



---

TYLA POCKET GUIDE:

---

GRIEVANCE  
AND  
MALPRACTICE 101

---



BE AN UNCOMMON LEADER.®

**Copyright 2013, 2023**

**TEXAS YOUNG LAWYERS ASSOCIATION**

Curriculum materials created by the Texas Young Lawyers Association. All rights reserved. No part of these materials may be reproduced in any form or for any other purpose without the written consent of the Texas Young Lawyers Association.

---

TYLA POCKET GUIDE:

---

GRIEVANCE  
AND  
MALPRACTICE 101

## **TABLE OF CONTENTS**

<b>DISCIPLINARY SYSTEM STATISTICS</b> . . . . .	<b>1</b>
<b>THE FUNCTIONS OF THE CHIEF DISCIPLINARY COUNSEL</b> . . . . .	<b>2</b>
<b>OUTLINE OF THE DISCIPLINARY PROCESS</b> . . . . .	<b>2</b>
<b>PROCESSING A GRIEVANCE FLOWCHART</b> . . . . .	<b>5</b>
<b>TIPS ON HOW TO PREVENT A GRIEVANCE</b> . . . . .	<b>6</b>
<b>WHAT TO DO IF YOU RECEIVE A GRIEVANCE NOTICE</b> . . . . .	<b>8</b>
<b>FREQUENTLY ASKED QUESTIONS REGARDING GRIEVANCES</b> . . . . .	<b>9</b>
<b>CHIEF DISCIPLINARY REGIONAL OFFICES</b> . . . . .	<b>10</b>
<b>MALPRACTICE</b> . . . . .	<b>12</b>
<b>WHAT CAN A LAWYER BE SUED FOR?</b> . . . . .	<b>12</b>
<b>LEGAL MALPRACTICE CLAIMS – GENERAL PRINCIPLES</b> . . . . .	<b>13</b>
<b>LEGAL MALPRACTICE – MOST COMMON ALLEGED ERRORS</b> . . . . .	<b>14</b>
<b>TIPS ON HOW TO AVOID MALPRACTICE SUITS</b> . . . . .	<b>14</b>
<b>WHAT TO DO IF YOU ARE SUED FOR MALPRACTICE</b> . . . . .	<b>18</b>
<b>FREQUENTLY ASKED QUESTIONS REGARDING MALPRACTICE</b> . . . . .	<b>18</b>
<b>USEFUL RESOURCES</b> . . . . .	<b>20</b>

No lawyer ever wants to receive a grievance or malpractice claim. But most lawyers are likely to receive at least one of these claims throughout their law career. This pocket guide will provide practical tips and resources on how to avoid and deal with these issues.

## **THE TEXAS DISCIPLINARY SYSTEM DISCIPLINARY SYSTEM STATISTICS**

In Texas, the areas of law that generally receive the most grievance claims each year are as follows:

### **Top Five Areas of Law for Grievances (High to Low)<sup>1</sup>**

- Criminal
- Family Law
- Civil
- Personal Injury
- Probate/Wills

### **Top Five Rule Violations Alleged in Grievances (High to Low)<sup>2</sup>**

- Communication
- Neglect
- Integrity
- Declining or terminating representation
- Safeguarding client property

## **THE FUNCTIONS OF THE CHIEF DISCIPLINARY COUNSEL**

The Texas attorney disciplinary system is administered by the State Bar of Texas Office of the Chief Disciplinary Counsel (CDC). The CDC is charged with investigating any complaints that allege professional misconduct. If just cause is found, the CDC will prosecute the disciplinary case in district court or before an evidentiary panel of a district grievance committee. The work of the CDC is overseen by the Commission for Lawyer Discipline, a permanent standing committee of the State

---

<sup>1</sup> <https://www.texasbar.com/Content/NavigationMenu/NewsandPublications/FortheMedia2/GrievanceandEthicsInformation/GrievanceChart.pdf>.

<sup>2</sup> <https://www.texasbar.com/Content/NavigationMenu/NewsandPublications/FortheMedia2/GrievanceandEthicsInformation/GrievanceChart.pdf>.

Bar of Texas. The Commission, represented by the CDC, becomes a party to any disciplinary matter that goes into litigation.

## OUTLINE OF THE DISCIPLINARY PROCESS

In Texas, the attorney discipline system is governed by the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure (TRDP). The former define proper conduct for a lawyer, and the latter define the mechanism by which grievances are processed, investigated, and prosecuted. If you are faced with a grievance, below is an outline of what the grievance process may include.

1. Step One: Grievance Filed<sup>3</sup>
  - A grievance is a written statement filed against a Texas attorney intended to allege professional misconduct, disability, or both. Grievances can be submitted online or via a written grievance form.
  - Anyone (i.e., clients, family members, opposing counsel, third parties) can file a grievance against a Texas attorney.
  - Filing a grievance initiates the disciplinary process.
  
2. Step Two: Classification of Grievance<sup>4</sup>
  - Upon filing, the CDC has 30 days to decide whether the grievance should be classified as an inquiry, complaint, or discretionary referral.
    - o A grievance that does not allege professional misconduct is classified as an inquiry and is dismissed.
    - o Some grievances may be referred to the Client-Attorney Assistance Program (CAAP) for mediation before a classification decision is made by the CDC.
    - o A grievance that alleges professional misconduct is classified as a complaint and is investigated.
  - Regardless of whether the grievance is dismissed or upgraded for investigation, the attorney against whom the grievance was filed (the Respondent) receives a copy of the grievance and a notification of the CDC's decision.
  
3. Step Three: Investigation<sup>5</sup>
  - Once the Respondent receives notice that the grievance is considered a complaint, the Respondent has 30 days from receipt of the notification

---

<sup>3</sup> TRDP 1.06(R).

<sup>4</sup> TRDP 2.10.

<sup>5</sup> TRDP 2.10(B), 2.12, 1.06(Z).

to provide the CDC with a written response to the allegations of professional misconduct.

- The CDC has 60 days from the Respondent's written response deadline to determine whether just cause exists to believe that professional misconduct occurred.
  - o "Just cause" means "such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of professional misconduct requiring that a sanction be imposed, or suffers from a disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation."
  - o If the CDC decides to issue an investigatory subpoena or conduct an investigatory hearing, the CDC's 60-day response deadline is extended to 60 days after completion of the hearing or subpoena compliance date.

#### 4. Step Four: Summary Disposition Panel<sup>6</sup>

- If the CDC finds no "just cause," it presents the matter to a Summary Dismissal Panel ("SDP").
  - o The SDP, which consists of local grievance committee members, determines whether the complaint should be dismissed or proceed. The information is presented to the SDP panel at a hearing without the complainant or Respondent present.
  - o The SDP votes on whether to dismiss or proceed with the complaint.
- If "just cause" is found, the matter proceeds to the election stage for a trial before a district court or an administrative hearing before an evidentiary panel of a district grievance committee.

#### 5. Step Five: Investigatory Hearing<sup>7</sup>

- The CDC may set a complaint for an investigatory hearing (IVH) before a panel of a local grievance committee.
- During the IVH, the panel may hear testimony from the complainant, Respondent, and any witnesses that are called.

---

<sup>6</sup> TRDP 2.13, 2.14.

<sup>7</sup> TRDP 2.12, 2.14.

- The IVH may result in a sanction negotiated with the Respondent, the CDC's dismissal of the complaint, or a finding of just cause. Any complaint not resolved by an agreed sanction or dismissal by the CDC proceeds to litigation.

#### 6. Step Six: Trial<sup>8</sup>

- If the matter proceeds to litigation, the Respondent is given written notice of the allegations and rule violations complained of.
- The Respondent has 20 days to elect whether to proceed before an evidentiary panel (comprised of lawyers and public members) or a district court (bench trial or jury trial). Failure to elect results in trial before an evidentiary panel of the grievance committee.
  - o Evidentiary panel hearings are confidential.
  - o District court proceedings are public.
- The parties to the proceeding are the Commission, represented by the CDC, and the Respondent. The complainant is a potential witness, but not a party.
- The burden of proof is preponderance of the evidence.

#### 7. Step Seven: Judgment and Available Sanctions<sup>9</sup>

- The evidentiary panel or district court is authorized to impose sanctions if there is a finding of professional misconduct. Available sanctions include:
  - o Private reprimand
  - o Public reprimand
  - o Probation of suspension (Respondent may practice law with conditions)
  - o Partially probated suspension (Combination of active and probated suspension)
  - o Active suspension (Respondent cannot practice law during this term)
  - o Disbarment
- Judgment may also include (if the evidence supports inclusion):
  - o Restitution and/or attorneys' fees
  - o Additional hours of CLE courses
  - o Law practice management

---

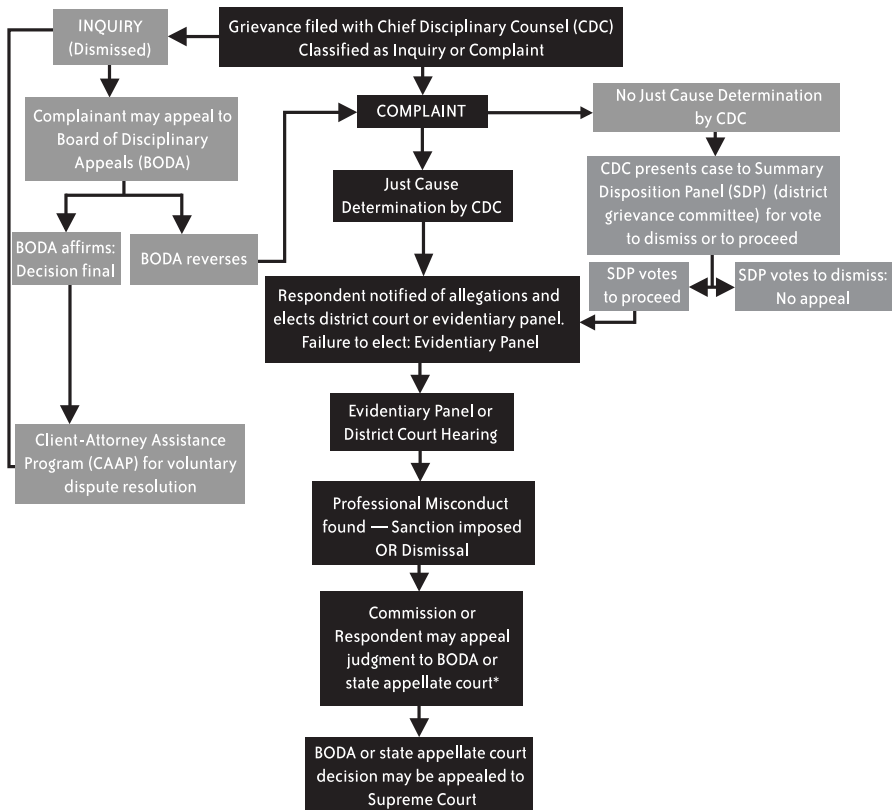
<sup>8</sup> TRDP 2.15, 2.16, 2.17, 3.01-3.08.

<sup>9</sup> TRDP 2.18, 2.19, 3.09-3.11.



- o Rehabilitative monitor
- o Psychological assessment reports
- o Substance abuse assessment
- o Random drug screens
- o Trust account reporting
- o Trust account audit
- If there is no finding of professional misconduct, the matter is dismissed.

## PROCESSING A GRIEVANCE FLOWCHART



\*Evidentiary judgments are appealed to BODA; District court judgements are appealed to state appellate court

## TIPS ON HOW TO PREVENT A GRIEVANCE

- **Supervise your employees.** Know what your employees are doing, and oversee any important tasks they are performing for clients. If you are not able to personally do this, appoint a lawyer in your office that you trust to do so.
- **Have a backup lawyer to cover for you if disaster strikes.** You never know what the future holds for you, so if disaster strikes or you have a three-week bout of the flu, make sure you have someone who can step in and cover your client responsibilities while you are unavailable.
- **Respond to client phone calls or emails within 48 hours.** If you are personally unable to do this, assign someone in your office to respond on your behalf.
- **Keep clients informed.** Ensure your clients are informed about all important events that occur in their case, including settlement offers, case deadlines, and expectations regarding future fees owed and case timeline. Make sure you document these conversations in writing.
- **Document correspondence with clients, including phone calls.** This will protect you in the event a client claims you have not provided them information or responded to their inquiries.
- **Properly calendar deadlines and inform clients of deadlines in writing.** Missing a deadline is one of the easiest ways to invite a grievance or malpractice claim. Designate someone in your office to calendar all case deadlines, and set your calendar to remind you when deadlines are approaching.
- **Have every client execute an engagement agreement.** Always enter into a written engagement agreement with every client that clearly spells out your scope of representation, your hourly rate, the actions you expect from the client, and your right to withdraw for a violation of the engagement agreement. This will help you manage client expectations, protect you from a client who refuses to follow your advice or pay for your services, and protect you in the event your duties or the scope of your representation is ever questioned.
- **Withdraw from representing a client who does not comply with your engagement agreement.** When you begin an attorney-client relationship, it is critical to document what you expect from your client in the engagement agreement. The client's compliance with the engagement agreement will affect your ability to represent them and impact your efficacy as their lawyer. If your client is not complying with their responsibilities, your representation will be

affected and this may cause you to fall short of your duties as their lawyer. No client is worth jeopardizing your law license over.

- **Collect your fees up front if possible.** At the time you are retained, collect a retainer that will cover all of the initial work that needs to be done on the case, and request that your client replenish the retainer funds before they are exhausted. Set up a system that alerts you when the retainer balance is getting low. Working on credit increases your chances of not getting paid for your work.
- **Keep your client's funds in a separate trust account until attorneys fees are earned or expenses are paid (or reimbursed).** This should be obvious, but you would be surprised at how many lawyers get in trouble for not following this rule. Even if you have charged your client a “non-refundable” retainer, you must deposit the fee in a separate trust account until the fee is earned.
- **Seek the help of outside experts on issues that are beyond your capabilities.** If you are unsure about handling a matter for any reason, seek appropriate help or refer the issue to another lawyer. As a lawyer, you are not an expert on everything. Seek the help of experts on particular issues that you are not familiar with. This not only protects you, but it also better serves the client. Most clients will appreciate you seeking the expertise to assist with their issues.
- **Keep an organized client file for every case.** You should have a file for every client that includes the engagement agreement, fee agreement, correspondence, pleadings, orders, and any discovery that has been conducted on the case. This is essential to not only educate you on what tasks have been performed, but also to assist you in defending against a client who may question what work has been done on their case.
- **Don't lie to clients.** We all have the client who expects all of our attention on their case all of the time. So when they call to check up on the status of their case, sometimes it may be easier to tell the client that certain tasks have been done that you may not have had time to get to yet. This little fib could turn a low-level disciplinary offense (like not returning calls) into a major one (neglect or lack of integrity). If you cannot be honest with a client, you should withdraw or pull in another lawyer to assist you with the case. It is not worth risking your law license over a client.
- **Document your work in writing.** You should always look to the worst-case scenario and protect yourself proactively when representing a client. Keep a physical or electronic paper trail of your communications with your client,

the work completed, decisions made, and advice given, this will help protect you from misunderstandings and false allegations, and can help you respond to any grievance claims that arise.

- **Read disciplinary decisions.** Familiarize yourself with the disciplinary process and changes or decisions made with regards to our disciplinary rules. Make an effort to read disciplinary decisions each month so that you are aware of the mistakes others have made and how to avoid them, and as a reminder that your law license is a privilege that should be carefully guarded.
- **If you are misusing drugs or alcohol or are experiencing mental health concerns, get help!** A significant number of attorneys suffer from some kind of impairment. It happens. The worst thing you can do is suffer in silence and not get help. This will only make matters worse and could lead to you losing your law license. The State Bar of Texas has a full-time, professional lawyer assistance program called Texas Lawyers' Assistance Program (TLAP). TLAP provides 100% confidential help for lawyers, law students, and judges who have concerns about substance abuse or mental illness for themselves or a colleague. TLAP is here to help. **You can call or text TLAP any time of day or night at 1-800-343-8527.**

## WHAT TO DO IF YOU RECEIVE A GRIEVANCE NOTICE

- **Breathe.** A complaint does not mean a finding of professional misconduct. It is merely a complaint.
- **Cooperate.** A lawyer who fails to respond in writing to allegations of a complaint is likely to violate Rules 8.01(b) and 8.04(a)(8) of the Texas Disciplinary Rules of Professional Conduct unless there is a privilege or other legal ground for failure to do so. Failing to cooperate will only make a bad situation worse.
- **Tell your side of the story.** You must file a response telling your side of the story. Calendar the response deadline and file a timely response! You do not want a default decision entered against you.
- **Be candid and honest.** A lawyer's dishonesty or lack of candor can be more damaging than the actual allegations. Your answer to the allegations should be honest, professional in tone, responsive to the allegations, and detailed enough to demonstrate that there has not been any misconduct on the lawyer's part.
- **Talk to another lawyer you respect.** It is improbable you will be objective about complaints against your law license. Talk to a lawyer you trust and respect about the complaint and how to handle the CDC's inquiry. Find

someone who will be honest with you and with whom you will be honest in return.

- **Do your diligence.** Familiarize yourself with the claim against you and the ethical rules that apply. Look at disciplinary caselaw relating to facts similar to your case. This will give you a good idea of the exposure you could face.
- **Reach out to the CDC investigator or attorney handling your complaint.** During the investigation and any time leading up to a hearing or trial of the case, CDC staff is available to answer questions about the process, agree to extensions of time to respond, or negotiate an early agreed resolution to the matter. As a general rule, the grievance process does not become adversarial until litigation commences.
- **Hire counsel.** Hire a lawyer that deals with grievance claims to help navigate the process and ensure you are protecting yourself.

## FREQUENTLY ASKED QUESTIONS

- **Will my malpractice carrier receive notice of the grievance filed against me?**

*No. Your malpractice carrier will not be contacted regarding a grievance filed against you. However, most carriers require that you disclose grievances filed against you in your application for legal malpractice insurance. Look at your policy and abide by your insurance carrier's requirements.*

- **Is there a statute of limitations for filing a grievance?**

*Yes. Under TRDP 17.06, there is a four-year statute of limitations on allegations of professional misconduct, except in cases in which disbarment or suspension is compulsory. Limitations will not begin to run where fraud or concealment is involved until such professional misconduct is discovered or should have been discovered in the exercise of reasonable diligence by the complainant.*

- **Can my license be suspended while the grievance claim is investigated?**

*It can under TRDP Part 14. If the CDC reasonably believes, based upon investigation of a complaint, that an attorney poses a substantial threat of irreparable harm to clients or prospective clients, and the CDC is authorized or directed to do so by the Commission, the CDC shall seek the immediate interim suspension of the attorney.*

- **If I am disbarred, how long does disbarment last?**

*At least five years. Under TRDP 11.01, you may apply for reinstatement “any time after the expiration of five years from the date of final judgment of disbarment...” If the disbarment was the result of a criminal conviction, you may apply for reinstatement “five years following the date of completion of sentence, including any period of probation and/or parole,” provided that you have not otherwise disqualified yourself from reinstatement.*

- **If I am concerned about the ethics of a particular action, who should I call?**

*Call the State Bar of Texas Ethics Helpline at 1-800-532-3947. Ethics attorneys answer your questions on a first-come, first-served basis from 8 a.m. to 5 p.m. Monday through Friday. The Ethics Helpline is a free service for Texas-licensed attorneys. Please note that the advice is not binding or confidential.*

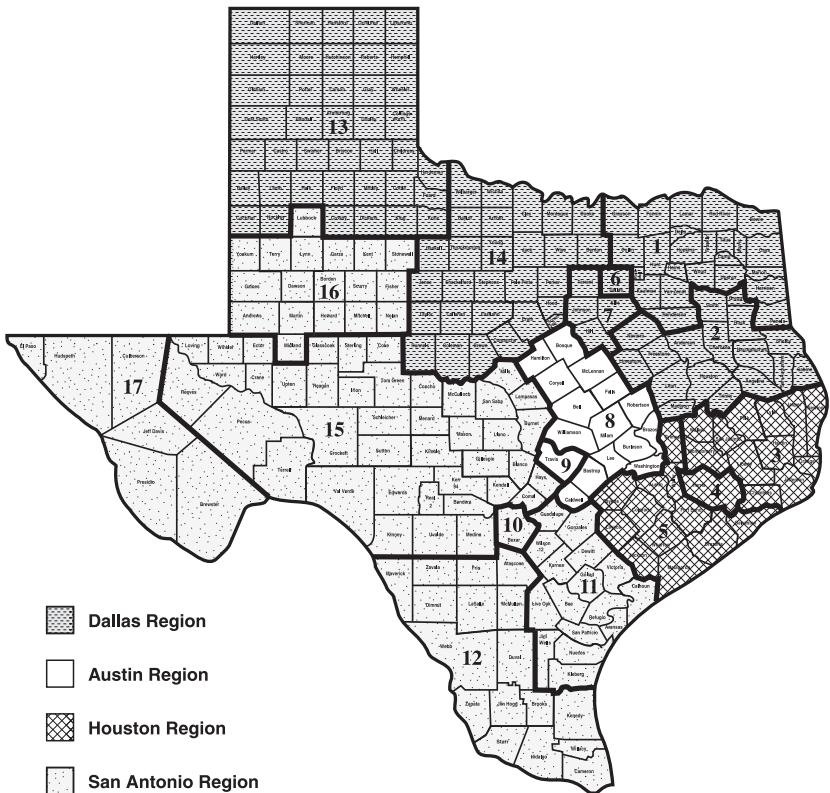
## **CHIEF DISCIPLINARY REGIONAL OFFICES**

The CDC is headquartered in Austin with regional offices in San Antonio, Dallas, and Houston. Each regional office is responsible for investigating and prosecuting disciplinary matters within its region. Each regional office is managed by a regional counsel.

- **AUSTIN**  
Chief Disciplinary Counsel  
1414 Colorado Street  
Austin, Texas 78701  
Phone 512-427-1350 / 877-953-5535  
Fax 512-427-4169
- **DALLAS**  
Chief Disciplinary Counsel  
14651 Dallas Parkway, Ste. 925  
Dallas, Texas 75254  
Phone 972-383-2900  
Fax 972-383-2935
- **HOUSTON**  
Chief Disciplinary Counsel  
4801 Woodway Drive, Ste. 315-W  
Houston, Texas 77056  
Phone 713-758-8200  
Fax 713-758-8292

- SAN ANTONIO  
 Chief Disciplinary Counsel  
 SWBC Tower  
 9311 San Pedro Avenue, Ste. 1000  
 San Antonio, Texas 78216  
 Phone 210-208-6600  
 Fax 210-208-6625

The regions for the CDC are broken up as follows:



# MALPRACTICE

## WHAT CAN A LAWYER BE SUED FOR?

In Texas, lawyers are generally sued for malpractice. These claims include:

### 1. Negligence

- In Texas, an attorney malpractice action is based on negligence. *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989). The client must prove the four elements of a standard negligence claim: duty, breach of duty, proximate cause, and damages. *Id.* Generally speaking, the ultimate questions are (1) whether the lawyer did something a reasonable and prudent lawyer would not have done (or failed to do something that a reasonable and prudent lawyer would have done) under similar circumstances, and (2) whether such deviation from the applicable standard of care mattered, i.e., whether it actually caused the client's damages.

### 2. DTPA

- Lawyers are sometimes sued under the Deceptive Trade Practices Act (DTPA), but such claims can be difficult to prevail on because the DTPA has a specific exemption for professional services. Furthermore, Texas courts are reluctant to allow "claim fracturing," which is taking what should be a negligence claim and calling it something else (e.g., breach of contract, DTPA, fiduciary duty, etc.). That said, under the right factual scenario, a DTPA claim can survive. *See, e.g., Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1998).

### 3. Breach of Fiduciary Duty

- Like in DTPA claims, Texas courts will take a hard look at alleged fiduciary duty claims to ensure that such claims are not simply negligence claims cast under a different name. While negligence claims generally assert some sort of mistake on the lawyer's part, true fiduciary duty claims generally assert that "the attorney obtained an improper benefit from representing the client." *Murphy v. Gruber*, 241 S.W.3d 689, 693 (Tex. App.—Dallas 2007, pet. denied). For example, an attorney can breach their fiduciary duty by, among other things, subordinating the client's interests to their own, retaining the client's funds, engaging in self-dealing, improperly using



client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends. *Id.*

#### 4. Breach of Contract

- Clients may also assert a claim for breach of contract. The attorney-client relationship derives from mutual consent and, in that respect, is largely shaped by agreement entered into between the lawyer and the client.

### LEGAL MALPRACTICE CLAIMS – GENERAL PRINCIPLES

Generally, the following principles apply to legal malpractice suits:

- These claims require an attorney-client relationship.
- Because an attorney malpractice claim is based on negligence, the two-year statute of limitations typically governs these claims. *See, e.g., Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989). For malpractice claims arising out of representation in litigation, this period is tolled during the representation. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991) (holding that “when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted.”).
- The claims may not be split or fractured. Courts are hesitant to allow a plaintiff to divide or fracture legal malpractice claims into breach of contract claims (or other claims, for that matter). *See Goffney v. Rabson*, 56 S.W.3d 186, 190-94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (holding that because legal malpractice claim was dropped before trial, plaintiff was not entitled to recover on her breach of contract, DTPA, and breach of fiduciary duty claims).
- To obtain damages in a legal malpractice suit, the client must prove not only that the underlying suit would have been successful but for the attorney’s malpractice, but the client must also establish the amount of damages that would have been recovered—this is also referred to as the “suit within a suit.” *Fireman’s Fund Am. Ins. Co. v. Patterson & Lamberty, Inc.*, 528 S.W.2d 67, 70 (Tex. Civ. App.—Tyler 1975, writ ref’d n.r.e.).
- Expert testimony is required in a malpractice suit to prove causation. *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 120 (Tex. 2004).

- Generally, strict privity applies in a malpractice suit. *Barcelo v. Elliott*, 923 S.W.2d 575, 578-79 (Tex. 1996). That is, lawyers typically cannot be sued by non-clients, unless the lawyer engaged in fraudulent conduct. *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ).

## LEGAL MALPRACTICE – MOST COMMON ALLEGED ERRORS

The most common alleged errors in a legal malpractice suit include:

- Failure to know or properly apply the law
- Failure to know or ascertain deadlines
- Failure to obtain consent or inform client
- Failure to calendar properly
- Inadequate discovery or investigation
- Conflicts of interest

## TIPS ON HOW TO AVOID MALPRACTICE SUITS

- **At a minimum, comply with applicable rules of ethics and professional conduct (Texas and ABA).** These rules can be found at:

<https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm>

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/)

- **Know the law.** Familiarize yourself with the law that applies to your client's issue and/or suit before you begin any representation.
  - **Know the local rules.** Almost every county has a set of local rules that apply to suits filed in that county. Generally, these can be found at the clerk's office or on the county's website. If you are not familiar with the applicable local rules, obtain a copy of the local rules and familiarize yourself with them.

- **Have your client sign a written fee agreement.** Your fee agreement should clearly identify who the client is, the scope and terms of the representation, and the fee arrangement. The agreement should also identify the work the lawyer will do on the case.
- **Get paid a retainer up front.** At the time the fee agreement is entered into, obtain a retainer up front. Set up an accounting system to remind you when retainers run low and require your clients to replenish their retainers.
- **Control client expectations.** Clearly communicate with your client in writing what they should expect, any problems that arise, all available courses of action, the timeline of the case, fees involved in each action taken, and the effects of all decisions made.
- **Define and monitor goals and objectives.** Define goals and objectives in writing with your client when your representation begins and revisit these with your client as the case progresses to ensure the actions you are taking align with the client's objectives.
- **Determine the extent of the client's involvement in the case and involve the client in major decisions.** Discuss the amount of involvement your client wants to have in the case and involve the client as requested. Discuss any major decisions made with the client and document these communications in writing.
- **Document everything.** Document communications with your client and keep an organized file of correspondence, pleadings and orders, and agreements in the case. Keep a copy of the file for at least seven years from the date the case is finalized.
- **Establish a reliable calendaring system.** Find a reliable way to calendar all important events that occur in your client's case, and set up your calendar to provide reminders prior to an event occurring. Communicate these deadlines to your client too.
- **Return all calls and correspondence.** Return all calls or correspondence from your client within 48 hours.

- **Beware of suing a client for unpaid fees.** Even if such a suit is warranted, it is usually met with a counterclaim for malpractice from your client.
- **Practice malpractice avoidance.** Assign a lawyer in your office to oversee malpractice avoidance audits on cases.
- **Look out for issues.** Look for warning signs in employees and fellow lawyers for substance abuse or other mental health concerns , and take appropriate action.
- **If you reject business, turn it down in writing.** Follow your instincts on whether to avoid taking a case. If you reject business, turn it down in writing and specifically explain that you are not going to be that person's lawyer. Then, send the potential client referrals for other lawyers that they can contact.
- **Be cautious about being general counsel or local counsel on any suits.** The risk you take in being a general counsel or local counsel is seldom worth it. You are setting yourself up to be blamed for a poor decision made by someone else or a mistake made by someone you don't control.
- **Maintain your professional standards when providing courtesy representation.** When performing courtesy representation, treat these cases the same as a paying client. Cutting corners in the representation almost always gets you in trouble and can turn a good deed into a malpractice suit.
- **Do not guarantee results.** You should never guarantee results you are not certain you can deliver. Things happen, and you can never be certain what the outcome might be.
- **Provide detailed time entries.** Have a system of documenting all work you and your staff perform on every case. Provide these detailed time entries in the form of a billing statement to your clients each month.
- **Be cautious about multi-client representation.** If you have a suit that involves representation of multiple parties, obtain written consent and conflicts waivers from all parties and keep these in your file. Be cautious and pay close attention to how such representation can (1) affect applicable privileges, and (2) lead to possible conflicts among joint clients.

- **Never let your non-legal staff practice law.** Appropriately supervise your staff and ensure that they are not taking actions you are not aware of or overseeing.
- **Check conflicts thoroughly on lateral employees or lawyers.** Check conflicts thoroughly on new lateral employees or lawyers from other law firms. Many conflicts cannot be waived and cannot be remedied with screening procedures. Therefore, ensure that all of the conflicts are cleared before bringing on that new employee or lawyer.
- **Run a conflicts check on any potential new clients.** When a potential new client calls to schedule an appointment, have a system in place that identifies the potential client, the adverse parties, and the potential adverse parties or third parties in the current or potential suit. Run this conflicts check before obtaining any confidential information.
- **Conduct necessary discovery needed to investigate every client's case.** You cannot properly advise your clients on their legal remedies or possible outcomes without knowing what their case entails. Conduct the discovery that is necessary for you to turn an educated guess into educated advice.
- **Limit your trust accounts to \$100,000.** It is never wise to risk your client's money and your law license on the integrity of a bank.
- **If your client refuses to pay your bill, withdraw from representation and provide the appropriate notices to the client in writing.** Document all efforts you have made and all notices you have sent to the client in writing and keep these in the file.
- **Form a professional corporation or limited liability partnership.** In order to protect yourself and your assets from another lawyer's negligence in your firm, it is advisable to form a professional corporation or a limited liability partnership.
- **Carry good malpractice insurance and be familiar with the policy.** Many malpractice claims may be resolved within your policy limits without exposing you or your estate to the risks of malpractice. Familiarize yourself with your policy and its requirements. This will save you time and prevent stress from the unknown.

## WHAT TO DO IF YOU ARE SUED FOR MALPRACTICE

- Call your malpractice insurance carrier
- Hire a lawyer to represent you
- Stop any form of communication with the client who has filed the suit against you
- Don't get rid of anything in that client's file

## FREQUENTLY ASKED QUESTIONS REGARDING MALPRACTICE

- **Can I represent myself in a malpractice suit filed against me?**

*Yes, but it is not advised. There is an old adage that one who is his own lawyer has a fool for a client.*

- **Does my malpractice carrier provide me with a lawyer if a suit is filed against me?**

*Typically, yes. Look closely at your policy to ensure it provides defense coverage. There is also nothing wrong with talking to your carrier about who it plans to retain and your representation options.*

- **Should I communicate with the client who filed the malpractice suit against me?**

*This is generally not a good idea unless you are still representing the client. In that circumstance, you should communicate what is necessary to comply with your legal and ethical obligations, while making arrangements to withdraw from representation or allowing another lawyer to substitute in your place. Once a malpractice suit is filed and you know the former client is represented by counsel, your communications must go through the former client's lawyer.*

- **Is there a statute of limitations on the filing of a malpractice suit?**

*Yes. It is typically two years, but there are some exceptions that can toll the accrual of a claim. A breach of fiduciary duty claim generally has a four-year limitations period.*

- **Does my current malpractice carrier cover me for acts done years ago before my current policy?**

*It depends on your coverage. If you have a "claims made" policy, you are typically covered for any claims filed during the policy period, irrespective of when the injury or malpractice occurred. Alternatively, a "tail coverage" rider to your policy may*

*provide you with coverage for acts that occurred before the current policy period. Without this, you may be insured only for acts committed from the date of the policy forward. Failure to purchase tail coverage may be the equivalent of having no insurance when it comes to acts that were done before your current policy was put into place.*

- **If I change law firms, leave private practice, or retire, am I still covered by my previous law firm’s malpractice policy for work that I did while employed there?**

*It depends. If your previous law firm is still in business and has a policy that covers both its current and previous employees, then chances are you are covered for legal work you did on behalf of that law firm. However, if your previous law firm is no longer in business, dropped its insurance coverage, or changed malpractice carriers or policies, then you may not be covered. In Texas, legal malpractice policies are not regulated by the Texas Department of Insurance, and policies can vary greatly from one insurance company to another. There is no standard policy form that law firms are required to carry that provides coverage for former employees. However, under certain circumstances, you may be able to buy a “tail policy” from your current carrier to cover your prior legal work. For more information about these policies, contact Texas Lawyers’ Insurance Exchange (“TLIE”) at [www.tlie.org](http://www.tlie.org) or 1-800-252-9332. TLIE also offers a substantially discounted policy for lawyers in the first three years of practice.*

## **USEFUL RESOURCES**

- **The Texas Disciplinary Rules of Professional Conduct**  
See Tex. Gov’t Code § 81.001, *et seq.*
- **The Texas Rules of Disciplinary Procedure**  
See Tex. Gov’t Code § 81.001, *et seq.*
- **The State Bar Act**  
Tex. Gov’t Code Ann. § 81.001, *et seq.*
- **State Bar of Texas Ethics Hotline**  
1-800-532-3947

- **Texas Lawyers' Assistance Program (TLAP)**  
1-800-343-8527
- **State Bar of Texas**  
[www.texasbar.com](http://www.texasbar.com)
- **Board of Disciplinary Appeals**  
[www.txboda.org](http://www.txboda.org)
- **Opinions from the State Bar of Texas Professional Ethics Committee**  
<https://www.legalethicstexas.com/resources/opinions/>
- **Texas Access to Justice Foundation**  
[www.teajf.org](http://www.teajf.org)
- **Texas Center for Legal Ethics**  
<https://www.legalethicstexas.com/> or 512-427-1477
- **Download a free copy of the Texas Disciplinary Rules of Professional Conduct**  
<https://www.texasbar.com/AM/Template.cfm?Section=pec&ContentID=27271&Template=/CM/ContentDisplay.cfm>
- **Download a free copy of the ABA Model Rules of Professional Conduct**  
Model Rules of Professional Conduct ([americanbar.org](http://americanbar.org))
- **Client-Attorney Assistance Program (CAAP)**  
<https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/CAAP/default.htm>
- **“A Lawyer’s Guide to Client Trust Accounts”**  
<https://www.texasbar.com/Content/NavigationMenu/ForLawyers/ResourceGuides1/TrustAccounts/GuidetoTrustAccounts.pdf>
- **TexasBarCLE and Law Practice Management**  
<http://www.texasbarcle.com/CLE/LMHome.asp>  
<http://www.texasbarpractice.com>





Prepared as a public service by the  
Texas Young Lawyers Association  
and distributed by the State Bar of Texas.

This pamphlet and other free resources  
for attorneys can be found online at [tyla.org](http://tyla.org).



For additional copies please Contact:  
Texas Young Lawyers Association  
P.O. Box 12487 Austin, Texas 78711-2487  
(800) 204-2222, Ext. 1529  
[tyla.org](http://tyla.org)

