LEGAL MALPRACTICE DEFENSES & LITIGATION STRATEGY

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STATUTE OF LIMITATIONS

• Limitations Period- Three Years

  • CPLR § 214 (b): three-year period of limitations applies to a claim of legal malpractice.

  • Regardless of how pleaded (breach of contract, breach of fiduciary duty), the limitations period for a tort-based claim against an attorney is governed by CPLR § 214 (b). See Melendez v. Bernstein, 29 AD2d 872 (2d Dept 2006).
STATUTE OF LIMITATIONS

• Accrual
  – Cause of action for legal malpractice accrues at time the act, error or omission took place, even if subsequently discovered, or damages result at a later date. See Glamm v. Allen, 57 NY2d 87 (1982); McCoy v. Feinman, 99 N.Y.2d 295, (2002).
  – “[I]f there is injustice in the operation of CPLR 214(6), the Legislature has not seen fit to ameliorate the statute’s effects by enacting a date of discovery rule.” McCoy v. Feinman, supra at 302 (fn. 2). “If the legislature chooses not to apply date of discovery principles in [legal] malpractice settings, this Court should not tread where the Legislature refuses to go.” Id.
CONTINUOUS REPRESENTATION DOCTRINE

– The statute of limitations is tolled during the continuous representation in the same matter out of which the alleged legal malpractice arose.

– There must be a continuing relationship of “trust and confidence” between lawyer and client during the tolling period.

– Plaintiff bears the burden of proving continuous representation.

– The statute of limitations is tolled only in connection with the particular transaction or matter from which the malpractice allegedly arose.
CONTINUOUS REPRESENTATION DOCTRINE

– The continuous representation doctrine applies
  • “only where there is a mutual understanding of the need for further representation” and
  • where such mutual understanding of the need for further representation is “on the specific subject matter underlying the malpractice claim.” McCoy v. Feinman, supra at 307.

– The continuous representation doctrine does not apply where there is no mutual understanding of a continuing relationship with respect to the specific work upon which the alleged malpractice is based upon.
STANDING- PRIVITY REQUIREMENT

• Legal Malpractice Claims Typically Limited to Clients
  – Absent fraud, collusion or malicious conduct, third parties cannot sue for legal malpractice.
  – Unilateral belief of an attorney-client relationship does not confer standing to sue, except if non-client reasonably relied on advice of attorney, and attorney should have reasonably foreseen such reliance.

• Retainer Not Required
  – Attorney-client relationship can arise from “explicit undertaking to perform a specific task.”
STANDING- PRIVITY REQUIREMENT

– Representation of an individual does not confer privity with the spouse, or children, unless expressly undertaken.

– Representation of a corporate client does not confer privity with an officer, director or shareholder unless such representation is directly undertaken.

– Under certain circumstances, lawyers who represent the trustee or personal representative of the estate could be sued by third-party trust or estate beneficiaries where the attorneys’ alleged negligence foreseeably affects the beneficiaries’ interests. See Estate of Schneider v. Finmann, 15 N.Y.3d 306 (2010).
STANDING- PRIVITY REQUIREMENT

- Third Parties: Approaching Privity
  - “While the payment of a fee or existence of a formal retainer agreement may be indicators of an attorney-client relationship, such factors are not dispositive. An attorney-client relationship may instead arise by words and actions of the parties; however, one party’s unilateral belief, standing alone, does not confer upon him or her the status of a client.” Moran v. Hurst, 32 A.D. 3d 909 (2d Dept. 2006) at 911.
  
  - Awareness by the lawyer of a third-party’s reliance on the legal advice (e.g., an opinion letter).
  
  - Proof of reliance on that legal advice on the part of the third-party.
Collateral Estoppel/Res Judicata

• Prior Fee Suit
  – can constitute res judicata or collateral estoppel for any subsequent claim of malpractice because that adjudication necessarily establishes the absence of malpractice.

• Attempted Rescission of Settlement Agreement
  – If a party unsuccessfully tries to rescind a settlement on grounds of fraud, duress or coercion in the underlying adjudication, any claim of malpractice predicated upon the same issues will be barred by res judicata.
Common Defenses- Prematurity/Ripeness

– A claim of legal malpractice requires non-speculative pecuniary loss.

– where an underlying action s still pending, the injury claimed (lost or diminished recovery) cannot be established and the claim may not be ripe for adjudication.

– Note- should avoid “ripeness” defense in cases with statute of limitations issues.
Waiver, Assumption of Risk and Ratification

– Waiver: where a client knowingly and voluntarily waives a right, that client may not later sue for legal malpractice complaining that the attorney did not protect the interest that the client knowingly surrendered.

– Assumption of Risk: can be pleaded as an affirmative defense.

– Ratification: even unauthorized acts by counsel can be ratified by the client’s failure to object and acceptance of benefits.
Judicial Estoppel

• Estoppel Against Inconsistent Positions
  – Judicial estoppel precludes a party who took one position in a prior legal proceeding and secured a judgment in his or her favor from assuming a contrary position in another action. The doctrine rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise. See Black v. White & Case, 280 A.D.2d 407 (1st Dept. 2001).

• Failure To List LPL Claim as an Asset in Bankruptcy
  – A client who fails to schedule the malpractice claim in a bankruptcy schedule will be barred from pursuing the claim pursuant to the doctrine of judicial estoppel.
Settlement Allocation as Estoppel

- Where a client allocates on the record and acknowledges that he or she knowingly and voluntarily entered into a stipulation of settlement and is satisfied with the attorney’s performance, there is no viable malpractice claim. See Schiller v. Bender, Burrows & Rosenthal, LLP, 116 A.D.3d 756 (2d Dept. 2014); Harvey v. Greenberg, 82 A.D.3d 683 (1st Dept. 2011); Weissman v. Kessler, 78 A.D.3d 465 (1st Dept. 2010); Katebi v. Fink, 51 A.D.3d 424 (1st Dept. 2008).

- This “Settlement Allocution” Rule has been extended to non-matrimonial cases. Katz v. Essner, 136 AD3d 575 (1st Dept. 2016).
Contributory or Third Party Negligence

– Client’s Culpable Conduct: if damages result from the client’s own negligence or inaction (failure to mitigate) and not the lawyer’s conduct, grounds may exist to move to dismiss the legal malpractice claim.

– Successor or Replacement Counsel: an attorney is not liable for acts or omissions which did not occur during his or her representation, or due to acts of successor or even predecessor counsel.

– Sophisticated Client Defense: if the claim arises from an alleged failure to advise, the courts recognize that “sophisticated clients” cannot pass off complete responsibility to the lawyer.
Professional Judgment Rule

– The “Professional Judgment Rule” – lawyers are generally not held to a standard of infallibility and can choose between reasonable paths in making strategic decisions in connection with a matter.

– If the lawyer errs on a question not elementary or conclusively settled by authority, or involves strategic decision-making, that error is one of judgment for which he or she is not liable.

– New Rules of Professional Conduct (1.4)- “Informed Consent” required, lawyer to explain material risks of proposed course of conduct and reasonable available alternatives.
Professional Judgment Rule

– **Trial Tactics**: the professional judgment rule recognizes that trial tactics, are a series of judgmental decisions which cannot be subjected to the scrutiny of 20/20 hindsight and form the basis of a malpractice claim unless the decisions made were palpably unreasonable.

– **Settlement Recommendations**: attorneys make recommendations regarding settlement everyday, based on many tangible and intangible factors, including unsettled issues of fact and law.

– **The Key is Reasonableness**: claims arising from reasonable recommendations are subject to dismissal.
Collectability and Emotional Distress

- Collectability - It is the plaintiff’s burden to prove that the damages would have been collectible in the underlying matter;
  - Except in the First Department, where it is the defendant attorney’s burden to prove that the damages would not have been collectable.

- Emotional distress damages are not recoverable in a legal malpractice action.
Actual and Ascertainable Damages

• Speculative Damages Not Permitted
  – The mere possibility of future damages is not enough, as the damages are not “actual or ascertainable.”

• Economic Damages
  – The plaintiff must prove economic damages directly resulting from the alleged negligence- the difference between (1) the plaintiff’s economic current position; and (2) what it should have been “but for” the alleged legal malpractice.

• Non-Liquidated Damages
  – Jury to measure the value of the claim that was lost.
Emotional Damages and Legal Costs

• Emotional distress damages are not recoverable in a legal malpractice action; only economic damages - Dombrowski v. Bulson, 19 N.Y.3d 347 (2012); Dawson v. Schoenberg, 129 A.D.3d 655 (2d Dept. 2015).

• Attorneys fees to prosecute legal malpractice claim are not recoverable; but the legal fees incurred to correct the underlying matter/the lawyer’s alleged malpractice at issue can be recoverable.