relates only to issues involving payment of claims, and payment or calculation of premiums is not governed by the law of bad faith); Maintenance, Inc. v. Hartford Group, Inc., 895 S.W.2d 816, 818-19 (Tex. App.—Texarkana 1995, writ denied) (holding that there is no claim for a breach of the duty of good faith and fair dealing between the insurance agent and the insured).

209. *See* Republic Ins. Co. v. Stoker, 903 S.W.2d 338, 341 (Tex. 1995) (holding that even though the insurer's basis for denying the claim was incorrect, the fact that there were other reasons for denying claims precluded the insurer from being held liable for bad faith).

210. *See generally* TEX. REV. CIV. STAT ANN. art. 4590i (Vernon Supp. 1998).

211. *See id.* §§ 11.02, 13.01.

212. *See id.* § 13.02.

213. *See id.* § 1.02(a)(1).

the same short period of time."[214] According to the Legislature, this combination of factors created "defects in the . . . legal systems," leading it to specifically establish as one of the goals of the amendment the reduction of "excessive frequency and severity of health care liability claims . . . ."[215]

The individuals who are adversely affected by this goal-oriented legislation are plaintiffs' lawyers, who now face significant barriers to bringing, trying, and prevailing in medical malpractice claims.[216] One medical malpractice attorney who writes in this area went so far as to state that "Texas has chosen, by virtue of legislative action, to make it much more difficult for plaintiffs injured by medical malpractice to get to a courtroom than with any other injury."[217] In addition, during 1996, the first year in which the new laws applied, the number of medical malpractice claims in Texas' most populous county, Harris County, plunged 36% from the previous year.[218]

Thus, due in part to the medical malpractice reform of 1995, plaintiffs' lawyers have had to look elsewhere for sources of litigation awards.[219] The disappearance of the traditional sources of litigation awards through tort reform, the erosion of the bad-faith

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214. *Id.* § 1.02(a)(3).

215. *Id.* §§ 1.02(a)(11), (13)(b)(1).

216. *See* Charles B. Camp, *Texas House OKs Malpractice Tort Reform; Bill Makes It Expensive to File Meritless Medical Suits*, DALLAS MORNING NEWS, Apr. 13, 1995, at 1D (discussing medical malpractice reform and the resulting difficulty for plaintiffs), *available in* 1995 WL 7486118; Mary Flood, *HMO Rules Haven't Led to Many Suits*, WALL ST. J., Oct. 1, 1997, at T1 (reporting that experts in the field have stated that the Texas medical malpractice landscape is "decidedly less friendly to patients since the 1995 tort reforms"); *cf.* Troy L. Cady, *Disadvantaging the Disadvantaged: The Discriminatory Effects of Punitive Damage Caps*, 25 HOFSTRA L. REV. 1005, 1026 n.107 (1997) (noting Texas' "substantive tort reform laws" in areas such as medical malpractice); Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2585 (1996) (discussing the origins of tort reform and the need to limit exorbitant jury awards in the medical malpractice area).

217. Mary Flood, *Doctors and Their Insurers Begin to Feel Comforts of Tort Changes*, WALL ST. J., May 7, 1997, at T1 (quoting Jim Perdue, Sr., of Houston, Texas, regarding the results of medical malpractice tort reform).

218. *See id.* (reporting that the number of medical malpractice cases dropped by 36% in Harris county).

219. *See id.* (reporting the success of tort reform efforts in the area of medical malpractice in Texas); Sandy Lutz, *Texas Tort Reform to Roll Back Premiums*, MODERN HEALTHCARE, Nov. 13, 1995, at 3 (discussing how insurers have lowered medical malpractice premiums in Texas by 13% because of the certainty of reduction of medical malpractice lawsuits), *available in* 1995 WL 2496806; Kimberly Reeves, *Need for Tort Reform Hits*

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cause of action, and recent legislation restricting medical malpractice claims is likely to foster an increase in legal malpractice claims. However, these factors are not the only indicators of such a trend.

### C. *The Dramatic Increase in New and Inexperienced Attorneys*

In addition to the factors described above, continuing increases in the number of attorneys entering the profession may further contribute to a rising number of legal malpractice claims. Statistics indicate that a new lawyer is likely to be subject to as many as three malpractice claims before leaving the profession.[220] Moreover, from 1990 to 1995, the errors alleged against attorneys most frequently involved the failure to know or properly apply the law, planning errors, inadequate discovery and investigation, failure to obtain consent, and procrastination in performance.[221] Such errors are likely made by new, inexperienced attorneys and are the types of errors that proper mentoring can help to alleviate.[222] Further,

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*Home with Frustrated Houston Realtors*, HOUS. BUS. J., May 9, 1994 (discussing problems caused by tort reform), *available in* 1994 WL 4163831.

220. *See* CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 3 (2d ed. 1997) (citing recent State Bar of Texas surveys that showed that 48 percent of attorneys or firms responding to a survey had been subjected to legal malpractice claims); *see also* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 1.6, at 19 (3d ed. 1989) (stating that although there is definitely an increased risk of attorneys being subject to malpractice suits, this risk must be judged against the general rise in levels of litigation in other areas); Manuel R. Ramos, *Legal Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 926 (1996) (quoting Jeffrey B. Albert, Chair of the Pennsylvania Bar Association's Professional Liability Committee, who stated that "a lawyer can anticipate facing the prospect of four or five claims on the average during a professional career rather than the one or two predicted in the ABA studies"); Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2617 (1996) (stating that lawyers in private practice have a twenty percent chance each year of facing a malpractice claim).

221. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 13 (1996) (charting the biggest alleged errors in a five-year period). The American Bar Association found in a 1986 study that malpractice claims occur in five broad categories: 53% litigation, 21% preparation of documents, 11% advice, 5% title opinions, and 10% "other." *See* Karen Wagner, *More Lawyers Being Sued for Malpractice: Suing the Client for Fees Is a Common Trigger*, ILL. LEGAL TIMES, June 1996, at 1. A 1992 St. Paul Insurance Company study found that of legal malpractice claims filed with the company between 1987 and 1991, the breakdown was as follows: 47% substantive, 20% administrative, 18% client relations, 14% intentional wrongs, and 1% "other." *See id.*

222. *See* DUKE NORDLINGER STERN & JO ANN FELIX-RETZE, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE 21 (1983) (asserting that the threshold issue for preventing malpractice in law firms is to educate attorneys about their malpractice risks). For a new lawyer just entering the profession and not having as much experience in "keep-

malpractice insurers contend that less supervision directly affects the susceptibility of lawyers to legal malpractice claims.[223] As noted by the ABA Standing Committee on Lawyer's Professional Liability,

> Most insurers have noticed that many young lawyers cannot find jobs with established firms, and so are starting their own practices without supervision or mentoring. This is likely to cause an increase in malpractice claims, although the claims may be relatively small in size due to the limited nature of a new lawyer's practice.[224]

Additionally, solo practitioners generally are more susceptible to malpractice claims due to a lack of mentoring.[225] Customarily, junior lawyers learn more from the informal mentoring of senior attorneys than from organized or formal training.[226] However, new attorneys without sufficient resources and start-up capital are more likely to participate in various types of office-sharing arrangements. These arrangements, as malpractice carriers have observed, produce an increase in claims due to problems such as conflicts of interests and vicarious liability.[227]

The overabundance of lawyers has also created economic pressures, which inevitably generate more legal malpractice lawsuits.[228]

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ing up" with changes in the law, rapid changes can create huge risks. *See* CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 3-4 (2d ed. 1997) (discussing major changes in disciplinary and procedural rules in Texas that damage the "professional health and welfare of Texas lawyers").

223. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 23 (1996) (detailing how downsizing in many firms means less intra-law firm supervision and greater individual responsibility). Further, "[s]ome insurers are worried that economic pressures will cause lawyers to over-economize and cut corners on cases, take on unsuitable clients, and delegate too much responsibility to unsupervised associates." *Id.*

224. *Id.* at 24.

225. *See id.*

226. *See* Manuel R. Ramos, *Legal Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 885-86 (1996) (lamenting the sink-or-swim mentality that law schools and firms take with new lawyers and calling for better practical education); Jett Hanna, *Avoiding Malpractice Claims: The Best Defense, Part II*, AUSTIN LAW., Fall 1997, at 19 (showing how effective training of young attorneys can result in fewer malpractice claims).

227. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 22 (1996).

228. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2.1, at 36 (3d ed. 1989) (citing factors that have led to increased pressures for attorneys such as deregulation, changes in the law, and increased competition).

In the State Bar of Texas 1997 Attorney Economic Survey, over half of the respondents reported that they had to compete for clients in the past two years.[229] Greater than half of the solo practitioners also reported that they have been low on work.[230] According to statistics provided by the State Bar Research and Analysis Department, in the last 20 years the number of lawyers in Texas has more than doubled.[231] In 1976, there were 27,855 lawyers in Texas; in 1996, there were 61,638 lawyers.[232] However, during this same time, Texas' general population grew by only fifty percent.[233] Put simply, malpractice claims have increased in part because the profession itself has become too competitive, forcing lawyers to take cases they should not take or that they are unable to effectively handle.[234]

### D. *The Inevitable Decline of the Texas Economy*

The inevitable decline of Texas' booming economy is yet another component to the likely increase in legal malpractice claims. Malpractice insurers have noticed that claims against attorneys reflect the strength of the economy.[235] In other words, an increased number of claims against attorneys follow economic downturns. However, Texas' economy during recent years has been experienc-

229. *See* Mary Flood, *Plaintiffs Bar Takes a Financial Hit from Tort Reform, Survey Shows*, WALL ST. J., Dec. 10, 1997, at T3.

230. *See* Karen Wagner, *More Lawyers Being Sued for Malpractice: Suing the Client for Fees Is a Common Trigger*, ILL. LEGAL TIMES, June 1996, at 1 (quoting Michael J. Rovell, Chicago attorney, as stating that the transformation of the profession is due in part to attorneys "scrambling for work").

231. *See Texas' Lawyer Population Doubles*, 60 TEX. B.J. 853, 853 (1997).

232. *See id.*; *see also* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2.1, at 36 (3d ed. 1989) (reporting the increase in the number of attorneys nationwide between 1950 and 1984 from one attorney for every 696 people in 1950 to one attorney for every 363 people in 1984); David Segal, *Lawyer vs. Lawyer: The Quiet Bar Fight—Malpractice Suits Grow, but out of Public Eye*, WASH. POST, Mar. 18, 1997, at D1 (reporting an increase from 542,000 attorneys in the United States in 1980, to 896,000 by 1996), *available in* 1997 WL 10007935.

233. See *Texas' Lawyer Population Doubles*, 60 TEX. B.J. 853, 853 (1997).

234. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1683 (1994) (quoting Chris Coley, president of an association comprised of lawyer-owned legal malpractice insurance companies, as stating that "malpractice claims have increased in part because attorneys are taking on too many cases").

235. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 20 (1996) (stating that "[c]laims against lawyers appear to be a lagging indicator of the economy").

ing an unprecedented period of growth.[236] In fact, economic growth in Texas in 1997 was the third highest in the last nine years.[237] Past trends suggest that when the economy slows, a greater number of claims will be filed against attorneys.[238]

Malpractice carriers have further observed that stable or increasing real estate values result in fewer claims against attorneys.[239] Conversely, when real estate values drop, more attorneys find themselves subject to a lawsuit.[240] During the 1990s, the Texas real estate market has been extremely positive.[241] However, when the

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236. *See id.* (announcing that "if a serious recession hits a particular state or region, insurers can expect to see an increase in both frequency and severity of claims against lawyers in the following years").

237. *See* Maria Halkias, *Strong Job Growth Forecast for Texas, Gain of 868,000 by 2001*, DALLAS MORNING NEWS, May 23, 1997, at 1D (reporting that in 1996, Texas' economy added 219,400 jobs, reflecting a growth rate of 2.7%, compared to a nationwide growth rate of 2.1%), *available in* 1997 WL 2671497; Jane Seaberry, *Tough Act to Follow: Texas Economy Turns in Terrific Year, Confounding Experts with Its Strength*, DALLAS MORNING NEWS, Dec. 17, 1997, at 1D (reporting that instead of slowing down this year, as experts had predicted, the Texas economy "took off at a gallop"), *available in* 1997 WL 16184829.

238. *See* Phil Britt, *The Texas Recovery*, AMERICA'S COMMUNITY BANKER, Feb. 1, 1996, at 18 (describing the cyclical nature of the Texas economy that saw "explosive growth in the 1970s" that turned into "the glut of the 1980s"), *available in* 1996 WL 9405487; Tom R. Rex, *Peak Population Growth Likely in 1995*, ARIZ. BUS. J., Feb. 1, 1995, at 1 (describing "[t]he boom and subsequent crash of the Texas economy in the 1980s" as one example of how economic development in one state can affect other states), *available in* 1995 WL 8416501; Jane Seaberry, *Tough Act to Follow: Texas Economy Turns in Terrific Year, Confounding Experts with Its Strength*, DALLAS MORNING NEWS, Dec. 17, 1997, at 1D (reporting that economists last year figured that Texas' economic growth would be slowed by expected slowing in the national economy and fears of inflation), *available in* 1997 WL 16184829; *Texas Jobless Rate Up 0.7%*, SAN ANTONIO EXPRESS-NEWS, Sept. 2, 1995, at 1C (quoting Bill Luker, chief regional economist with the U.S. Bureau of Labor Statistics in Dallas, as stating, "It's very hard to determine where things are going in Texas . . . . There's a lot of different forces moving in different directions" and reporting on how growth industries reflect "the seesaw nature of the Texas economy"); *cf. Virgin Redwood Stand Threatened As Owner, Federal Officials Negotiate*, SACRAMENTO BEE, Aug. 27, 1996, at B5 (quoting Bob Irelan, president of a Houston-based company, who stated that "savings and loans failed 'because of the precipitous decline of the Texas economy' "), *available in* 1996 WL 3313472.

239. *See* ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 22 (1996) (discussing trends in the area of real estate in the 1980s and early 1990s that likely resulted in adverse claims against attorneys).

240. *See id.*

241. *See* Phil Britt, *The Texas Recovery*, AMERICA'S COMMUNITY BANKER, Feb. 1, 1996, at 18 (describing the higher demand for commercial and residential real estate in the 1990s), *available in* 1996 WL 9405487; Maria Halkias, *Strong Job Growth Forecast for*

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real estate cycle eventually takes a downturn, resulting in decreasing real estate prices, lawsuits against attorneys are likely to follow.

All of the factors discussed above, including the eventual economic downturn, the disintegration of lawyer-to-lawyer relationships, the reduction of traditional litigation award sources, and the increasing number of inexperienced attorneys, indicate that a wave of legal malpractice litigation is forthcoming in Texas. As such, the time is ripe to take action in order to prevent an ensuing malpractice crisis.

## V. Proposals for Responding to the Impending Wave of Legal Malpractice Litigation

The success of plaintiffs' attorneys in Texas and the accompanying huge jury verdicts were the primary catalysts for tort reform in Texas in the mid-1990s.[242] Ralph Wayne, president of the Texas Civil Justice League and one of the individuals primarily responsible for Texas' tort-reform movement, was quoted in the *Wall Street Journal* as stating that "[t]rial lawyers who turned lawsuits into such profit centers for themselves caused tort reform and brought these changes on themselves."[243] Today, rather than waiting for

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*Texas: Gain of 868,000 by 2001*, DALLAS MORNING NEWS, May 23, 1997, at 1D (discussing the construction boom of the 1990s), *available in* 1997 WL 2671497.

242. *See* Mary Flood, *Plaintiffs Bar Takes a Financial Hit from Tort Reform, Survey Shows*, WALL ST. J., Dec. 10, 1997, at T1 (detailing how plaintiffs' lawyers have been affected by tort reform and the fact that defense attorneys and consumer group representatives have "no regrets" over how tort reform has adversely affected the plaintiffs' bar); Robert G. Knowles, *Texas Lawmakers Approve Five Tort Reform Measures*, NAT'L UNDERWRITER PROP. & CAS.-RISK & BENEFITS MGMT., May 22, 1995, at 2 (reporting how the public's perception that the legal system had broken down prompted Governor Bush to promise voters to secure tort reform), *available in* 1995 WL 8435266; *see also* Guy M. Hohmann & Gary N. Schumann, Tort Reform Primer for Insurers 3-4 (1996) (unpublished manuscript, on file with the *St. Mary's Law Journal*) (discussing factors that led to the passage of Texas tort reform).

243. Mary Flood, *Plaintiffs Bar Takes a Financial Hit from Tort Reform, Survey Shows*, WALL ST. J., Dec. 10, 1997, at T1; *see also* Mary Flood, *Making Dollars and Sense to Insurers—More Personal Injury Cases End Up in Court Because of Tort Reform Outcry, Stingy Juries*, HOUS. CHRON., Mar. 30, 1997, at 4 (detailing how Texas jurors are beginning to rebel against plaintiffs' attorneys seeking huge amounts of damages because of the recent trend of excessive jury awards), *available in* 1997 WL 6548443. Many citizens perceived Texas as the "queen of torts," which produced a deleterious effect on business and industry in the state. *See* Michael Totty, *Beaumont's Heavy Caseload Fuels Both Sides in Tort Reform Debate*, WALL ST. J., Feb. 1, 1995, at T1 (stating that Texas juries had traditionally been pro-plaintiff and large damage awards had made Texas a "magnet" for litigation, undermining the state's economy); Bernard Weinstein, Editorial, *Tort Tax Lifts Big*

plaintiffs' lawyers to turn legal malpractice cases into their new "profit centers," the Legislature and the courts should act and steady the swinging pendulum.

The primary vehicle for effectuating such change is the legislation proposed below. In addition to this legislation, certain secondary measures, such as decreasing the number of new attorneys, should also be taken in order to ensure any success in preventing the coming malpractice crisis.

### A. *Legislation*

Presently, no legislation is specifically designed to govern legal malpractice lawsuits in Texas. In contrast, other professionals, such as physicians, have successfully lobbied for legislation specifically formulated to decrease claims against them.[244] In many respects, the lobbying efforts of the medical profession should be emulated by the bar.

Most recently, lobbyists for medical practitioners submitted House Bill (HB) 971, which was ultimately enacted as part of The Medical Liability and Insurance Improvement Act.[245] In a bill analysis of HB 971, the House Civil Practices Committee made a statement that could easily apply to lawyers seeking relief from malpractice litigation:

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*Bucks from Texans' Wallets*, FORT WORTH STAR-TELEGRAM, Dec. 19, 1992, at 31 (characterizing Texas as the nation's litigation capitol and describing the "significant costs" to families and businesses in Texas each year), *available in* 1992 WL 10823739.

244. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 (Vernon Supp. 1998) (detailing the Legislature's findings that health care liability claims against doctors had increased inordinately, which adversely affected medical malpractice insurance rates for doctors and created a medical malpractice "crisis"); Brian McCormick, *Senate Showdown Looms; Medicine Wary, but Optimistic of Another Tort Reform Victory*, AM. MED. NEWS, Apr. 17, 1995, at 1 (discussing medical malpractice reforms supported by doctors and their lobbyists at the national level), *available in* 1995 WL 10008729; Ken Ortolon, *TMA Gets Ready to Tackle Medical Liability Issues in '97*, HOUS. BUS. J., June 28, 1996 (discussing tort reform measures enacted in 1995 in the medical malpractice area and continued efforts to effectuate change in 1997), *available in* 1996 WL 7818907; Juan R. Palomo, Editorial, *The Tort 'Reformers' Don't Really Care About You*, HOUS. POST., Jan. 16, 1995, at A17 (complaining how medical malpractice reform in 1995 was fueled by "[t]he doctors and corporations and their expensive lobbyists [who] are spreading big lie[s]"), *available in* 1995 WL 10274077.

245. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01 (Vernon Supp. 1998) (containing procedural provisions for the medical malpractice statute, including cost bond, deposit, and expert report provisions).

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> The high costs associated with defending medical liability claims have led to an increase in malpractice insurance premiums, difficult physician recruitment in medically underserved areas and an incentive for defendants to settle suits early. These costs can be attributed to a rise in non-meritorious claims and a lack of controls in the Medical Liability and Insurance Improvement Act. Medical Liability lawsuits are often frivolous because proof of medical corroborations by expert witnesses is not required until 90 days after a claim is filed, though defendants do not have access to this information under the discovery process.[246]

Just as the costs of medical malpractice were passed on to consumers, some commentators have noted that "it is almost certain that the costs associated with avoiding or defending such suits (e.g., malpractice premiums or expending attorney time to document client contacts so as to avoid fee disputes) are being passed on to legal consumers."[247]

Accordingly, attorneys, like doctors and other professionals, should lobby for legislation that creates a threshold requirement, which must be met before suit can be brought, and which provides for particular defenses unavailable to the public at large.[248] Essentially, the Texas Legislature should codify various legal malpractice common-law doctrines and enact additional legislation to govern suits against lawyers. However, before attorneys can expect the Legislature to pass laws that the public might perceive as providing the bar special immunities or privileges from suit, attorneys must demonstrate that an immediate public benefit will be served by such legislation. Accordingly, the following proposed addition to

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246. CIVIL PRACS. COMM., BILL ANALYSIS, Tex. H.B. 971, 74th Leg., R.S. (1995).

247. Thomas E. Zehnle, *Study Finds Legal Malpractice Claims on the Rise: Lawyers Suing Lawyers More Commonplace*, LITIG. NEWS (American Bar Assn., Chicago, Ill.) Sept. 1997, at 4.

248. *Cf. Hearing on Tex. S.B. 28 Before the Senate Econ. Dev. Comm.*, 74th Leg., R.S. 3 (Feb. 28, 1995) (statement of Bob Owen, president of the Texas Society of Certified Public Accountants) (urging the committee to adopt tort reform measures such as proportionate liability) (copy on file with the *St. Mary's Law Journal*); John Carlson, *Unreasonable Claims Fuel Clamor for Legal Reform*, SEATTLE TIMES, May 9, 1995, at B4 (illustrating small business owners' desire to reform the tort system and referring to a San Antonio businessman who had to settle a frivolous lawsuit for $6,000), *available in* 1995 WL 5021345; Kimberly Reeves, *Need for Tort Reform Hits Home with Frustrated Houston Realtors*, HOUS. BUS. J., May 9, 1994 (discussing realtors' efforts to form a coalition with other professions, such as general contractors and engineers, to bring about tort reform), *available in* 1994 WL 4163831.

the Texas Civil Practices and Remedies Code is designed to accomplish the goal of creating additional protection for attorneys from frivolous lawsuits, while dealing more severely with attorneys who are truly abusing their positions of trust.

This proposed addition to the Texas Civil Practices & Remedies Code would be codified under Title 4, Liability in Tort. A new chapter would be added entitled "Suits Against Attorneys." In summary, this statute would accomplish the following:

1. Codify the privity requirement for suits against attorneys;[249]
2. Codify the non-assignability of claims against attorneys;[250]
3. Create a cost bond procedure whereby a preliminary hearing would be conducted, allowing the court to determine whether the malpractice claim could continue absent the filing of a bond;[251]
4. Require the presiding judge at a preliminary hearing to issue a report to the State Bar Grievance Committee if it appears that the attorney has violated any of the State Bar Rules of Disciplinary Conduct;[252]

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249. *Cf.* Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996) (affirming the requirement that privity must exist between an attorney and a plaintiff in order for the plaintiff to proceed in a malpractice claim against the attorney). *But cf.* F.E. Appling Interests v. McCamish, Martin, Brown & Loeffler, 953 S.W.2d 405, 409 (Tex. App.—Texarkana 1997, pet. granted) (appearing to ignore the *Barcelo* holding by ruling that a cause of action may be maintained against an attorney for negligent misrepresentation in the absence of privity between a plaintiff and an attorney). The fact that the Texas courts seem to be chipping away at the privity requirement in certain contexts, coupled with the fact that the national trend is towards abrogating the privity requirement as a common-law doctrine, underscores the need for the codification of the privity requirement to solidify its role in Texas jurisprudence.

250. *Cf.* Vinson & Elkins v. Moran, 946 S.W.2d 381, 389 (Tex. App.—Houston [14th Dist.] 1997, pet. dism'd by agr.) (holding that legal malpractice claims are not assignable in Texas).

251. *Cf.* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(a)(i) (Vernon Supp. 1998) (requiring the filing of a separate cost bond of $5,000 for each physician or health care provider named as defendant in a medical malpractice suit).

252. *See* TEX. GOV'T CODE ANN. § 81.076 (Vernon 1998) (governing the grievance committee for discipline against Texas attorneys); *cf.* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.03(a) (requiring a lawyer who knows that another lawyer has committed a violation of the applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, to inform the appropriate disciplinary authority), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 1998). Our proposal streamlines this process by vesting the judge with the discretion to determine whether a disciplinary rule has been violated, and if so, empowers the judge to forward the matter to the appropriate disciplinary authorities. This system is more efficient because a judge will not harbor the same fears of turning in a colleague as would another practicing attorney.

5. Prohibit punitive damage awards against attorneys in light of increased judicial oversight described in item 4 above;[253] and
6. Require courts to use a motion practice to determine damage issues that arise during underlying litigation.[254]

The above proposals are optimistic in scope. However, if only a few of these provisions are enacted as legislation, the legal profession will be able to handle any potential increase in legal malpractice litigation in a more reasonable fashion, thus stemming the tide before the number of legal malpractice claims reaches an unworkable level.

The following discussion lays out the specific parameters and operation requirements for the proposed legislation. These parameters are designed to reduce the likelihood of an increase in legal malpractice litigation. However, these requirements are also designed to permit meritorious legal malpractice claims to go forward and receive the judicial time, effort, and resources they deserve.

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253. *Cf.* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble (stating that "[t]he Supreme Court of Texas has the constitutional and statutory responsibility . . . to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline and disability"); *id.* 1.02 (stating "[t]hese rules establish the procedures to be used in the professional disciplinary and disability system for attorneys in the State of Texas"). The Rules of Disciplinary Procedure provide a mechanism for disciplining lawyers for misconduct. *See* NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 21 (1996). Sanctions for misbehavior by a licensed attorney include disbarment, suspension, and publication of the disciplinary results in the *Texas Bar Journal*. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 6.07, 8.05, 8.06. The purpose of punitive damages is very similar to that of the Disciplinary Rules; punitive damages are imposed to punish and deter. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon 1998) (defining "exemplary damages" as "any damages awarded as a penalty or by way of punishment. 'Exemplary damages' includes punitive damages"); Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 40 (Tex. 1998) (stating that "the purpose of punitive damages is to punish a party for its 'outrageous, malicious, or otherwise morally culpable conduct' and to deter it and others from committing the same or similar acts in the future"); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 16-17 (Tex. 1994) (arguing that "punitive (or exemplary) damages are levied against a defendant to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct"); David Ira Rosenbaum, *Punitive Damages in Professional Malpractice Cases*, 61 TEMP. L. REV. 1431, 1436 (1988) (outlining the underlying purposes of punitive damages). By imposing punitive damages upon an attorney who has already been disciplined under the Disciplinary Rules, that attorney would be subject to being punished twice.

254. *Cf., e.g.*, TEX. R. CIV. P. 166a (allowing for a motion for summary judgment); TEX. R. CIV. P. 169 (permitting a party to serve upon another party a written request for admission of the truth of certain matters); TEX. R. CIV. P. 320 (admitting a motion for new trial to set aside a judgment).

### 1. Definitions and Applicability

The definitions section of this Chapter would define attorneys to include all members of the State Bar of Texas[255] or members of the bar of any other state who have been admitted to practice *pro hac vice*[256] in Texas. Law students who have been granted their provisional licenses to practice law pursuant to Section 81.102 of the Texas Government Code would also be included.[257] For the purposes of the proposed statute, attorneys would also include "representatives of the lawyer" such as paralegals, secretarial staff, and law clerks. A guide to drafting the definition section of the statute could be Texas Rule of Evidence 503, which defines the category of persons subject to the lawyer-client privilege.[258] In short, any person who would be considered an attorney for the purposes of invoking the attorney-client privilege would also be entitled to the benefits of the proposed statute.[259]

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255. *See* TEX. GOV'T CODE ANN. § 81.052 (Vernon 1988) (detailing membership classes of the state bar).

256. *See* Nationalist Movement v. City of Cumming, 913 F.2d 885, 894 (11th Cir. 1990) (stating that an out-of-district lawyer may apply for permission to appear *pro hac vice*, which means "for this one occasion"). Federal courts may set reasonable standards for *pro hac vice* admission. *See* Zambrano v. City of Tustin, 885 F.2d 1473, 1482-83 (9th Cir. 1989) (explaining that because federal courts have an interest in maintaining standards, courts may determine requests for admission to practice). Section 81.102 of the Texas Government Code, governing admission to practice in state courts, states that "the supreme court may promulgate rules prescribing the procedure for limited practice of law by . . . attorneys licensed in another jurisdiction." TEX. GOV'T CODE ANN. § 81.102 (Vernon 1988); *see also* Commercial Credit & Control Data Corp. v. Wheeler, 756 S.W.2d 769, 770 (Tex. App.—Corpus Christi 1988, writ denied) (detailing the process by which an out-of-state lawyer can move to practice before a Texas state court by submitting a sworn motion requesting *pro hac vice* admission).

257. *See* TEX. GOV'T CODE ANN. § 81.052 (Vernon 1988) (detailing the rules for allowing the limited practice by law students attending accredited law schools).

258. *See* TEX. R. EVID. 503(a)(4) (stating that "[a] 'representative of the lawyer' is (A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or (B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services").

259. *See* TEX. R. EVID. 503(c). The rule provides, in the section entitled "Who May Claim the Privilege," that:

> The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

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In addition, the statute would serve as the explicit vehicle and remedy for malpractice. The statute would also explicitly require that those bringing suit be in privity with the attorney.[260] Therefore, all lawsuits must be brought through the statute, and those parties not in privity would be prevented from circumventing the statute. The statute would also prohibit the assignability of claims brought pursuant to its statutory requirements.[261]

2. Show-Cause Hearing

In addition, the proposed statute would contain a procedural provision patterned after the requirements for posting bonds in suits against physicians found in Article 4590i, subchapter M of the Texas Revised Civil Statutes.[262] However, unlike the medical malpractice statute, the proposed statute would not allow plaintiffs to bring suit simply by posting a bond. Instead, a preliminary hearing would be required within twenty days after the defendant files an answer in all lawsuits alleging claims for legal malpractice. At the preliminary hearing, the plaintiff would have the burden of demonstrating a prima facie case of legal malpractice. Such showing would require some evidence in the form of affidavits or live testi-

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*Id.* "Client" is defined as "a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer." TEX. R. EVID. 503(a)(1). A "representative of the client" is defined as "a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client." TEX. R. EVID. 503(a)(2)(A). The definition of "representative of the client" in the rule also adopts the subject matter test. As the Texas Supreme Court noted:

> Courts applying this test generally protect only statements made by the upper echelon of corporate management . . . . The control group test reflects the distinction between the corporate entity and the individual employee and is based on the premise that only an employee who controls the actions of the corporation can personify the corporation.

National Tank Co. v. Brotherton, 851 S.W.2d 193, 197 (Tex. 1993).

260. *Cf.* Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996) (reaffirming the privity requirement needed to bring a legal malpractice suit against an attorney).

261. *Cf.* Vinson & Elkins v. Moran, 946 S.W.2d 381, 389 (Tex. App.—Houston [14th Dist.] 1997, pet. dism'd by agr.) (holding that legal malpractice claims are not assignable in Texas).

262. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(a)(i) (Vernon Supp. 1998) (requiring the posting of a bond of $5,000 by the plaintiff in a medical malpractice suit for each doctor or health care provider in order to proceed with the suit).

mony to establish a prima facie case demonstrating each of the following elements:

(1) that the defendant attorney in the malpractice claim breached a duty owed to the plaintiff,
(2) that such breach proximately caused the plaintiff damages, and
(3) that the defendant attorney has no meritorious defenses.

If the court finds that the plaintiff failed to meet his burden at the show cause hearing, the plaintiff would then have twenty days in which to file a nonsuit or post a bond before proceeding with the case. The bond would be an amount set within the discretion of the court. In setting the bond, the court would take into account the ability of the plaintiff to post the bond, the expected defense costs and expert fees if the case were to continue, and the relative strengths and weaknesses of the plaintiff's evidence presented at the show cause hearing.

If a bond is posted and the case proceeds, the attorney-defendant would be allowed to make an offer of judgment similar to the procedure outlined in Federal Rule of Civil Procedure 68.[263] If the court requires the plaintiff to post a bond and the plaintiff does not obtain an award for actual damages greater than the offer of judgment, court costs and the attorney fees of the defendant attorney

263. *See* FED. R. CIV. P. 68 (reciting the rule regarding offers of judgment in federal trials). The rule reads:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

*Id.*

would then be forfeited from the bond.[264] This mechanism would act as a great damper against frivolous lawsuits, lawsuits brought solely for negotiating purposes, and lawsuits brought for the sole purpose of challenging claims for unpaid legal fees.

Another important component of the show cause hearing would be a statutory requirement compelling the court to provide a written report to the State Bar Grievance Committee in a form promulgated by the bar. The form would contain the judge's preliminary determination as to whether it appeared that the attorney's conduct merits further review by the grievance committee. This reporting requirement would be independent of the malpractice action, and the judge's report and the grievance committee's actions could not be placed into evidence at trial.

The reporting requirement should be an essential part of any legislation that seeks to place restraints on the bringing of malpractice actions. Without such a provision, the public is likely to perceive the legislation as constituting merely an "attorney-protection" statute. However, the public should understand that many malpractice lawsuits are currently settled quietly by insurance carriers without the bar grievance committee having any knowledge of the attorney's malfeasance. As a result, the guilty attorney is able to continue committing further acts of malpractice. In contrast, the proposed system would automatically subject attorneys who are being sued in legal malpractice actions to grievance proceedings. The public, thus, would be better served by a system that effectively results in the potential for license revocation each time a meritorious malpractice claim is brought, rather than a simple insurance settlement.

3. Punitive Damages

The proposed statute would also contain a provision exempting attorneys from Chapter 41 of the Texas Civil Practice and Reme-

264. *Cf. id.* (requiring the party who rejects the offer of judgment and who receives a judgment smaller than offer to pay costs of the offeror); Sheppard v. Riverview Nursing Ctr., Inc., 88 F.3d 1332, 1337 (4th Cir. 1996) (stating that whether attorneys' fees fall within the category of costs subject to Rule 68 "depends upon the precise language of the statute providing for the fee award") (citation omitted). Obviously, the new statute would include attorneys' fees within a malpractice award.

dies Code that allows for the imposition of punitive damages.[265] Specifically, the proposed legislation would provide that claims against attorneys could not give rise to punitive damage awards. The rationale for exempting attorneys from punitive damages is founded upon the rationale for awarding punitive damages in the first place. Punitive damages are intended to punish and protect the public from similar future conduct.[266] However, this rationale is already addressed by the provision in the proposed statute that requires reporting of lawyer malpractice. Another mechanism, such as the awarding of punitive damages, is not necessary to adequately deter similar future conduct by attorneys.

Under the proposed procedure, judges would be required to report attorney malfeasance to the State Bar Grievance Committee as part of the show-cause hearing. The State Bar Grievance Committee, familiar with the disciplinary rules and ethical obligations of attorneys, is in a much better position than a jury to formulate the appropriate penalty for the attorney's conduct. Further, because grievance committee actions, with the exception of private reprimands, are publicly reported, an "example" is truly set. Punitive damage awards awarded by juries, by contrast, are often unreported and do not set an example to deter future conduct in the same manner that grievance committee rulings achieve.

265. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001-.013 (Vernon 1998) (outlining Texas' punitive damages provisions).

266. *See id.* § 41.011(a) (listing the elements the jury should consider in awarding punitive damages); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 16-17 (Tex. 1994) (stating that punitive damages have "an altogether different purpose" from compensatory damages, as they are designed to "punish the defendant for outrageous, malicious, or otherwise morally culpable conduct"); James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 436 n.92 (1995) (asserting that punitive damages are meant to punish the defendant for his acts and not to redress an injury done to plaintiff); Rhanda R. Smith, George Grubbs Enterprises v. Bien: *Punitive Damages and the Single Business Enterprise Theory—Grubbing for Money*, 48 BAYLOR L. REV. 607, 609 (1996) (stating that "[t]he purposes behind punitive damages are to punish the wrongdoer and to deter future acts of similar wrongdoing"); John T. Simpson, Jr., Comment, *Discovery of Net Worth in Bifurcated Punitive Damages Cases: A Suggested Approach After* Transportation Insurance Co. v. Moriel, 37 S. TEX. L. REV. 193, 200 (1996) (listing punishment and deterrence as rationales for punitive damages).

### B. *Decrease the Number of Individuals Admitted to Law Schools and the Bar*

Although the legislation described above is the first and most important step in preventing a wave of legal malpractice claims, further steps at other levels are necessary to ensure the integrity of the profession. Action by the Texas Legislature is the most effective method of addressing the problems the profession currently faces; however, it is not a panacea. We must also make true and meaningful changes in the number of students admitted to law schools and subsequently to the bar.[267] Currently, it seems that the profession's method is to allow the majority of applicants into law school and, if they pass the bar exam, into the bar itself, rather than attempting to "regulate" the profession at an earlier stage in the process.[268]

Although upon first glance, decreasing the number of lawyers in the state may seem to be a draconian solution to a potential malpractice crisis, it is a solution that cannot be ignored.[269] Quite simply, there is an overabundance of attorneys in Texas, and concomitantly, more malpractice is being committed by more bad lawyers.[270] To remedy the solution, less money should go to efforts

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267. *Cf.* Harrison Sheppard, *It's Time for the Legal Profession to Clean Up Its Act*, BUFF. NEWS, June 9, 1996, at F7 (claiming that law schools must better prepare young lawyers for their responsibilities in the profession), *available in* 1996 WL 5847171.

268. For anyone who has applied to or attended law school, or is even familiar with the process, the reasons and incentives for such a process are obvious. From law school application fees, LSDAS fees, LSAT exam fees, "prep course" expenses, ever-increasing tuition fees, "declaration of intent" fees, and bar exam fees, to the newly required "ethics classes," fees, taxes, and dues required of all new attorneys in the state of Texas once they enter the profession, the running of institutions of legal education and the profession itself is a business—a money-making machine—for those in charge. *See* Manuel R. Ramos, *Legal Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 906-19, 934 (1996) (asserting that law schools and related systems simply can no longer govern professions, and that law schools are "cash cows" that unabashedly use high tuition for purposes other than educating students and producing quality lawyers); *see also* Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2590 (1996) (asserting that lawyers and law professors must be reformed to bring about change in the legal system as it relates to legal malpractice).

269. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1693 (1994) (declaring that the "weeding out" process is not working and is highly suspect).

270. *See id.* (demonstrating the ignorance, or at best, naivete, of observers who cannot figure out why legal malpractice is more widespread today, despite efforts made by law schools, continuing legal education administrators, the courts, and administrators of the

such as character screening for admission to the bar[271] after the applicant has already been admitted to, and is ready to graduate from, law school, after-the-fact sanctioning,[272] and education of the masses of law students. Rather, time and effort should be spent to ensure that a lower number of candidates, who are of a higher caliber, are admitted to the law schools and the legal profession.[273] Such proactive, as opposed to reactive, measures will not only save time, effort, and money, but will also help ensure that the quality of legal services provided to the public improves. In addition, efforts to decrease the number of lawyers in the state will more than likely be looked upon favorably by the public at large. Thus, decreasing the number of lawyers in Texas, in tandem with the legislation proposed above, can effectuate meaningful change in the profession and assist in cutting back the commission of legal malpractice in Texas.

The legislation proposed, which incorporates increased judicial oversight, coupled with affirmative steps to diminish the output of lawyers by the law schools, should also help to foster the public support necessary to allow the passage of the broader package of legislation and respond to the increasing number of legal malpractice claims. Furthermore, with the changes proposed herein, attorneys and the legal system will be offered protection from the impending wave of legal malpractice claims. Regardless of the

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admission to the state bars); Richard Perez-Pena, *When Lawyers Go After Peers: The Boom in Malpractice*, J. REC. (Okla. City), Aug. 6, 1994, at 5 (quoting Edward Freidberg, a plaintiffs' malpractice attorney, as stating, "'I would say one in four trial lawyers is incompetent or routinely negligent,'" and opining that clients have gotten wise), *available in* 1994 WL 4767385.

271. *See, e.g.*, TEX. GOV'T CODE ANN. § 82.023 (Vernon 1998) (outlining the Declaration of Intention to Study Law). Every person with the intent to apply for admission to the bar must file a declaration of intention to study law. *See id.* § 82.023(a). This form identifies and investigates factors including whether the applicant "has not been formally charged with any violation of law," is mentally ill, has been charged with fraud, and whether he has been involved in civil litigation or bankruptcy proceedings. *See id.* § 82.027(b). With these factors, the Board of Law Examiners "conducts an investigation of the moral character and fitness of each applicant for a license." *Id.* § 82.028.

272. *See, e.g.*, TEX. DISCIPLINARY R. PROF'L CONDUCT 6.07, 8.05, 8.06 (listing sanctions for misbehavior by a licensed attorney to include disbarment, suspension, and publication of the disciplinary results in the *Texas Bar Journal*).

273. *Cf.* Richard Perez-Pena, *When Lawyers Go After Peers: The Boom in Malpractice*, J. REC. (Okla. City), Aug. 6, 1994, at 5 (stating that both plaintiff and defendant malpractice attorneys agree that a glut of attorneys helped make malpractice law suits more common).

cause of the increase in legal malpractice suits and the theories upon which such suits are based, one thing is abundantly clear: if change is not forthcoming, the outer boundaries of legal malpractice liability will continue to expand dramatically. This expansion will fundamentally affect the profession and may result in a breakdown of the legal system itself. Our proposals meet this challenge head on, ensuring that the profession and legal system maintain their efficiency and integrity.

This Article does not suggest that any causes of action be eliminated or that parties with meritorious claims be precluded from bringing suit. Rather, this Article proposes changes to the system in which these suits are brought and changes to the *way* these suits are handled within Texas courts. The aim is that meritorious claims be handled efficiently and that truly liable attorneys be dealt with harshly, yet fairly.

## VI. Conclusion

Little argument can be made that the number of suits against attorneys will not increase dramatically in the next few years. In the same way that bad-faith lawsuits against insurers started as a trickle and swelled into a flood, legal malpractice claims against attorneys may eventually become the staple of many practitioners. For lawyers to continue to play the appropriate role as advocates in our system of justice, establishing safeguards is crucial to prevent every unhappy outcome for a litigant from turning into a subsequent malpractice action. Rather than reacting to this crisis after it is underway, our state and our profession would be better served if proactive measures were taken.

Such measures, rather than simply acting as attorney-protection statutes, must be carefully drafted not only to provide attorneys with protection from unwarranted claims, but also to promote the public interest by ensuring that truly egregious malpractice claims are brought to the attention of the bar grievance committee. By doing so, action will be taken that is truly effective in protecting the public, rather than simply providing settlement payments by malpractice carriers that enrich only plaintiffs' attorneys and individual plaintiffs. Further, the public will benefit if a fundamental cause of malpractice is addressed: too many inexperienced, unmentored attorneys chasing too few clients. Accordingly, a legislative program that both remedies problems inherent in the litigation of legal mal-

practice claims and ameliorates the factors that exist among the lawyer population in order to decrease malpractice before it occurs should be enacted by the Texas Legislature.

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