THE VITALITY OF *BARCELO* AFTER TEN YEARS: WHEN CAN AN ATTORNEY BE SUED FOR NEGLIGENCE BY SOMEONE OTHER THAN HIS CLIENT?

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I. INTRODUCTION

This year marks the tenth anniversary of *Barcelo v. Elliott*.[1] *Barcelo* is the venerable case in which the Texas Supreme Court aligned itself with other jurisdictions embracing the common-law rule that an attorney owes a duty of care only to his client, and not to third parties who claim that they were damaged by the attorney's negligent representation of the client.[2]

As the *Barcelo* precedent enters into its second decade, a review of its progeny reveals that Texas courts have occasionally whittled away at the general rule that privity is required to sue an attorney for negligence, such that, in certain situations, a court might permit a third party to bring a negligence suit against an attorney with whom he never had an attorney-client relationship, and to whom he never paid a dime in legal fees.[3] The instances in which such suits have been allowed to date are limited, and the boundaries between permissible and impermissible claims remain somewhat blurred.

This Article identifies some of the past, present, and future battlegrounds relevant to the viability of certain negligence claims against lawyers. Specifically, the authors examine two specific scenarios in which plaintiffs attempt to sue an attorney for acts or omissions related to legal work that the attorney provided for *someone else*: (1) when the plaintiff has been assigned a legal malpractice claim by the lawyer's client; and (2) when the plaintiff brings a negligent misrepresentation claim against the lawyer.

II. GENERALLY, THIRD PARTIES MAY NOT SUE AN ATTORNEY FOR LEGAL MALPRACTICE

In Texas, it is hornbook law that an attorney owes no duty to non-clients and will not be held liable to third parties for damages resulting from legal

[1] 923 S.W.2d 575 (Tex. 1996).

[2] *See id.* at 577–79.

[3] The scope of this Article is limited to negligence claims brought by a third party against an attorney. There are other situations in which courts have permitted other causes of action to be brought—for example, third-party fraud claims may be allowed in certain scenarios. *See, e.g.*, McKnight v. Riddle & Brown, P.C., 877 S.W.2d 59, 61 (Tex. App.—Tyler 1994, writ denied) ("Texas has long held that while an attorney is authorized to practice his profession without making himself liable for damages, where an attorney acting for his client participates in fraudulent activities, his action is 'foreign to the duties of an attorney.'") (citations omitted); *see also* Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ).

malpractice.[4] This common-law rule creates a privity barrier, without which a client may lose control over the attorney-client relationship, and attorneys would face the specter of "almost unlimited liability."[5] One court has summarized the rule as follows:

> Under Texas law, an attorney owes a duty only to those parties in privity of contract with him. Because an attorney has no duty of care to non-clients, a non-client can have no claim for negligence against an attorney. Third parties in Texas have no standing to sue attorneys on causes of action arising out of their representation of others.[6]

The requirement of privity is based on the unique relationship between the attorney and the client. An attorney must exercise judgment "within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties."[7] The ethical foundation for the privity requirement was previously found in the Texas Code of Professional Responsibility: "Neither his personal interests, the interests of other clients, nor the desires of third parties should be permitted to dilute [the attorney's] loyalty to his client."[8] While the Texas Code of Professional Responsibility was replaced, effective January 1, 1990, by the Texas Disciplinary Rules of Professional Conduct, the current Rules continue to provide that "[i]n all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law."[9]

The privity rule for attorneys is grounded in public policy.

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[4] *Barcelo*, 923 S.W.2d at 577–79.

[5] *See id.* at 577 (citing Helen Jenkins, *Privity—A Texas-Size Barrier to Third Parties for Negligent Will Drafting—An Assessment and Proposal*, 42 BAYLOR L. REV. 687, 689–90 (1990)).

[6] Bossin v. Towber, 894 S.W.2d 25, 33 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citations omitted).

[7] Bell v. Manning, 613 S.W.2d 335, 338 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.), *abrogated by* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 795 (Tex. 1999) (citing TEX. STATE BAR R., art. XII, § 8, EC 5-1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon 1988) (superceded 1990)). While the *McCamish* court disapproved of the *Bell* court's refusal to allow a negligent misrepresentation claim against a lawyer by a non-client, *Bell*'s discussion of the rationale behind the privity rule, which endures as the general rule regarding claims for legal malpractice in the wake of *McCamish*, has continuing vitality.

[8] *Id.*

[9] TEX. DISCIPLINARY R. OF PROF'L CONDUCT preamble at 3, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Vernon Supp. 2005).

> [Holding an attorney liable to a third party] would inject undesirable self-protective reservations into the attorney's counselling role. The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as distinguished from fraud) by any with whom his client might deal would prevent him from devoting his entire energies to his client's interest. The result would be both an undue burden on the profession and a diminution in the quality of the legal services received by the client. It would also tend to encourage a party to contractual negotiations to forego [sic] personal legal representation and then sue counsel representing the other contracting party for negligent misrepresentation if the resulting contract later proves disfavorable in some respect.[10]

Accordingly, as a general proposition, if an attorney must be concerned about potential liability to third parties, the resulting self-protective tendencies may deter vigorous representation of the client. The risk of liability to non-clients might cause the attorney to improperly weigh the interests of third parties in such a way that might taint zealous representation, thereby contravening what should be the attorney's uncompromising duty of loyalty to the client.

III. ASSIGNMENTS OF LEGAL MALPRACTICE CLAIMS ARE VOID, WITH FEW (IF ANY) EXCEPTIONS

One particular twist on the *Barcelo* rule has been at issue in a number of Texas appellate decisions: Can the rightful holder of a legal malpractice claim, the client, assign the cause of action to another plaintiff? The answer is certainly no in most instances, and the weight of Texas case law suggests a negative answer for any type of assignment. The Texas Supreme Court, however, has not yet explicitly enunciated a bright-line rule that *all* assignments of legal malpractice claims are void.

A. Generally, Causes of Action May Be Assigned

The *Barcelo* rule that a non-client may not bring a legal malpractice claim against an attorney does not necessarily resolve the question of whether the rightful owner of such a claim, the client, can assign or sell the

[10] *Bell*, 613 S.W.2d at 339.

cause of action to a third party. After all, in most instances, Texas courts permit the assignment of claims, reasoning that a cause of action is a property right that may be assigned to another.[11]

Still, "the assignability of *most* claims does not mean *all* are assignable; exceptions may be required due to equity and public policy."[12] Although some contracts are assignable, a contract that relies on the personal trust, confidence, or skill of the parties cannot be assigned without the consent of the parties.[13]

B. The Corpus Christi Court Treats Assignment of Legal Malpractice Claims No Differently than Other Causes of Action

Through the early 1990s, the Texas Supreme Court expressed no opinion regarding legal malpractice assignments.[14] It was not until the 1990s that Texas courts began repeatedly confronting the issue of whether one could assign a legal malpractice claim. Initially, the Corpus Christi Court of Appeals held that a legal malpractice claim could be freely assigned.[15] The *Drabek* court was quick to recognize that non-clients, in the absence of privity of contract, are owed no duty by an attorney and cannot bring suit for legal malpractice.[16] However, the ultimate conclusion was that "[a] part or all of a claim for legal malpractice can be assigned, just as any other negligence claim."[17]

[11] *See* Gutierrez v. Elizondo, 139 S.W.3d 768, 774 (Tex. App.—Corpus Christi 2004, no pet.); *see also* PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship, 146 S.W.3d 79, 87 (Tex. 2004).

[12] *PPG Indus., Inc.*, 146 S.W.3d at 87 (footnotes omitted).

[13] *See* Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 596 (Tex. 1992).

[14] *See* Am. Centennial Ins. Co. v. Canal Ins., 843 S.W.2d 480, 484 n.6 (Tex. 1992) ("The question of whether a malpractice claim may be assigned is not presented today . . . .").

[15] Stonewall Surplus Lines Ins. Co. v. Drabek, 835 S.W.2d 708, 711 (Tex. App.—Corpus Christi 1992, writ denied) (en banc).

[16] *Id.* at 710.

[17] *Id.* at 711.

C. With Zuniga, *the Texas Supreme Court Determines that Legal Malpractice Claims Arising From Litigation May Not Be Assigned*

The San Antonio Court of Appeals soon had the opportunity to evaluate the propriety of a legal malpractice assignment in *Zuniga v. Groce, Locke & Hebdon*, and reached a conclusion contrary to that of the *Drabek* court.[18] The *Zuniga* opinion carries particular importance because the Texas Supreme Court has adopted it as its own.[19] In the case underlying *Zuniga*, the Zuniga plaintiffs had sued Bauer Manufacturing Company and another defendant for personal injury damages.[20] Attorney Ron Sprague of Groce, Locke & Hebdon defended Bauer.[21] The Zunigas suggested that some of Sprague's responses to discovery "negligently admitted part of the liability case against Bauer."[22] Bauer's insurer became insolvent, and Bauer became concerned that a large judgment in favor of the Zunigas would bankrupt Bauer.[23] The Zunigas offered to settle with Bauer if Bauer would assign to the Zunigas its malpractice cause of action against Sprague and his law firm.[24] Bauer agreed to a $25 million judgment and assigned the malpractice action to the Zunigas.[25] The other terms of the parties' agreement were that: (1) Bauer could transfer all of its remaining assets to a new corporation; (2) the Zunigas waived their rights to the new entity's assets; (3) the Zunigas released their claims against individuals associated with Bauer; and (4) the parties agreed that Bauer's asset transfer was not a fraudulent transfer.[26]

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[18] 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref'd).

[19] *Id.* While the opinion was originally authored by the San Antonio Court of Appeals, the Texas Supreme Court refused the writ, thus adopting the San Antonio court's opinion with a precedential value commensurate to the Texas Supreme Court's own opinions. TEXAS RULES OF FORM, app. A (Texas Law Review Ass'n ed. 10th ed. 2003); State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 707 (Tex. 1992) (citing *Zuniga* as Supreme Court precedent); *see also* TEX. R. APP. P. 56.1(c) (defining the meaning of the Texas Supreme Court's refusal of a petition with the notation "Refused": "The court of appeals' opinion in the case has the same precedential value as an opinion of the Supreme Court.").

[20] *Zuniga*, 878 S.W.2d at 314.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

After the legal malpractice suit was brought by Zuniga against Sprague and Groce, Locke & Hebdon, the trial court rendered summary judgment for Sprague on the sole ground that a legal malpractice action may not be assigned.[27] On appeal, the San Antonio court declined to accept the Corpus Christi court's *Drabek* reasoning as settled Texas law, explaining that: "[I]t is dictum, it is unsupported by reasoning or authority, it is overbroad and incorrect as a matter of substantive law, and the supreme court has said the issue is open and unsettled in Texas."[28]

Ultimately, the court held that the assignment of the legal malpractice claim was invalid, after framing the question as "whether a client, who is in privity with the lawyer, may assign his cause of action to someone who lacks privity and thereby enable the assignee to bring the malpractice lawsuit."[29] To assist in explaining the rationale behind its outcome, the *Zuniga* court divided legal malpractice into two broad categories: (1) assignments made in the context of commercial marketing of malpractice claims by strangers to the attorney-client relationship; and (2) assignments apparently motivated by "forces other than the ordinary commercial market," such as a plaintiff's inability to collect judgments from defendants lacking adequate funds or insurance.[30]

As to the first category of assignments, the court opined that reducing legal malpractice claims to a commodity would demean the profession:

> Most of the authorities disallowing assignment have reasoned that to allow assignability would make possible the commercial marketing of legal malpractice causes of action by strangers, which would demean the legal profession. This is a legitimate concern. We do not relish the thought of entrepreneurs purchasing the legal rights of clients against their attorneys as an ordinary business transaction in pursuit of profit. We do not know the extent to which this fear would be realized if we were to permit assignment, or whether it has been realized in the few states that have already permitted assignment. In the fountainhead case on this subject, a person with no

[27] *Id.*

[28] *Id.* at 314–15.

[29] *Id.* at 315.

[30] *Id.* at 316.

> apparent connection to the original representation purchased the legal malpractice action as a thing of value.[31]

The fountainhead case to which the court referred was a California decision warning that "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" give rise to public policy concerns that malpractice assignments might "debase the legal profession."[32] The ultimate result of creating a market for legal malpractice claims would be the fostering of unjustified lawsuits against attorneys, placing undue burden on the legal profession and the judicial system, which would in turn restrict the availability of legal services.[33]

The *Zuniga* court then turned to what it viewed as the prototypical category of assignments, those motivated by "forces other than the ordinary commercial market," such as the plaintiffs' inability to collect judgments from defendants lacking adequate funds or insurance.[34] Faced with the prospect of obtaining a worthless judgment against an insolvent defendant, a plaintiff might seek to obtain the rights to sue the defendant's attorney, who presumably has deeper pockets—or at least an insurance policy. While these assignments would fund the plaintiff's judgment, they would enable a plaintiff to "drive a wedge between the defense attorney and his client by creating a conflict of interest; in time, it would become increasingly risky to represent the underinsured, judgment-proof defendant."[35] The conflict of interest would come if the plaintiff offered to settle with the defendant in return for a malpractice assignment; the attorney would presumably recognize that his own interests clash with his client's, and would need to recommend that the client seek the advice of additional counsel regarding the offer.[36] Zealous advocacy might be undermined because a defense attorney would realize that he might provoke opposing counsel into offering to accept assignment of a claim against the defense attorney to settle a case.[37] Additionally, attorneys would think twice about representing

[31] *Id.* at 316 (footnote omitted).

[32] *Id.* at 316 n.4 (quoting Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976)).

[33] *Id.*

[34] *Id.* at 316.

[35] *Id.* at 317.

[36] *Id.*

[37] *Id.*

defendants without appreciable assets, as the lawyers themselves, should they accept representation, soon might find themselves the most attractive target for the plaintiff.[38] "[U]nderinsured, undercapitalized clients might discover that lawyers are less willing to represent them."[39]

The San Antonio court went on to explain the demeaning role reversal that would result from assignment of legal malpractice claims by pointing to the facts before it.[40] The Zunigas' position in the personal injury suit was that they had a valid tort case against Bauer.[41] Once receiving assignment of Bauer's legal malpractice action, however, the Zunigas would need to reverse field and show that, but for the attorneys' negligence, Bauer would have succeeded in defending the suit brought by the Zunigas.[42] In the words of the *Zuniga* court, "For the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth."[43] In the end, the court held that "an assignment of a legal malpractice action arising from litigation is invalid."[44]

D. Moran, Booth, *and* Britton *Take the Next Step: Holding that Legal Malpractice Claims Not Based on Underlying Litigation May Not Be Assigned*

Notably, the *Zuniga* decision did not put to rest all controversy regarding the assignment of malpractice claims in Texas. The holding stated that assignment of a claim "arising from litigation is invalid," begging the question of whether attorneys providing legal services in other contexts might see prospective claims against them assigned to third parties.[45]

Houston's Fourteenth Court of Appeals was presented with the issue in *Vinson & Elkins v. Moran.*[46] The thrust of the complaint in that suit was

[38] *Id.* at 317–18.
[39] *Id.* at 318.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.).

that Vinson & Elkins failed to reveal conflicts of interest and to act in the best interest of the estate of W.T. Moran, which Vinson & Elkins administered.[47] After obtaining a jury verdict in its favor on legal malpractice claims, Moran contended on appeal "that while some legal malpractice assignments may be banned, others are authorized by statute and supported by policy considerations against misconduct by lawyers."[48] Vinson & Elkins, in response, contended that *Zuniga*, read properly, means that no legal malpractice claims should be assignable.[49] The *Moran* opinion is notable for the length and depth of its analysis regarding the assignment issue. Ultimately, the court decided that a bright-line rule was warranted, and that no legal malpractice action could be assigned.[50]

1. Property Code Provision Does Not Necessarily Permit Assignment

In support of its argument for assignability, Moran pointed to section 12.014 of the Texas Property Code, which states:

> A judgment or part of a judgment of a court of record or an interest in a cause of action on which suit has been filed may be sold, regardless of whether the judgment or cause of action is assignable in law or equity, if the transfer is in writing.[51]

Moran argued that the existence of this statute mandated upholding the validity of the assignments at issue before the court.[52] The court brushed this argument aside, noting that the Texas Supreme Court had held other types of assignments invalid.[53]

[47] *Id.* at 386.

[48] *Id.* at 389.

[49] *Id.* at 391.

[50] *Id.* at 386.

[51] *Id.* at 390–91 (quoting TEX. PROP. CODE ANN. § 12.014(a) (Vernon 2004)).

[52] *Id*.

[53] *Id.* at 391; *see, e.g.*, State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 710 (Tex. 1996); Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992); Int'l Proteins Corp. v. Ralston-Purina Co., 744 S.W.2d 932, 934 (Tex. 1988); Trevino v. Turcotte, 564 S.W.2d 682, 690 (Tex. 1978).

2. *Zuniga* Rationale Is Not Limited to Assignments Related to Underlying Litigation

The Houston court then turned to Moran's argument that the holding and reasoning of the *Zuniga* decision were limited to situations in which a judgment-proof defendant assigns his legal malpractice claim to the plaintiff.[54] Moran argued that the assignments at issue were outside of the *Zuniga* context (an assignment resulting from underlying litigation against a judgment-proof defendant).[55] The *Moran* court found this purported distinction unavailing, and noted that the Texas Supreme Court had not confined its rationale to the litigation context:

> While the [*Zuniga*] court did base its reasoning, in part, on those cases that discuss the consequences that could arise from an assignment motivated by a plaintiff's inability to collect from an insolvent, uninsured defendant, and the policy reasons for disallowing such assignments, the court's discussion of the issue was not limited to a review of those cases involving that situation. The court also reviewed the case relied on most often by courts in other jurisdictions, even those with fact patterns similar to *Zuniga*.[56]

> Like the *Zuniga* court and the other jurisdictions that have addressed this issue, we too find that public policy considerations should guide our analysis, rather than straining to fit the particular fact pattern into a category. Assignments should be permitted or prohibited based on the likely effect on society, and in particular, on the legal system. Employing a public policy analysis, the majority of courts in this country have concluded that legal malpractice claims are not assignable.[57]

The *Moran* panel acknowledged that the *Zuniga* decision voiced policy concerns unique to the fact pattern before the San Antonio court, but it also

[54] *Moran*, 946 S.W.2d at 392.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 392–93 (citations omitted).

cited cases expressing policy concerns "which are universal to the assignability question."[58]

3. The Unique Quality of Legal Services Supports Broad Prohibition on Assignments

The court then cited extensively to the *Goodley* case, and expressed agreement with the California court's focus "on the unique quality of legal services, the personal nature of the attorney-client relationship, and the confidentiality of that relationship."[59] The Houston court analogized to issues associated with assignments of contracts. Generally, a contract may be assigned, but those that rely on the personal trust, confidence, skill, character, or credit of the parties may not be assigned without the parties' consent.[60] So, too, does the attorney-client relationship rely upon special trust, confidence, and character, and should not be assignable.[61]

4. Concerns Regarding Loyalty and Client Confidences Support Broad Prohibition on Assignments

The *Moran* court expounded upon issues of loyalty implicated by the *Zuniga* court's discussion of zealous representation.[62] The decision declared that the prospect of a client assigning a claim against an attorney would weaken the attorney's loyalty.[63] "A legal system that chills the duty of loyalty disserves the client and the public."[64]

Similarly, the court explained, "When an attorney is sued by his own client, the attorney is permitted to reveal confidential information so far as necessary to defend himself."[65] When it is the *client* filing suit, the client can control disclosure by retaining the right to dismiss the suit if he decides that he would prefer to keep certain communications confidential.[66] If a third party controls the claim, however, the client loses the right to control

[58] *Id.* at 395.

[59] *Id.* at 393–94 (discussing Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976)).

[60] *Id.* at 394 n.7.

[61] *Id.*

[62] *Id.* at 394.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

the confidential communications, and the attorney can defend himself by revealing the information.[67] Knowing that an assignment (and therefore unchecked revelation of client confidences) may someday occur, the *Moran* court reasoned that a client may be encouraged to withhold information from its counsel.[68] The broader societal interest of justice is thereby compromised, because a client cannot be secure in the knowledge that his communications will never be divulged, and therefore may not confide in his attorney the information that might be required to provide proper representation.[69]

5. *Moran* Embraces a Bright-Line Rule that No Legal Malpractice Action Can Be Assigned

The *Moran* court made clear what the *Zuniga* court did not—a party may not assign its legal malpractice claim under any circumstances.[70] The Houston court stated that concept in multiple portions of its opinion:

> "We hold that legal malpractice claims are not assignable."[71]
>
> "These policy considerations compel this court to hold that all legal malpractice claims are not assignable."[72]
>
> "[W]e hold that the best rule is to bar all assignments of legal malpractice claims."[73]
>
> "While the actual stated holding contained in the last paragraph of the *Zuniga* opinion is limited to claims 'arising from litigation,' *we find the court's actual holding*, based on its analysis and review of authority, is much broader and *bars the assignment of all legal malpractice claims*."[74]

[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *See id.* at 389.
[71] *Id.*
[72] *Id.* at 394.
[73] *Id.* at 395.
[74] *Id.* (emphasis added).

6. *Booth* Employs Language Suggesting a Bright-Line Rule

In *City of Garland v. Booth*, the Dallas Court of Appeals addressed a classic *Zuniga* context—a defendant in a suit assigned a legal malpractice claim to the plaintiff.[75] The holding enunciated by the court did not, however, limit its scope to assignment of claims arising out of litigation: "Because we agree with appellees and the reasoning set forth in [*Zuniga*], we hold that legal malpractice claims are not assignable."[76]

7. The Fifth Circuit Finds that Texas Law Appears To Prohibit Assignment Altogether

Before the *Moran* decision, the Fifth Circuit had faced a similar case in which a plaintiff attempted to limit the holding of *Zuniga* by claiming that by forbidding certain assignments of legal malpractice claims, "Texas courts are concerned only with specific abuses—such as sale to strangers for profit and transfer by defendants in settlement of litigation—and not with assignment in general."[77]

Marian Britton sued her brothers regarding the siblings' respective inheritances from their parents, who had established partnerships and trusts with Britton's brothers named as trustees.[78] Britton sued her brothers for an accounting.[79] While the suit for an accounting was pending, the probate court declared the Brittons' mother to be incompetent and made her a ward of the court.[80] The suit for an accounting was settled (mostly with the mother's money), with the provision that the mother's guardian would not investigate wrongdoing by the children, the lawyers, or other professionals who had represented the mother.[81] The probate court transferred any claims the mother had against the professionals to the Britton children.[82]

Attorney Robert Seale had done estate planning for the Brittons' parents and had continued to represent the mother and her court-appointed guardian

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[75] 895 S.W.2d 766 (Tex. App.—Dallas 1995, writ denied).

[76] *Id.* at 769. A later decision in the *Booth* litigation (discussed *infra* note 116 and accompanying text) revealed that the Dallas court might not have intended this statement to be read broadly.

[77] Britton v. Seale, 81 F.3d 602, 604 (5th Cir. 1996) (footnote omitted).

[78] *Id.* at 603.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

during the suit for an accounting.[83] He and his colleagues also defended the brothers in that suit and helped negotiate the settlement.[84]

In her federal suit, Britton alleged that Seale ignored a conflict of interest in representing both the mother and the sons, and that Seale took advantage of Britton's mother by encouraging her to fund the settlement of Britton's suit and to pay other debts of her sons.[85] The federal district court dismissed the case, and the issue considered by the Fifth Circuit on appeal was whether the probate court's transfer order gave her standing to bring this action.[86]

The Fifth Circuit evaluated Texas law and stated:

> [Plaintiff] is correct in noting that the Texas cases discuss a variety of specific problems that would result from permitting assignment, but she is wrong in concluding that they limit the ban on assignment to cases presenting those problems. Instead, *Zuniga* and *Booth* appear to *prohibit assignment altogether* in order to prevent such problems from occurring.[87]

While the Fifth Circuit's construction of Texas law led to its conclusion that assignments of legal malpractice claims were inappropriate under any circumstances, the appellate panel allowed that the Texas Supreme Court might come to a different conclusion (but would arrive at the same result on the *Britton* facts): "Even if the Texas Supreme Court were to limit its ban on assignment of legal malpractice claims to those 'arising from litigation,' the instant situation would still fall within that ban."[88]

E. The Dissenting Voice: Baker v. Mallios

1. The Dallas Court Permits Assignment of Certain Legal Malpractice Claims

To be sure, the Texas courts have not spoken with one voice in stating that a bright-line rule precludes any and all assignments of legal malpractice

[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 604 (emphasis added).
[88] *Id.*

claims. Despite its broad pronouncement in *Booth* that legal malpractice claims are not assignable,[89] the Dallas Court of Appeals construed *Zuniga* more narrowly and reached a different result in *Baker v. Mallios*.[90]

Mark Baker suffered an injury when driving while intoxicated.[91] He hired attorney Mallios to sue the owner of the establishment that served him alcoholic beverages.[92] Mallios sued the entity that Mallios believed to be the owner of the establishment, and obtained a default judgment.[93] It turned out that Mallios had sued the wrong entity. By the time the error had been discovered, the suit against the correct entity was barred by limitations.[94]

Baker assigned an interest in the proceeds from his malpractice claim against Mallios to T.G. Herron.[95] Herron recommended legal counsel and negotiated the terms of employment for Baker subject to Baker's approval, and Herron paid attorneys' fees, costs, and expenses for the legal malpractice claims.[96] In exchange, Herron would be entitled to fifty percent of Baker's recovery, net of expenses.[97]

The intermediate *Baker* court walked through some of the policy considerations outlined in *Zuniga* and *Booth* and ultimately determined:

> [T]hat those cases raise legitimate public policy concerns against the assignment by *a losing defendant* of his malpractice claim against his attorney *to the winning plaintiff* in exchange for an agreement by the plaintiff not to execute on the judgment. These public policy concerns do not support a prohibition against a *plaintiff* assigning to a third party a portion of any proceeds he recovers in his legal malpractice claim against his own attorney.[98]

[89] City of Garland v. Booth, 895 S.W.2d 766, 769 (Tex. App.—Dallas 1995, writ denied).

[90] *See* 971 S.W.2d 581, 587 (Tex. App.—Dallas 1998, writ granted), *aff'd on other grounds*, 11 S.W.3d 157 (Tex. 2000).

[91] *Id.* at 582.

[92] *Id.*

[93] *Id.*

[94] *Id*. at 583.

[95] *Id.*

[96] *Id*. at 584.

[97] *Id.*

[98] *Id.* at 587 (footnote omitted).

In so holding, the *Baker* court refused to accept that *Zuniga* set forth a bright-line rule. Instead, it embarked upon an analysis of the individual justifications in the *Zuniga* opinion.[99]

2. Role Reversal Was Not an Issue in *Baker*

The Dallas court first observed that the assignment from Baker to Herron was not one in which a defendant assigned to a plaintiff a cause of action against the defendant's attorney, such that an "illogical reversal of roles" might result.[100] Because he had not assigned the entirety of his interest in the legal malpractice claim, and because he was suing his own attorneys (as opposed to his adversary's), Baker was maintaining a consistent position in both the underlying litigation and the legal malpractice litigation—that the case against the dram shop had merit.[101] Based upon this role-reversal issue, the *Baker* court differentiated other cases forbidding assignment.[102]

3. Availability of Legal Services Would Not Be Reduced

The *Baker* panel summarily dispensed with the *Zuniga* concern that assignment of legal malpractice claims might impact the availability of legal services to those with limited resources or insurance, and concluded that "[t]his policy consideration is inapplicable . . . when there is no role-reversal[;] that is, when an unsuccessful plaintiff assigns his cause of action against his previous attorney to a third party not involved in the underlying litigation."[103]

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[99] *Id.* at 585–87. The intermediate court's decision in *Baker* is particularly noteworthy because it determined not that *Zuniga* did not forbid assignment outside the litigation context, but that assignment was permissible for a case that did indeed "aris[e] from litigation"—a result squarely at odds with the stated holding in *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref'd). *Id.* at 584.

[100] *Baker*, 971 S.W.2d at 585 (quoting *Zuniga*, 878 S.W.2d at 318).

[101] *Id.*

[102] *See id.* (citing City of Garland v. Booth, 895 S.W.2d 766, 767–68 (Tex. App.—Dallas 1995, writ denied); Vinson & Elkins v. Moran, 946 S.W.2d 381, 389–90 (Tex. App.—Houston [14th Dist.] 1997, no writ)).

[103] *Id.*

4. No Risk of Collusion in *Baker*

Mallios argued on appeal that the *Zuniga* court's disquiet with assignment being used as a "transparent device to replace a judgment proof, uninsured defendant with a solvent defendant" was brought to bear on the *Baker* case.[104] The Dallas court acknowledged that collusion is a valid concern in "a role reversal case," but, given its previous conclusion that no role reversal existed on the facts at issue, found that there was no risk of improper collusive activity that would prohibit "an unsuccessful plaintiff from assigning his malpractice cause of action against his attorneys in the underlying action to a third party not involved in that action."[105]

5. No Threat to Zealous Advocacy in *Baker*

The court acknowledged *Zuniga*'s uneasiness regarding assignment of claims deterring zealous advocacy for fear of provoking opposing counsel into offering to accept an assignment of legal malpractice claims in settlement of underlying litigation. However, the appellate court found the public policy concern irrelevant to the facts before it, in that the assignee was a party with no involvement in the underlying suit.[106]

6. No Risk of Creation of a Marketplace for Malpractice Claims on Facts of *Baker*

Finally, the Dallas court addressed the concern that assigning legal malpractice claims would demean the legal profession by creating a marketplace for suits against attorneys.[107] The court differentiated the *Zuniga* facts by noting that the assignor retained no role in the litigation against the assignor's former attorney.[108] The structure of the assignment to Herron apparently swayed the court to conclude that there were no "creation of a marketplace" concerns in *Baker*. Specifically, Baker did not assign his claim; rather, Herron would be entitled only to a portion of proceeds that might be recovered from Mallios.[109] Therefore, "Baker, unlike the Zunigas, retain[ed] ownership of his claim and maintain[ed] an

[104] *Id.* at 586 (quoting *Zuniga*, 878 S.W.2d at 317).

[105] *Id.*

[106] *Id.* at 587.

[107] *Id.*

[108] *Id.* (citing *Zuniga*, 878 S.W.2d at 314).

[109] *Id.*

interest in the litigation."[110] As to whether Baker had ceded control of the malpractice litigation to Herron, the court found a record that was not fully developed, and so resolved the perceived ambiguity in favor of Baker, the nonmovant.[111]

7. On Review, the Texas Supreme Court Does Not Reach the Issue of Assignability

On further appeal, the Texas Supreme Court did not reach the question of whether the assignment of the claim to Herron violated public policy. Instead, it explained:

> [E]ven assuming Mallios is correct that the agreement between Baker and Herron violates Texas public policy, *an issue we do not decide today*, the question remains whether that invalidity would entitle Mallios to a take-nothing judgment on Baker's malpractice claim. The situation here is not like the one in *State Farm Fire and Casualty Co. v. Gandy*, for example, in which we rendered a take-nothing judgment against the purported assignee of a claim because the assignment was void, leaving her no claim to pursue. Here, Baker is the alleged assignor, and assuming there was a partial assignment, Baker still retained a portion of his claim. Mallios does not dispute that Baker had the right to sue Mallios before Baker's agreement with Herron. And *even if we were to reach the issue of the agreement's validity and determine that Mallios is correct that it is an invalid assignment, that would not vitiate Baker's right to sue Mallios. Thus, either way, summary judgment was improper and Baker may continue his suit. We therefore express no opinion on the validity of the underlying arrangement between Baker and Herron.*[112]

As the emphasized language shows, the court expressly did "not reach the question of whether the agreement between the plaintiff and the third party

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[110] *Id.*

[111] *Id.*

[112] Mallios v. Baker, 11 S.W.3d 157, 159 (Tex. 2000) (emphasis added) (internal citation omitted); *see also* Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 315 (Tex. App.—San Antonio 1994, writ ref'd).

violated public policy . . . ."[113] A concurrence authored by Justice Hecht, joined by three other justices, concluded that "an assignment of an interest in a legal malpractice claim is contrary to public policy if the assignee takes the interest purely as an investment unrelated to any other transaction . . . ."[114]

F. Unanswered Questions About Assignment

Plainly, there will be further litigation surrounding the issues left unresolved in the Texas Supreme Court's *Mallios* decision. The court did not reach the issue of whether *Zuniga* could be differentiated in certain factual situations. Justice Hecht's concurrence would have held that an assignee may not receive a legal malpractice claim purely as an investment unrelated to any other transactions.[115] In the wake of *Mallios*, the questions remain:

> (1) Is there a bright-line rule in Texas that forbids an assignment of legal malpractice actions?
>
> (2) If there is no bright-line rule, under what circumstances can a valid assignment occur?
>
> (3) Can an assignee receive a legal malpractice claim as an investment that is tied to another transaction?
>
> (4) Can an assignee receive a legal malpractice claim purely as an investment unrelated to any other transactions?
>
> (5) Are there circumstances under which an assignment may be valid, even though the malpractice claim arises from litigation?
>
> (6) Are assignments valid if they do not arise from litigation?

To the extent these issues have been addressed in published decisions, courts of appeals have come to contrary conclusions. For its part, the Dallas Court of Appeals has clung to its analysis in *Baker* in a subsequent case by asserting, "[A]s we stated in *Baker*, a legal malpractice claim is

[113] *Id.* at 158.

[114] *Id.* at 170 (Hecht, J., concurring).

[115] *Id.* Justice Hecht is the only justice remaining on the Supreme Court from the four-justice concurrence he authored. (The others were Justice Owen, Justice Abbott, and Justice Baker.)

assignable if it does not have the public policy concerns present in *Zuniga* . . . . Therefore, to determine whether assignment of the claims was barred by *Zuniga*, we must examine the claims to determine whether they raise *Zuniga*'s public policy concerns."[116] At least as to the question of whether there is a bright-line rule against assignment, Texas lawyers should expect the clash of the Houston court's ruling in *Moran* and the Dallas court's ruling in *Baker* eventually to require resolution by the Texas Supreme Court.

IV. SUIT FOR NEGLIGENT MISREPRESENTATION AGAINST AN ATTORNEY BY A NON-CLIENT

Another type of suit in which attorneys might find non-client plaintiffs bringing suit against them is one claiming negligent misrepresentation grounded in section 552 of the Restatement (Second) of Torts. The tort of negligent misrepresentation requires a plaintiff to establish: (1) a duty to act with care; (2) a negligent representation upon which third parties are expected to, and do, rely to their detriment; and (3) knowledge by or notice to the professional that the representation will be relied upon.[117] Until recently, Texas courts had refused to apply this tort to attorneys.[118]

Interestingly, Texas courts in the past permitted section 552 claims against other professionals, but consistently drew the line at permitting suit against attorneys. In *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, in which creditors sued an accounting firm hired by its debtor to audit its financial records before going bankrupt, the court of appeals applied section 552 of the Restatement (Second) of Torts and held privity was not a bar to recovery against the accounting firm.[119] The *Blue Bell* court also considered the apparent conflict between this conclusion and its earlier decision in *First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart*,[120] in which the court declined to apply section 552 of the Restatement to an attorney who had issued an opinion letter to a client

[116] City of Garland v. Booth, 971 S.W.2d 631, 634 (Tex. App.—Dallas 1998, pet. denied) (citing Baker v. Mallios, 971 S.W.2d 581, 588 (Tex. App.—Dallas 1998), *aff'd on other grounds*, 11 S.W.3d 157 (Tex. 2002)).

[117] RESTATEMENT (SECOND) OF TORTS § 552 (1997).

[118] *See* Thompson v. Vinson & Elkins, 859 S.W.2d 617, 623 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (rejecting the idea that section 552 applies to attorneys).

[119] 715 S.W.2d 408, 411 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

[120] 648 S.W.2d 410, 413 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

knowing a third party would rely on it.[121] The *Blue Bell* court explained, "We doubt the wisdom of continuing to apply different standards for determining the liability of different professionals to third parties, but conclude that we need not eliminate these distinctions in this case."[122]

Texas courts' approach to section 552 as applied to lawyers changed with the *McCamish* decision, as the Texas Supreme Court carved a significant exception from the rule that an attorney cannot be liable for negligence to non-client plaintiffs.[123] In *McCamish*, the Court held that, under certain circumstances where a non-client justifiably relies upon the representations of an attorney, the non-client may sue an attorney for negligent misrepresentation.[124]

A. McCamish*: The Texas Supreme Court Permits Negligent Misrepresentation Claims by Non-Clients Against Attorneys*

The McCamish law firm represented Victoria Savings Association (VSA) in negotiations with F.E. Appling Interests and Boca Chica Development Company (collectively, Appling).[125] Appling was not a client of McCamish.[126] Appling obtained a loan and line of credit from VSA in 1985 to finance a real estate project.[127] Appling claims that VSA represented that it would later expand the line of credit if lot sales at Appling's recreational property warranted completion of the development.[128] Two years after the loan, and despite the success of the development project, VSA decided not to extend any additional credit to Appling.[129] Appling eventually declared bankruptcy and sued VSA for $15 million in damages.[130] Appling was concerned that VSA would become insolvent before a judgment could be obtained and that VSA would be placed into receivership by the Federal Savings & Loan Insurance

[121] *Blue Bell*, 715 S.W.2d at 413.

[122] *Id.*

[123] *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999).

[124] *Id.* at 795.

[125] *Id.* at 788.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 788–89.

Corporation (FSLIC) such that the claim against VSA would be unenforceable because it was based upon the breach of an oral promise.[131] Appling and VSA discussed settlement and reached an agreement in which the development would be deeded to VSA in exchange for forgiveness of the loan.[132] Appling wished to ensure that the settlement agreement would be enforceable against the FSLIC.[133] No agreement is enforceable against the FSLIC unless it is: (1) in writing; (2) executed by the depository institution and any person claiming an adverse interest thereunder; (3) approved by the board of the depository institution or its loan committee; and (4) continuously an official record of the depository institution.[134] Although VSA represented that the contemplated settlement agreement satisfied this federal statute, Appling would go through with the settlement "only if VSA's lawyers would affirm that the agreement did, in fact, comply with the statute."[135] Eventually, the parties *and their attorneys* signed a settlement agreement with such representations.[136] McCamish attorney Ralph Lopez was the attorney of record for VSA in the underlying litigation and was also the member of the firm that signed the settlement agreement in the course and scope of his employment with VSA.[137]

Less than a month before executing the settlement agreement, the VSA Board of Directors adopted a resolution consenting to the Texas Savings and Loan Commissioner placing VSA under "voluntary supervision."[138] Tom Martin, a McCamish shareholder, was a member of that Board of Directors.[139] Pursuant to the VSA resolution, the Texas Savings and Loan Department had the power to settle lawsuits against VSA.[140] Then, less than a week before the settlement was signed by VSA and Appling, the VSA Board (including Martin) gave the Savings and Loan Commissioner supervisory control over VSA.[141] The agreed order that turned over supervisory control provided that "no action taken at any Board meeting

[131] *Id.* at 789.
[132] *Id.*
[133] *Id.*
[134] *Id.* (citing 12 U.S.C. § 1823(e)(1) (2000)).
[135] *Id.*
[136] *Id.* (emphasis added).
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*

will be valid or binding on [VSA] unless and until such action is approved in writing by the Supervisor or the Commissioner."[142]

After those events, the VSA Board approved the Appling settlement.[143] "Martin did not sign the approval resolution."[144] Lopez testified that Martin did not inform him about the supervisory order, and that Lopez was not aware that the VSA Board lacked the authority to approve the settlement agreement when he signed the Appling settlement agreement.[145] The settlement agreement was never entered as a final judgment.[146]

Less than two months later, VSA was declared insolvent.[147] FSLIC was appointed as the receiver and removed Appling's case to federal court.[148] The federal court determined that the settlement agreement was not binding on the FSLIC because the VSA Board had relinquished its authority to enter into a settlement, and therefore the mandates of the federal statute had not been satisfied.[149]

Appling then sued McCamish, alleging that McCamish had negligently misrepresented that the VSA Board had approved the settlement agreement.[150] The trial court granted a motion for summary judgment, holding that the firm owed no duty to Appling.[151] On appeal, the court of appeals reversed, theorizing that, "even absent privity, an attorney may owe a duty to a third party to avoid negligent misrepresentation."[152] McCamish then took the issue to the Texas Supreme Court, and contended that a non-client may not sue a lawyer for negligence because privity is lacking.[153] McCamish argued that the privity rule applies to all negligence-based causes of action, regardless of whether the non-client's claim is characterized as legal malpractice or negligent misrepresentation.[154] In response, Appling maintained that an attorney may be held liable under

[142] *Id.* at 789–90.
[143] *Id.* at 790.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*

section 552 of the Restatement (Second) of Torts.[155] Section 552(1) provides:

> 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 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.[156]

Before the Texas Supreme Court, Appling contended that the Restatement and Texas precedent called for application of section 552 to lawyers, and that section 552 had no privity requirement.[157] In sum, "Appling urge[d] [the court] to recognize a distinction between cases of legal malpractice, which are subject to the privity rule, and cases of negligent misrepresentation, which are not."[158]

Of course, Appling had to contend with the policy rationale behind the general requirement that privity is necessary to sue an attorney for negligence. In addressing this issue, Appling stressed that section 552 limited liability to a narrow class of defendants.[159] Appling asserted that permitting negligent misrepresentation claims against attorneys would "not only improve the legal profession's integrity and reputation, but will also promote desirable economic activity by protecting a commercial actor who justifiably relies on an evaluation provided by the attorney of another commercial actor."[160]

As it began its analysis, the court observed that Texas courts had long accepted causes of action based upon section 552, and had recognized the viability of section 552 suits against other professionals—such as doctors, accountants, and surveyors.[161] The court then concluded:

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[155] *Id.*

[156] RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

[157] *McCamish*, 991 S.W.2d at 790.

[158] *Id.*

[159] *Id.* at 791.

[160] *Id.*

[161] *Id.*

> We perceive no reason why section 552 should not apply to attorneys. First, nothing in the language of section 552 or in the reasoning of *Sloane* warrants such an exception. More importantly, allowing a non-client to bring a negligent misrepresentation cause of action against an attorney does not undermine the general rule that persons who are not in privity with an attorney cannot sue the attorney for legal malpractice. Nor does applying section 552 to attorneys implicate the policy concerns behind our strict adherence to the privity rule in legal malpractice cases. Finally, the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (Tentative Draft No. 8, 1997), which sets forth certain circumstances in which an attorney may owe a duty of care to a non-client, validates the application of section 552 to an attorney when the attorney invites a non-client's reliance.[162]

The court further observed that a negligent misrepresentation claim is not equivalent to a legal malpractice claim, and that section 552 imposes a duty to avoid negligent misrepresentation, regardless of privity.[163] The *McCamish* court acknowledged as legitimate the teaching of *Barcelo* that, "without a bright-line privity rule, clients would 'lose control over the attorney-client relationship' and lawyers would be 'subject to almost unlimited liability'"; however, the court concluded that these precepts did not preclude a section 552 action by a non-client against a lawyer.[164]

As a threshold issue, the Court opined that permitting section 552 claims against attorneys would not cause a client to "lose control" over the attorney-client relationship.[165] In response to McCamish's assertion that the ability to zealously represent a client would be compromised by potential liability to third parties, which "creates a conflict of duties and threatens the attorney-client privilege," the court relied upon the Texas Disciplinary Rules of Professional Conduct.[166] Specifically, the court explained that a Texas lawyer must advise a client of the implications of an evaluation given

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[162] *Id.* (footnote omitted).

[163] *Id.* at 792 (citing F.E. Appling Interests v. McCamish, Martin, Brown & Loeffler, 953 S.W.2d 405, 408 (Tex. App.—Texarkana 1997, pet. granted)).

[164] *Id.* at 793 (quoting Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996)).

[165] *See id.*

[166] *Id.*

to a third party.[167] Therefore, the court reasoned, "[R]ule 2.02 safeguards against a lawyer's exposure to conflicting duties and ensures that the client makes the ultimate decision of whether to provide an evaluation."[168]

The court also brushed aside concerns that section 552 would subject lawyers to "almost unlimited liability."[169]

> Under section 552(2), liability is limited to loss suffered: (a) by the person or one of a limited group of persons for whose benefit and guidance one intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that one intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.[170]

And so, the court reasoned, an attorney providing information for which liability would arise must be aware of the non-client, and intend that the non-client rely on the information.[171] The court reassured attorneys that risk of suit by a non-client might be minimized by setting forth limitations as to who should rely upon a representation or to disclaimers regarding the scope and accuracy of the representation.[172]

B. The Boundaries of the McCamish *Holding: Justifiable Reliance*

While permitting negligence lawsuits by non-clients in certain situations, the *McCamish* court made clear that an important check on potentially unlimited liability exposure by attorneys is the requirement that "a claimant justifiably rely on a lawyer's representation of material fact."[173] The court's explication of when an attorney may or may not be liable under section 552 promised more litigation as litigants seek to explore the depths of the *McCamish* holding. For example, the court clarified, statements such as those used by an attorney to set out a client's negotiating position are not

[167] *Id.* (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 2.02 cmt. 5, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005)).

[168] *See id.*

[169] *Id.*

[170] *Id.* at 794 (quoting RESTATEMENT (SECOND) OF TORTS § 552(2) (1977)).

[171] *Id.*

[172] *Id.*

[173] *Id.*

statements of material fact.[174] By way of further explanation, Justice Hankinson wrote on behalf of the court:

> In determining whether section 552's justifiable reliance element is met, one must consider the nature of the relationship between the attorney, client, and non-client. Generally, courts have acknowledged that a third party's reliance on an attorney's representation is not justified when the representation takes place in an adversarial context. *See, e.g.*, Mehaffy [, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A., 892 P.2d 230, 235, 237 (Colo. 1995)] (business transaction); L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 378–79 (Minn. 1989) (arbitration proceeding); Garcia [v. Rodey, Dickason, Sloan, Akin & Robb, 750 P.2d 118, 122–23 (N.M. 1988)] (litigation); Beeck v. Kapalis, 302 N.W.2d 90, 96–97 (Iowa 1981) (litigation) . . . .[175]

The court acknowledged that "not every situation is clearly defined as 'adversarial' or 'nonadversarial,'" and that "the characterization of the inter-party relationship should be guided, at least in part, by 'the extent to which the interests of the client and the third party are consistent with each other.'"[176]

In providing a broad outline of what "justifiable reliance" might mean, the court set the ground rules for future skirmishes regarding whether an attorney might be susceptible to a claim brought by a non-client.[177] Litigators are left to fight the battles that remain unsettled; to wit, the determination of convergent and divergent interests of the client and the third party so that a situation may be characterized as adversarial or not. Based on existing precedent, one can reasonably anticipate that communications made during or before litigation will not be actionable under section 552 against an attorney. The more problematic analysis lies in the area of negotiations and transactions, in which multiple parties can have conflicting interests and goals, and yet seek an accord that can

[174] *Id.*

[175] *Id.* at 794.

[176] *Id.* (quoting Jay M. Feinman, *Attorney Liability to Non-clients*, 31 TORT & INS. L.J. 735, 750 (1996)).

[177] *See id.* at 795.

mutually benefit each party—Texas lawyers should expect a fact-intensive analysis under those conditions.

1. Representations by Lawyers Made in Anticipation of or During the Course of Litigation Should Generally Not Be Actionable

It seems reasonable to assume that statements made while litigation is pending or imminent are made in an "adversarial" context so that no section 552 claim against an attorney should be permitted; case law generally bears this out.[178] In *Lesikar*, the parties had engaged in numerous, protracted suits, and the Texarkana court held that no reliance was justified by a party upon another's lawyer's representations.[179]

The *Lesikar* outcome reflects Texas's general rule that "[a]ny communication, even perjured testimony, made in the course of a judicial proceeding, cannot serve as the basis for a suit in tort."[180] This judicial communication privilege is absolute. It "should be applied to claims arising out of communications made in the course of judicial proceedings, regardless of the label placed on the claim."[181]

In addition to the holding in *Crain* regarding judicial privilege, which applies to non-attorney witnesses as well as attorneys, a more particularized privilege protects attorneys from liability for actions taken in the course of representing clients. It is well-established in Texas that an attorney may zealously represent his clients in litigation without subjecting himself to the threat of liability to the opposing party.[182] This rule is grounded in the recognition that attorneys have an absolute right to "practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages."[183] The public has

[178] *E.g.*, Lesikar v. Rappeport, 33 S.W.3d 282, 319 (Tex. App.—Texarkana 2000, pet. denied) ("This case is distinguishable from *McCamish*, which occurred in a transactional, as opposed to a litigation, setting."); Mitchell v. Chapman, 10 S.W.3d 810, 812 (Tex. App.—Dallas 2000, pet. denied) ("[A]s the relationship between Mitchell and Chapman's client in the earlier suits was 'adverse,' Chapman's conduct in representing his client could not create an actionable duty under Section 552 of the RESTATEMENT (SECOND) OF TORTS.").

[179] *Lesikar*, 33 S.W.3d at 319.

[180] Crain v. Unauthorized Practice of Law Comm. of the Sup. Ct. of Tex., 11 S.W.3d 328, 335 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

[181] *Id.* (footnote omitted).

[182] Toles v. Toles, 113 S.W.3d 899, 910 (Tex. App.—Dallas 2003, no pet.).

[183] Kruegel v. Murphy, 126 S.W. 343, 345 (Tex. Civ. App.—Dallas 1910, writ ref'd).

an important interest in "loyal, faithful and aggressive representation by the legal profession."[184] As the *Toles* court explained:

> Any other rule would act as a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled.[185]

As stated by another court:

> The knowledge of an attorney for one party that he may be sued by the other party would exacerbate the risk of tentative representation to at least the same degree as would knowledge that opposing counsel could sue him. And it arguably could have a greater chilling effect, since a lawyer may reasonably think it more likely that a private party, rather than a fellow professional, would seek to retaliate in this manner.[186]

This is why Texas courts consistently enforce the litigation privilege against tort claims brought by persons claiming to have been adversely affected by representation. To hold an attorney liable for actions taken in the course of client representation would favor tentative representation, not the zealous representation that the adversarial system of justice requires.[187] Based on this overriding public policy, Texas courts have repeatedly held that an opposing party does not have a right of recovery, *under any cause of action*, against another attorney arising from the discharge of his duties in representing a party in a lawsuit.[188]

Because of the public policy described above, courts have held that an attorney has an absolute privilege to communicate with clients, potential clients, and witnesses regarding the subject of an ongoing or contemplated judicial proceeding, and to zealously prosecute claims in such proceedings,

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[184] *Toles*, 113 S.W.3d at 910.

[185] *Id.* (quoting Morris v. Bailey, 398 S.W.2d 946, 947–48 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

[186] Taco Bell Corp. v. Cracken, 939 F. Supp. 528, 532 (N.D. Tex. 1996) (applying Texas law).

[187] *See* Bradt v. West, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

[188] *See Taco Bell Corp*., 939 F. Supp. at 532; *Toles*, 113 S.W.3d at 910; *Bradt*, 892 S.W.2d at 71–72 (emphasis added).

without fear of suit by the opposing party. A good example of how courts have endorsed the absolute privilege is provided in the summary judgment disposition of the *Toles* case. In *Toles,* a party to a divorce proceeding sued her former spouse and his lawyers, alleging negligence, among other things.[189] The trial court granted summary judgment to the lawyers without providing the plaintiff any opportunity to replead her case, in light of the absolute bar against such claims.[190] The court of appeals upheld the summary judgment. Citing a First Court of Appeals decision, the court confirmed that the claims were barred by the litigation privilege, stating that "'an attorney does not have a right of recovery, *under any cause of action*, against another attorney arising from conduct the second attorney engaged in as part of the discharge of his duties in representing a party to a lawsuit in which the first attorney also represented a party,'" [191] and that "these principles apply with equal force to the liability of an attorney to the opposing party."[192]

Texas courts have repeatedly recognized and confirmed the absolute privilege that led to the granting of a summary judgment against the tortious interference claim in *Toles*.[193]

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[189] *Toles*, 113 S.W.3d at 906.

[190] *Id.* at 907.

[191] *Id.* at 910 (quoting *Bradt*, 892 S.W.2d at 71–72).

[192] *Id.*

[193] *See, e.g.*, IBP, Inc. v. Klumpe, 101 S.W.3d 461, 471 (Tex. App.—Amarillo 2001, pet. denied) ("The absolute privilege from civil liability for damages based on the content of communications made by counsel, parties or witnesses in pre-trial and trial proceedings is well established."); Chapman's Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 441 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) ("Because other sanctions are available, an attorney's conduct is not actionable even if it is frivolous or without merit as long as the attorney's alleged conduct was part of discharging his duties in representing his client."); *see also* Lewis v. Am. Exploration Co., 4 F. Supp. 2d 673, 680 (S.D. Tex. 1998) ("Labeling such conduct as fraudulent or as part of a conspiracy to defraud does not subject the attorneys to liability for tort damages to the opposing party under Texas law."); Miller v. Stonehenge/FASA-Texas, JDC, L.P., 993 F. Supp. 461, 464 (N.D. Tex. 1998) (citations omitted) (applying Texas law).

> As a general rule, a party may not sue opposing counsel under any theory of recovery for "acts or omissions undertaken as part of the discharge of their duties as attorneys to opposing parties in the same lawsuit." This rule protects the public's interest in loyal, faithful, and aggressive representation by the legal profession . . . .

Taco Bell Corp., 939 F. Supp. at 532 (holding that an opposing party or his attorney "has no right of recovery, under any cause of action, against another attorney arising from conduct the second attorney engaged in as part of the discharge of his duties in representing a party in a

There is one inconsistency with all of the case law regarding representations made in the context of litigation—*McCamish* itself. In *McCamish*, VSA's attorney made representations to Appling in connection with the settlement of a lawsuit–suggesting that an adversarial context existed.[194] It might seem, therefore, that even if Appling's cause of action existed, it had no justifiable reliance. Recall, however, that the *McCamish* court never actually determined whether or not there was justifiable reliance. Because the trial court had granted McCamish's motion for summary judgment on the sole ground that, without privity, Appling was owed no duty, the Supreme Court held only "that McCamish . . . *may owe a duty* to Appling, irrespective of privity," and thus remanded the case to the trial court.[195] In other words, the only thing the Texas Supreme Court actually decided in *McCamish* was that lack of privity is not an absolute bar to a section 552 suit against an attorney; the high court never applied the justifiable reliance analysis to the facts before it. Additionally, even if a court were to determine that there was justifiable reliance in *McCamish*, that conclusion might be attributable to the unique facts at issue in that case: an attorney actually becoming a signatory to his client's settlement agreement and affirming that a statutory requirement had been met. Under those circumstances, one might argue, Appling would be justified in relying upon McCamish's statements no matter how adversarial the relationship might have been.

2. Representations by Lawyers Made During the Course of Negotiations Require a Fact-Intensive Analysis

Having arrived at the relatively comfortable conclusion that most communications made in the context of litigation are adversarial and not actionable under section 552, one must then turn to the trickier issue—the circumstances under which a plaintiff might bring a negligent misrepresentation suit against a lawyer. The *McCamish* court quoted favorably from a treatise for the proposition that "[t]he adversary concept is not limited to litigation. The same policy considerations apply to business and commercial transactions."[196]

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lawsuit . . . .").

[194] McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 789 (Tex. 1999).

[195] *Id.* at 795 (emphasis added).

[196] *Id.* at 794 (quoting 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE

Recently, the First District Court of Appeals in Houston expressed its agreement with the principle that negotiations may be considered adversarial:

> Generally, reliance on representations made in a business or commercial transaction is not justified when the representation takes place in an adversarial context. . . . A party to an arm's length transaction must exercise ordinary care and reasonable diligence for the protection of his own interests, and a failure to do so is not excused by mere confidence in the honesty and integrity of the other party.[197]

The First District Court has similarly noted that "[r]eliance on representations made in a business or commercial transaction is not justified when the representation takes place in an adversarial context."[198]

But what are the hallmarks of a transaction that takes place "in an adversarial context"? The Fourteenth District Court of Appeals has noted that "statements made during settlement negotiations [are] likely made in an adversarial context."[199] However, statements made during the formation and operation of a business entity "most likely [are] not."[200] Because the parties were "ostensibly working toward the same goal of a successful business venture," the Houston court held that statements made by an attorney that led to the plaintiff's contributing assets to a company were actionable.[201] On the other hand, a federal court has concluded that a sale of a school "was an arms-length transaction in which the seller was under no duty to avoid negligent misrepresentation," and granted summary judgment on a negligent misrepresentation claim.[202]

§ 7.10 (4th ed. 1996)).

[197] Coastal Bank SSB v. Chase Bank of Tex., N.A., 135 S.W.3d 840, 843 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

[198] Swank v. Sverdlin, 121 S.W.3d 785, 803 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

[199] McMahan v. Greenwood, 108 S.W.3d 467, 497 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

[200] *Id.*

[201] *Id.*

[202] Tex. Technical Inst., Inc. v. Silicon Valley, Inc., No. Civ.A. H-04-3349, 2006 WL 237027, at *8 (S.D. Tex. Jan. 31, 2006).

From the few data points provided by these cases, a rough summary of courts' inclinations on the adversarial context issue discussed in *McCamish* might be as follows:

> (1) negotiations of a dispute settlement are almost certainly adversarial;
>
> (2) negotiations to form a business are generally not adversarial; and
>
> (3) other arms' length negotiations will generally be considered adversarial.

As a caveat, this is not a normative assessment of how *McCamish should* be interpreted, and this assessment is based on a selection of the relatively few cases that have addressed the subject. Moreover, the cases do not provide much exposition on the rationale underlying their conclusions in this matter. Future decisions will shape the direction that the adversarial context analysis takes, as there is currently no clear line of demarcation between situations that are adversarial as opposed to non-adversarial.

V. CONCLUSION

Ten years have passed since *Barcelo* announced its entry onto the landscape of Texas legal malpractice jurisprudence, setting forth the general proposition that an attorney may be sued only by his client. During the intervening timeframe, there have been suggestions by various courts that the rule against suits by non-clients is not inviolate. Nevertheless, the situations in which a non-client can bring a viable negligence suit against an attorney are quite limited. In the view of at least one Texas appellate court (and apparently the Fifth Circuit), there can be no suit of any kind brought by an assignee of a legal malpractice claim, although another Texas appellate court has allowed such suits under specific circumstances. Similarly, the Texas Supreme Court has permitted negligent malpractice suits against attorneys, but only when there has been justifiable reliance in an adversarial context. As jurists and lawyers struggle with the shape and form of those terms in future litigation, so too will they continue to give contour to the *Barcelo* rule.

Importantly, Texas lawyers should stay apprised of the extent and breadth of exceptions to *Barcelo*, because they affect every attorney in Texas—shaping the way we prosecute and defend suits, the way we negotiate agreements, and the way we interact with our clients.