

# PROFESSIONAL LIABILITY UPDATE

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*This newsletter is intended to summarize significant recent cases impacting non-medical professional liability litigation. It is not a comprehensive digest of every recent case involving professional liability issues nor of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice.*

***Comm'n for Lawyer Discipline v. Rosales, 577 S.W.3d 305 (Tex.App.—Austin 2019, pet. filed).***

Case Summary: The Commission for Lawyer Discipline brought a disciplinary action against Omar Rosales for multiple grounds of alleged professional misconduct.

The Commission alleged Rosales sent demand letters to various medical providers asserting that the recipients' websites did not comply with the Americans with Disabilities Act (ADA) and rules promulgated under the ADA related to website accessibility. In one letter reproduced by the court of appeals, Rosales used the trade name "Center for Veterans Access" and provided an initial demand to settle the lawsuit for \$2,000. Rosales also told the recipients they must "immediately self-report to the Department of Health and Human Services (DHHS)" and forfeit federal funding.

Rosales filed a motion to dismiss the Commission's disciplinary action under the Texas Citizen's Participation Act (TCPA). Rosales claimed the allegations against him were based on his exercise of the right to free speech through the website demand letters, which were "communication[s] made in connection with a matter of public concern." The district court granted Rosales's motion and dismissed the Commission's suit.

The Commission appealed, arguing (1) the TCPA does not apply to lawyer discipline proceedings because the Commission prosecutes the disciplinary proceedings as a government enforcement action, and (2) even if the TCPA does apply, the Commission carried its burden of establishing a prima facie case through clear and specific evidence of each essential element of its claim.

The court of appeals rejected the Commission's immunity claim. The court held that the TCPA exempts enforcement actions brought in the name of the state or a political subdivision only if brought by the attorney general, a district attorney, a criminal district attorney, or a county attorney. The Commission was not included in the very specific listing of exempt entities, and the court refused to override the legislature and insert words into the statute.

However, the court of appeals sustained the Commission's second issue and reversed the trial court's dismissal. The court held that the Commission established a prima facie case of professional misconduct by clear and specific evidence. A prima facie case for professional misconduct requires two elements: (1) the respondent is an attorney that is licensed to practice law in Texas who (2) engaged in acts and conduct that violate the Texas Disciplinary Rules.

The court of appeals held Rosales’s demand letters provided prima facie evidence that he: (1) misrepresented the applicability of ADA to websites; (2) practiced under an impermissible trade name that might suggest some relationship to the U.S. Department of Veteran’s Affairs; and (3) implied an ability to improperly influence a government agency or official by claiming that he would involve DHHS and recoup federal funding

Practice Point: The intersection of Anti-SLAPP litigation and professional misconduct claims is ripe for exploration. The Texas Citizen’s Participation Act has recently been amended, so remember to review all recent changes to the text of the statute.

***Bustamante v. Miranda & Maldonado, P.C.*, 569 S.W.3d 852 (Tex. App.—El Paso 2019, no pet.).**

Case Summary: Hugo Bustamante Jr., sole shareholder and president of Carlube, Inc., sued his former attorney, Gabriel Perez, and Miranda & Maldonado, P.C. (“Firm”) for professional negligence, negligent misrepresentations, breach of fiduciary duty, and gross negligence, stemming from Perez’s actions as Carlube’s counsel during bankruptcy proceedings.

Carlube filed a Chapter 11 Bankruptcy in June 2012. In February 2013, the United States Bankruptcy Court for the Western District of Texas approved the U.S. Trustee’s motion to convert Carlube’s bankruptcy case to a Chapter 7 liquidation proceeding. Later, the court ordered Bustamante to discontinue operations after the U.S. Trustee reported no funds were available to pay creditors. Perez and the Firm withdrew as counsel, and Bustamante filed suit for legal malpractice.

In response to the legal malpractice lawsuit, the Firm filed a plea to the jurisdiction and motion for summary judgment asserting Bustamante lacked standing because the

legal malpractice claim was the property of Carlube’s bankruptcy estate. The Firm argued the Chapter 7 trustee had exclusive standing to bring the claim. The trial court granted summary judgment, and dismissed all of Bustamante’s claims.

On appeal, Bustamante argued his legal malpractice claim did not accrue until the case was converted to a Chapter 7 case because the harm did not occur until the conversion. And, since a Chapter 7 estate only includes property existing at the time of the conversion, the malpractice claim belonged to Bustamante, not the Chapter 7 trustee.

The court affirmed the trial court’s dismissal. Relying on *In re Cantu*, 784 F.3d 253 (5th Cir. 2015), the El Paso Court of Appeals identified legal harm that occurred prior to conversion due to Perez’s alleged failure to (i) timely request the use of cash collateral and (ii) timely file a confirmable reorganization plan. These failures imposed additional fees and expenses on the bankruptcy estate. Therefore, the claims existed pre-conversion, and the Chapter 7 trustee had exclusive standing to bring the claim

Practice Point: When defending against a legal malpractice claim, always consider whether the Plaintiff is the proper party to bring the claims. This is particularly important in the bankruptcy context.