Hyperlink all case and statute and rule citations to be directed to that case, statute, or rule. I will provide .pdf of each for your use.

What is "Legal Malpractice"?

In general, "legal malpractice" occurs when a lawyer breaches a legal duty to a client. The duties of a lawyer can be broken into three categories, described next.

1. **Disciplinary Duties**: Lawyers are required to comply with professional duties articulated by disciplinary rules. In Texas, these are found in the Texas Disciplinary Rules of Professional Conduct. Each state has similar disciplinary rules. A violation of these duties can subject a lawyer to discipline by the licensing authority of the state where the violation occurs. In Texas, such a violation may also be—but is not always—a breach of a the "duty of care" and/or the "fiduciary duty" owed to a client, described below. The Texas Disciplinary Rules of Professional Conduct do not create private causes of action and no not by themselves create civil liability. However, they "inform th[e] law" while "not binding as to the substantive law regarding attorneys." *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 505 (Tex. 2015). There are numerous Texas court opinions in which the Texas disciplinary rules are referred to as "quasi-statutory" or otherwise expressing the public policy of the state. See, for example, *Dardas v. Fleming, Hovenkamp & Grayson, P.C.*, 194 S.W.3d 603, 613 (Tex. App. – Houston [14th Dist.] 2006, pet. denied); *Davis Law Firm v. Bates*, 2014 WL 585855 (Tex. App.—Corpus Christi-Edinburg 2014, no pet.); *Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 742, n. 6 (Tex. App.—Austin 1995, no writ). The Supreme Court of Texas has referred to the Texas disciplinary rules in numerous non-disciplinary cases as expressing relevant considerations. This is especially true in cases involving disputes about attorneys' fees charged to a client For example, the eight non-exclusive factors in Rule 1.04(b) have been consistently cited by the Texas courts on evaluating the reasonableness of legal fees. See, *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W. 2d 812 (Tex. 1997).

2. **The Duty of Care:** The "duty of care" is a legal standard that is based upon what a lawyer of ordinary prudence would—or would not—do. Under Texas law, the failure to exercise that duty of care is "negligence." *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 426 (Tex. App.—Austin 2009, no pet.). "Negligence" means the "failure to use ordinary care" or "failing to do that which [an attorney] of ordinary prudence *would* have done under the same or similar circumstances or doing that which [an attorney] of ordinary prudence *would* not have done under the same or similar circumstances." See Section 60.01, Texas Pattern Jury Charges. The word "could" should be substituted for the word "would" in the case of an attorney, according to *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989). See, for example, *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d at 923-249 (Tex. App. – Fort Worth 2002, pet.

denied)("For example, an attorney can commit legal malpractice by giving an erroneous legal opinion or erroneous advice, *by failing to give advice or opinion when legally obligated to do so*, by disobeying a client's lawful instruction, by taking an action when not instructed by the client to do so, by delaying or failing to handle a matter entrusted to the attorney's care by the client, *or by not using an attorney's ordinary care in preparing, managing, and presenting litigation that affects the client's interests*. *Zidell v. Bird*, 692 S.W.2d 550, 553 (Tex. App.—Austin 1985, no writ))". (Emphasis added).

3. **Fiduciary Duty:** Attorneys also owe fiduciary duties to their clients. *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988); *Hoover Slovacek, LLP v. Walton*, 206 S.W.3d 557, 560-61 (Tex. 2006).The fiduciary duties recognized in Texas are: **1) the duty of candor; 2) The duty of loyalty; 3) The duty of utmost good faith; and 4) The duty to avoid conflicts of interests and self-dealing, including conflicts between the attorney's interest and the client's interest.** The most frequently encountered breaches of fiduciary duty include the following:

a. **Failure to Disclose Conflicts of Interest & Self-Dealing:** Engaging in an undisclosed conflict of interest, including a lawyer pursuing his or her own interest to the client's detriment ("self-dealing"), can be a breach of that fiduciary duty owed by a lawyer to his or her client. *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). See also, Rule 1.06, Texas Disciplinary Rules of Professional Conduct, regarding conflicts of interest, including conflicts between the attorney's or law firm's interests and the client's interest, and the requirements to gain a client's informed consent to a conflict. "The breach of the duty of full disclosure [to a client] by a fiduciary is tantamount to fraudulent concealment….And where "self-dealing" by the fiduciary is alleged, a "presumption of unfairness" automatically arises and the burden is placed on the fiduciary to prove **(a)** that the questioned transaction was made in good faith, **(b)** for a fair consideration and **(c)** after full and complete disclosure of all material information to the principal." *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 21-22 (Tex. App.—Tyler 2000, pet. denied).

b. **Excessive or Undisclosed Fees and Expenses:** Further, intentionally charging an excessive and/or undisclosed fee (including expenses that a client has not agreed to pay or which are prohibited) to a client is self-dealing and, therefore, a breach of fiduciary duty by the lawyer to the client. See, for example, *Piro v. Sarofim*, 2002 WL 538741 (Tex. App.—Houston [1st Dist.] 2002, no pet.), *published in part*, 80 S.W.3d 717. With respect to lawyer compensation arrangements with clients, "**the duty is the highest when the attorney contracts with his or her client or otherwise takes a position adverse to his or her client's interests.**" *Hoover Slovacek LLP v. Walton*, 206 S.W.3d

557, 560-61 (Tex. 2006). The Texas Supreme Court, in its *Hoover Slovacek* opinion, also held that "**[w]hen interpreting and enforcing attorney-fee agreements, it is 'not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship'…[W]e hold attorneys to the highest standards of ethical conduct in their dealings with their clients.**" *Id*. Additionally, the Texas Supreme Court also held, in *Anglo-Dutch Petroleum Int'l v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 449-50 (Tex. 2011) and consistent with its holding in *Hoover Slovac*ek, "'[w]hether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered.'" One such circumstance is the existence of a lawyer-client relationship between the parties. **Because a lawyer's fiduciary duty to a client covers contract negotiations between them, such contracts are closely scrutinized. Part of the lawyer's duty is to inform the client of all material facts. And so that this responsibility is not a mere and meaningless formality, the lawyer must be clear."** (Emphasis added). Further, Rule 1.04(a) prohibits the charging by a Texas lawyer of unconscionable legal fees as follows: "***A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable***". Rule 1.04(b) provides eight non-exclusive factors to be considered in determining whether a fee sought is reasonable.