LEGAL MALPRACTICE CAUSES OF ACTION, LITIGATION STRATEGY AND ETHICS

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A. Statute of Limitations

The statute of limitations for filing a legal malpractice action in New York is governed by N.Y. Civ. Prac. L. & R. §214(6).

> § 214. Limitations of Time.
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> Actions to be commenced within three years: for non-payment of money collected on execution; for penalty created by statute; to recover chattel; for injury to property; for personal injury; for malpractice other than medical, dental or podiatric malpractice; to annul a marriage on the ground of fraud
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> The following actions must be commenced within three years:
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> 6. an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort.

A common mistake is to look to the statute of limitations applicable in the underlying matter out of which the malpractice claim arose. The underlying limitations period may provide more time to file suit (e.g., breach of contract - six (6) years) but it will not govern the legal malpractice action.

Note that the statute of limitations governing legal malpractice actions may not apply if the attorney functioned other than in a legal capacity. *See, e.g., Bouley v. Bouley*, 19 A.D.3d 1049, 797 N.Y.S.2d 221 (2005) (applying limitations period for breach of fiduciary duty in matter involving attorney who held money or property for claimant);

- **Claim Accrual**

The first step in determining whether a legal malpractice claim is timely, is to determine when the cause of action accrued. A cause of action to recover damages for legal malpractice accrues when the malpractice is committed. *See Shumsky v. Eisenstein*, 96 N.Y.2d 164, 166, 750 N.E.2d 67, 69, 726 N.Y.S.2d 365 (2001). For instance, if the alleged malpractice is an attorney's failure to initiate suit, the statute of limitations begins to run when the limitations period in the underlying time-barred action expires. *See Shumsky*, 96 N.Y.2d at 166. Legal malpractice claims accrue "when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court." *McCoy v. Feinman*, 99 N.Y.2d 295, 755 N.Y.S.2d 693 (2002) *quoting Ackerman v. Price*, 84 N.Y.2d 535, 620 N.Y.S.2d 318 (1994); . Whether the aggrieved party is aware that malpractice has been committed is irrelevant. *Id.* As such, the crucial measuring date is when the malpractice occurred, not when the aggrieved party discovers it.

- **Continuous Representation Doctrine**

Pursuant to the continuous representation doctrine, the statute of limitations for filing a legal malpractice action is tolled until the attorney's ongoing representation of the client in the underlying matter is completed. *See Shumsky*, 96 N.Y.2d at 166. Tolling applies to the attorney, as well as his former law firm. *Waggoner v. Caruso,* 68 A.D.1, 886 N.Y.S.2d 368 (1st Dep't 2009).

The doctrine recognizes that a client has the right to repose confidence in the attorney's professional expertise and should not be expected to possess the insight to question the manner in which legal services are rendered. *Shumsky v. Eisenstein*, 96 N.Y.2d at 167. *See also Glamm v. Allen*, 57 N.Y.2d 87, 94, 453 N.Y.S.2d 674, 439 N.E.2d 390 (1982) (client not expected to jeopardize underlying case or relationship with attorney by commencing legal malpractice action before ongoing representation is completed).

The doctrine of continuous representation typically applies only to the matter in which the attorney committed the alleged malpractice. If counsel ceases to represent the client in the allegedly mishandled matter, but continues to represent the client in other matters, the doctrine does not toll the statute of limitations in the mishandled matter. *See, e.g., Montes v. Rosenzweig*, 21 A.D.3d 460, 463, 800 N.Y.S.2d 444, 448 (2005). Application of the doctrine will be determined in large measure by the nature of the retainer and/or the lawyer's services. Where a client legitimately did not know that its lawyer had withdrawn from representation, the doctrine tolls the limitations period until such knowledge exists. *See Shumsky*, 96 N.Y.2d at 168. *Compare McCoy v. Feinman*, 99 N.Y.2d 295, 755 N.Y.S.2d 295, 785 N.E.2d 714 (2002) (restrictive application of continuous representation doctrine due to absence of legitimate understanding of the need for further representation after the divorce judgment entered with the court). Plaintiffs who wish to utilize the continuing representation doctrine have the burden to establish that there was a mutual understanding of the need for further representation. *Zorn v. Gilbert*, 8 N.Y.3d 933, 834 N.Y.S.2d 702 (2007). More specifically, for the continuous representation doctrine to apply to an action sounding in legal malpractice, there must be clear indicia of an ongoing, continuous, developing, and dependant relationship between the client and the attorney, which often includes an attempt by the attorney to rectify an alleged act of malpractice. *Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 A.D.2d 505, 560 N.Y.S.2d 787 (2d Dep't 1990).

It must be noted that when an attorney sues a former client for unpaid fees, a client will often assert a counterclaim for legal malpractice. If such a counterclaim is brought after the expiration of the three year statute, it will not be deemed to be time-barred if the attorney's complaint was brought within such three years. If the attorney's complaint is brought after the expiration of the three years, then the counterclaim is still be allowed, but only to the extent of the damages sought in the complaint. CPLR 203(d).

- **Concealment and Discovery**

  - **The Concealment Rule**

If an attorney conceals misconduct by misrepresenting the status of a matter to the client, the statute of limitations is generally tolled until the client discovers, or should have discovered, the basic facts. *See Mangno v. Mangno*, 206 A.D.2d 936, 615 N.Y.S.2d 181 (4th Dep't

1994).(limitations period not tolled because plaintiff did not allege that attorney misrepresented status of matter in an attempt to conceal negligence).

It is well settled, however, that an attorney's concealment or failure to disclose malpractice without more does not give rise to a cause of action for fraud that is separate and distinct from a legal malpractice cause of action. *See Weiss v. Manfredi*, 83 N.Y.2d 974, 977, 639 N.E.2d 1122, 1124, 616 N.Y.S.2d 325, 327 (1994); *see also LaBrake v. Enzien*, 167 A.D.2d 709, 711-712, 562 N.Y.S.2d 1009, 1011 (3d Dep't 1990) (fraudulent representation claim dismissed because measure of damages for legal malpractice and fraud claim were the same; i.e., not separate and distinct).

- **The Discovery Rule**

According to the discovery rule, a statute of limitations does not begin to run until the client discovers or should discover the essential facts that support a cause of action. The discovery rule does not depend on when the attorney-client relationship ends.

New York courts, however, have not adopted the discovery rule. Although the courts toll the three-year statute of limitations period under the continuous representation doctrine, *supra*, there is no recognized exception to measuring the limitation period from the date the attorney's malpractice. *McCoy v. Feinman*, 99 N.Y.2d 295, 301, 785 N.E.2d 714, 755 N.Y.S.2d 693 (2002). *See Shumsky v. Eisenstein*, 96 N.Y.2d 164, 166, 750 N.E.2d 67, 726 N.Y.S.2d 365 (2001) (legal malpractice claim accrues when malpractice is committed, not when client discovered it). Until the Legislature chooses to apply the date of discovery rule in the legal malpractice setting, the courts "should not tread where the Legislature refuses to go." *McCoy*, 991 N.Y.2d at 301 n. 2.

B. Capacity to Sue and Standing

Lack of standing and the absence of plaintiff's capacity to sue are common and effective defenses to a legal malpractice action filed against an attorney by a non-client. *See, e.g., Columbia Memorial Hosp. v. Barley*, 16 A.D.3d 748, 748, 790 N.Y.S.2d 576, 577 (3d Dep't 2005). The defense may take several forms.

- **Privity**

A claim for legal malpractice requires privity of contract between the attorney and the party advancing the claim. *Weiss v. Manfredi*, 83 N.Y.2d 974, 616 N.Y.S.2d 325 (1994); *D'Amico v. First Union National Bank*, 285 A.D.2d 166, 728 N.Y.S.2d 146 (1st Dep't 2001), *lv. to appeal den.,* 99 N.Y.2d 510, 752 N.Y.S.2d 588 (2002). It is generally held that "an explicit undertaking to perform a specific task is required to establish an attorney-client relationship." *Sucese v. Kirsh*, 199 A.D.2d 718, 606 N.Y.S.2d 60 (3d Dep't 1993). As such, generally third-parties not in privity cannot recover for legal malpractice, unless there are acts of collusion, fraud, malicious acts or other special circumstances. *Rovello v. Klein*, 304 A.D.2d 638, 757 N.Y.S.2d 496 (3d Dep't 2003); *see also*, *Conti v. Polizzotto,* 243 A.D.2d 672, 663 N.Y.S.2d 293 (2d Dep't 1997).

The formation of an attorney-client relationship is governed by contract principles. *See*

C.K. Indus. Corp. v. C.M. Indus. Corp., 213 A.D.2d 846, 623 N.Y.S.2d 410 (3d Dep't 1995); *Swalg Dev. Corp. v. Gaines*, 274 A.D.2d 385, 710 N.Y.S.2d 619 (2d Dep't 2000). Since formality is not essential to the formation of the contract, it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed. *Id. citing Kubin v. Miller*, 801 F. Supp. 1101 (S.D.N.Y. 1992) and *People v. Ellis*, 91 Misc. 2d 28, 397 N.Y.S.2d 541 (N.Y. Sup. Ct., New York County 1977); *see also, Mason Tenders Dist. Council Pension Fund v. Messera*, 4 F. Supp.2d. 293 (S.D.N.Y. 1998).

The existence of an attorney-client relationship depends on a variety of factors, including:

> (1) Whether a fee arrangement was entered into or a fee paid; (2) whether a written contract or retainer agreement exists indicating that the attorney accepted representation; (3) whether there was an informal relationship whereby the attorney performed legal services gratuitously; (4) whether the attorney actually represented the individual in an aspect of the matter (e.g., at a deposition); (5) whether the attorney excluded the individual from some aspect of a litigation in order to protect another (or a) client's interest; (6) whether the purported client believed that the attorney was representing him and whether this belief was reasonable.

M.J. Woods, Inc. v. Conopco, Inc., 271 F. Supp. 2d. 576 (S.D.N.Y. 2003) *quoting First Hawaiian Bank v. Russell & Volkening, Inc.*, 861 F. Supp. 233 (S.D.N.Y. 1994); *Riftin v. Stark*, 9 Misc. 3d 1112A, 808 N.Y.S.2d 920 (N.Y. Sup. Ct., Kings County 2005); *Reyes v. Leuzzi*, 10 Misc. 3d 1064A, 14 N.Y.S.2d 564 (N.Y. Sup. Ct., New York County 2005).

A plaintiff's unilateral beliefs and actions do not confer upon him or her the status of a client. *Solondz v. Barash,* 225 A.D.2d 996, 639 N.Y.S.2d 561 (3d Dep't 1996); *Jane St. Co. v. Rosenberg & Estis, P.C.*, 192 A.D.2d 451, 597 N.Y.S.2d 17 (1st Dep't 1993) *app. den.* 82 N.Y.2d 654, 602 N.Y.S.2d 803 (1993).

Further, "the absence of a fee arrangement is a general indication that no attorney-client relationship has been established." *Heine v. Colton, Hartnick, Yamin & Sheresky*, 786 F. Supp. 360 (S.D.N.Y. 1992) *citing Elghanayan v. Iannucci*, 535 N.Y.S.2d 611, 535 N.Y.S.2d 611 (1st Dep't 1988). Most important, it is the act of directly rendering legal advice, services, or assistance that forms the touchstone of the attorney-client relationship. *Brandman v. Cross & Brown Co.*, 125 Misc. 2d 185, 479 N.Y.S.2d 435 (N.Y. Sup. Ct., Rockland County 1984) *citing In re Grand Jury Subpoena for Documents in the Custody of the Bekins Storage Co.*, 118 Misc. 2d 173, 460 N.Y.S.2d 684 (N.Y. Sup. Ct., New York County 1983).

An attorney moving for summary judgment on a lack of attorney-client relationship, has the initial burden to demonstrate that no contract or relationship exists between the parties. *Moran v. Hurst*, 32 A.D.3d 909, 822 N.Y.S.2d 564 (2d Dep't 2006). A plaintiff is required to introduce evidence that the defendant attorney caused him to believe that he was acting as his attorney or that the attorney allowed the plaintiff to proceed under that misconception. *Id. citing Solondz v. Barash*, 225 A.D.2d 996, 639 N.Y.S.2d 561 (3d Dep't 1996).

- **Relaxation of Privity Requirement**

The current national trend has been to relax the rule requiring privity as a condition to filing a legal malpractice action against an attorney or law firm. One of the more common circumstances where this is seen is in claims by beneficiaries against attorneys who draft wills. *See, e.g., Victor v. Goldman*, 74 Misc.2d 685, 344 N.Y.S.2d 672 (1973), *aff'd*, 43 A.D.2d 1021, 351 N.Y.S.2d 956 (2d Dep't 1974) (discussion of California law and trend towards relaxation of privity rule).

Decisions from New York courts initially moved toward conformity to the national trend. *See White v. Guarente*, 43 N.Y.2d 356, 401 N.Y.S.2d 474 (1977) (accountant could be held liable to a third-party, despite lack of privity, if such third-party was known to the accountant and reasonably relied on his services); *see also Baer v. Broder*, 106 Misc.2d 929, 436 N.Y.S.2d 693 (1981), *aff'd*, 86 A.D.2d 881, 447 N.Y.S.2d 538 (2d Dep't 1982) (legal malpractice action could be brought against attorney by executrix in her personal capacity despite lack of privity); *Schwartz v. Greenfield, Stein & Weisinger*, 90 Misc.2d 882, 396 N.Y.S.2d 582 (1977) (professional negligence claim could brought against borrower's attorney by the lender, despite lack of privity, because attorney promised to file and perfect a security agreement for the lender).

- **Current Approach**

The Court of Appeals clarified the privity requirement in *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 590 N.Y.S.2d 831 (1992), a case where the defendant law firm whose client was a borrower drafted an opinion letter for the lender in a commercial transaction. The Court of Appeals held that a *prima facie* negligent misrepresentation claim against a law firm requires "either actual privity of contract between the parties or a relationship so close as to approach that of privity." Id. 80 N.Y.2d 382. Liability for negligent misrepresentation may thus be imposed against a law firm, despite a lack of privity by the plaintiff, where three critical criteria are demonstrated:

i. an awareness by that maker of a statement that it is to be used for a particular purpose;

ii. reliance by a known party on the statement in furtherance of that purpose; and

iii. conduct by the maker of the statement linking it to the relying party and evincing an understanding of such reliance.

Id. 80 N.Y.2d at 384.

However, on June 17, 2010 the Court of Appeals expanded the potential liability of lawyers for negligent estate planning in *Estate of Saul Schneider v. Finmann,* 15 N.Y.3d 306, 907 N.Y.S.2d 119 (2010). Previously it had been the law that strict privity protected estate planning attorneys against malpractice lawsuits brought either by the personal representatives of the estate, their beneficiaries, or third-parties. But the court has now modified and relaxed that rule to allow a

claim by the personal representative because otherwise "it leaves the estate with no recourse against an attorney who planned the estate negligently" consequently damaging it.

The traditional defense argument, which had been established law, was that any damages resulting in avoidable estate taxes due to allegedly bad legal advice occurred after the deceased's death, were not suffered by the deceased while alive, and absent fraud or collusion, the attorney could not be held liable to third parties, such as the estate. In modifying this former privity rule, the Court of Appeals reasoned that "the attorney estate planner surely knows that minimizing the tax burden on the estate is one of the central tasks entrusted to the professional." The Court, however, continued the strict privity rule to bar malpractice suits brought by estate beneficiaries or other third parties absent fraud claims or other special circumstances.

- **Ripeness and Mootness**

  - **Ripeness**

Where the underlying matter is pending or otherwise not resolved, a claim for legal malpractice may be dismissed on the ground that it is not justiciable. *See Parametric Capital Mgmt., LLC v. Lacher*, 15 A.D.3d 301, 791 N.Y.S.2d 10 (1st Dep't 2005); *see also Kahan Jewelry Corp. v. Rosenfeld*, 295 A.D.2d 261, 744 N.Y.S.2d 664 (1st Dep't 2002); *Slinin v. Marina Trubitsky & Assoc., PLLC,* 2010 N.Y. Misc. LEXIS 2254, 2010. N.Y. Slip Op. 31335(U) (N.Y. 2010).

The basis for dismissal is normally plaintiff's inability to plead and/or prove actual damages. *See, e.g., Parametric Capital Mgmt., LLC*, 791 N.Y.S.2d at 11; *Kahan Jewelry Corp.*, 744 N.Y.S.2d at 665. A cause of action for legal malpractice becomes ripe when plaintiff allegedly sustains and thus may allege actual damages. *Parametric Capital Mgmt., LLC*, 791 N.Y.S.2d at 11.

  - **Mootness**

A legal malpractice claim may be dismissed where it can be established that the plaintiff's underlying claim was rendered moot by a change in circumstances essential to the viability thereof. *See Miszko v. Leeds & Morelli*, 3 A.D.3d 726, 769 N.Y.S.2d 923 (3d Dep't 2004) (plaintiff's underlying discrimination claim rendered moot by legislative change in retirement law that afforded desired relief. Legal malpractice claim based on alleged mishandling of underlying claim thus dismissed for inability to plead actual damages). A claim of legal malpractice may also be rendered moot if the attorney successfully undertakes to rectify the alleged error. *Pollicino v. Roemer & Featherstonhaugh P.C.*, 260 A.D.2d 52, 699 N.Y.S.2d 238 (3d Dep't 1999).

- **Collateral Estoppel and Res Judicata**

  - **Collateral Estoppel - Generally**

The doctrine of collateral estoppel, or issue preclusion, precludes re-litigation of an issue raised and decided against a party in a prior proceeding where the party had a full and fair opportunity to contest the prior determination. *Weiss v. Manfredi*, 83 N.Y.2d 974, 616 N.Y.S.2d 325 (1994); *Kaminsky v. Herrick Feinstein, LLP*, 59 A.D.3d 1, 870 N.Y.S.2d 1 (1st Dep't 2008)..

The prior action and present action need not be identical and the party invoking the defense of collateral estoppel need not have been a party to the prior action so long as such party had a full and fair opportunity to litigate the issue. *Katash v. Kranis*, 229 A.D.2d 305, 644 N.Y.S.2d 276 (1st Dep't 1996).

For collateral estoppel to apply the issue must have been: (i) material to the first action or proceeding; (ii) essential to the decision rendered therein; and (iii) the same issue to be determined in the subsequent action such that a different determination would destroy or impair rights or interests established by the decision in the first action. *Ryan v. N.Y. Telephone Co.*, 62 N.Y.2d 494, 500-501, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984).

The burden rests on proponent of collateral estoppel to demonstrate identity and decisiveness of ruling on the issue, while the burden rests on opponent to establish the absence of full and fair opportunity to litigate the issue in the prior action. *Id.*

- **Collateral Estoppel - Legal Malpractice Context**

A client may be collaterally estopped from asserting a claim against her attorney. *See e.g., Rosenkrantz v. Steinberg*, 13 A.D.3d 88, 786 N.Y.S.2d 35 (2004); *see also Roller v. Walsh*, 13 A.D.3d 1135, 787 N.Y.S.2d 529 (4th Dep't 2004) (complaint for legal malpractice dismissed on ground that the non-existence of an attorney-client relationship was an issue resolved in a prior matter); *Tydings v. Greenfield, Stein & Senior, LLP*, 110963/06 (Sup. Ct. 2007) (plaintiff collaterally estopped from arguing that attorney failed to assert statute of limitations defense in underlying action where it was determined in such action that the defense did not apply). *Compare Weiss v. Manfredi*, 83 N.Y.2d 974, 616 N.Y.S.2d 325 (1994) (no identity of issues between prior and subsequent actions and thus plaintiff not collaterally estopped from asserting legal malpractice action).

- **Res Judicata - Generally**

The doctrine of res judicata, or claim preclusion, bars re-litigation of the same issues raised or that should have been raised between the same parties and those in privity (e.g., partners, joint venturers, etc.) where there has been a prior judgment. *See Chisolm-Ryder Co v. Sommer & Sommer*, 78 A.D.2d 143, 434 N.Y.S.2d 70 (4th Dep't 1980).

New York has adopted the transactional analysis approach in deciding whether res judicata applies to a subsequent claim. Under this approach, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or seeking a different remedy. *O'Brien v. City of Syracuse*, 54 N.Y.S.2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687 (1981).

Generally, a judgment on the merits by a court of competent jurisdiction is res judicata in a subsequent action concerning the same matter. *Sherman v. Ansell*, 207 A.D.2d 537, 616 N.Y.S.2d 90 (2d Dep't 1994), *citing Chisolm-Ryder Co v. Sommer & Sommer*, 78 A.D.2d 143, 144, 434 N.Y.S.2d 70 (4th Dep't 1980). *Compare Towne v. Asadourian*, 277 A.D.2d 800, 722 N.Y.S.2d 187 (3d Dep't 2000) (decision upon which no formal judgment has been entered has no preclusive effect and is not a bar to subsequent proceedings).

- **Res Judicata - Legal Malpractice Context**

Res judicata may bar a client from proceeding against its attorney in a legal malpractice action. *See, e.g., Coburn v. Robson & Miller, LLP*, 13 A.D.3d 323, 788 N.Y.S.2d 337 (1st Dep't 2004) (prior order fixing the value of defendants' lien for services rendered in plaintiff's divorce action established there was no legal malpractice in that action). *Compare Mosher v. Baines*, 254 A.D.2d 467, 679 N.Y.S.2d 404 (2d Dep't 1998) (res judicata did not apply because attorneys were not parties to the prior action).

An attorney, however, is rarely a party or in privity with a party in the underlying action and thus decisions rendered in such action often will not support a res judicata defense in a subsequent legal malpractice action.

The defense arises perhaps most frequently in a legal malpractice action where there was prior litigation concerning between client and lawyer legal fees. *See Coburn*, 13 A.D.3d 323, 788 N.Y.S.2d 337 (1st Dep't 2004) (legal malpractice claim raised in prior action to determine lawyer's fees); *see also AfsaAfsharimehr v. Barer*, 303 A.D.2d 432, 755 N.Y.S.2d 888 (2d Dep't 2003) (prior fee action barred subsequent legal malpractice action). As a general rule, when a client does not prevail in an action against an attorney for the value of professional services, a subsequent legal malpractice action is barred on the theory that such a ruling implicitly finds that there was no malpractice. *Koppelman v. Liddle, O'Connor, Finkelstein & Robinson*, 246 A.D.2d 365, 668 N.Y.S.2d 29 (1st Dep't 1998). For instance, when a plaintiff contests an attorney's fee before a Surrogate Court, if the decree fixes the value of the defendant's services, the court has effectively concluded that there was no malpractice. *Lefkowitz v. Schulte, Roth & Zabel*, 279 A.D.2d 457, 718 N.Y.S.2d 859 (2d Dep't 2001). As such, a plaintiff's legal malpractice claims based upon the same services at issue before the Surrogate Court are barred by the doctrines of collateral estoppel and *res judicata*. *Id.* The same holds true if a Bankruptcy Court approves a defendant attorney's fee, then a subsequent legal malpractice action would also be barred by the doctrines of collateral estoppel and *res judicata*. *Izko Sportswear Co. v. Flaum*, 20 A.D.3d 392, 798 N.Y.S.2d 136 (2d Dep't 2005).

A predicate to the defense, however, is that the client is or should be aware of the claim. *See, e.g., Sherman v. Ansell*, 207 A.D.2d 537, 616 N.Y.S.2d 90 (2d Dep't 1994) (client sued for legal fees did not know and could not have discovered lawyer's malpractice in failing to obtain a creditor's agreement to accept less on the mortgage).

- **Release and Waiver**

- **Release**

The law disfavors contracts intended to exculpate a party from the consequences of its negligence and such agreements will be closely scrutinized. *See Swift v. Choe*, 242 A.D.2d 188,674 N.Y.S.2d 17 (1st Dep't 1992). However, attorneys may obtain a release of liability from a client which can be used to bar subsequent legal malpractice actions. *See Martino v. Kaschak*, 208 A.D.2d 698, 617 N.Y.S.2d 529 (2d Dep't 1994). In doing so, however, attorneys must be cognizant of Rule 1.8 of the Rules of Professional Conduct (22 NYCRR §1200.0), which requires the advice to the client to obtain independent counsel. *David v. Hack,* 97 A.D.3d 437, 948 N.Y.S.2d 583 (1st Dep't 2012).

Release of partnership discharges individual partners from vicarious liability even though not specifically named in the release. *See Schuman v. Gallet, Dreyer & Berkey, LLP*, 280 A.D.2d 310, 719 N.Y.S.2d 864 (1st Dep't 2001).

A party may be able set aside the release if it is shown that it was procured by duress, illegality, fraud or mutual mistake. *See Mangini v. McClurg*, 24 N.Y.2d 556, 249 N.E.2d 386 (1969).

Seeking a release from a client during the course of representation violates the Code of Professional Responsibility, DR 6-102(A), 22 N.Y.C.R.R. §1200.31(a) (attorney cannot seek by contract to limit prospectively the attorney's liability to a client for malpractice).

An attorney who seeks to avail himself of a release made with a client must establish that the client provided the release with full knowledge of all material circumstances known to the attorney, and that there was no fraud on the part of the attorney, or misconception on the part of the client. *Swift v. Choe*, 242 A.D.2d. 188, 674 N.Y.S.2d 17 (1st Dep't 1992).

- **Waiver**

Waiver is the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable. *See General Motors Acceptance Corp. v. Clifton-Fine Cent. Sch. Dist.*, 85 N.Y.2d 232, 236 (N.Y. 1995). Waiver may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage. Id.

A waiver can be express or implied. An example of express waiver involves a written release from future claims. *See, e.g., Swift v. Choe*, 242 A.D.2d. 188, 674 N.Y.S.2d 17 (1st Dep't 1992). Implied waiver can result from a client's actions. *See Jakobleff v. Cerrato, Sweeney and Cohn*, 97 A.D.2d 834, 468 N.Y.S.2d 895 (2d Dep't 1983), *citing, People v. Shaprio*, 308 N.Y. 453, 126 N.E.2d 559 (1955) (client voluntarily testifying to a privileged matter); *Liberty Mut. Ins. Co. v. Engels*, 21 A.D.2d 808, 250 N.Y.S.2d 851 (2d Dep't 1964) (waiver when client publicly discloses confidences).

The use of waivers in the conflict of interest context is cautioned. In *Roller v. Walsh*, 278

A.D.2d 811, 718 N.Y.S.2d 519 (4th Dep't 2000), the Appellate Division, Fourth Department, overturned the Supreme Court's dismissal based upon the documentary evidence, as the defendant attorney failed to fully disclose the nature of the alleged conflicts and because the documents did not support dismissal because the alleged conduct occurred subsequent to the execution of the documents.

C. The Standard of Care

An attorney must exercise the degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community.

- **Negligence**

Elements:

1. Duty – generally arises out of the attorney-client relationship.

2. Breach of Duty - defendant failed to adhere to standard of care (i.e. failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community);

Not all attorney errors rise to the level of legal malpractice. Errors in professional judgment do not constitute legal malpractice. *Rosner v. Paley*, 65 N.Y.2d 736, 492 N.Y.S.2d 13(1985); *Bua v Purcell & Ingrao*, P.C., 99 A.D.3d 843 (2d Dep't 2012); H*ealy v Finz & Finz, P.C.*, 82 A.D.3d 704 (2d Dep't 2011) (An attorney has a right to determine a reasonable course of action and a plaintiff cannot succeed on an action for legal malpractice by alleging, in conclusory fashion, that a law firm simply chose the wrong expert.) A lawyer's strategic decision cannot form the basis of a legal malpractice claim. *Holmberg, Galbraith, Holmberg, Orkin & Bennett v. Koury*, 176 A.D.2d 1045, 575 N.Y.S.2d 192 (3d Dep't 1991); *Bixby v. Somerville*, 62 A.D.3d 1137 (3d Dep't 2009). Further, when a sophisticated client imposes a strategic decision on an attorney, the client's action absolves the attorney from liability for legal malpractice. *Town of N. Hempstead v. Winston & Strawn, LLP*, 28 A.D.3d 746, 814 N.Y.S.2d 237 (2d Dep't 2006).

The selection of one among several reasonable courses of action does not constitute malpractice. *Bernstein v. Oppenheim & Co.*, P.C., 160 A.D.2d 428, 554 N.Y.S.2d 487 (1st Dep't 1991). However, an attorney may be held liable for ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action. *Id*.

- **Breach of Fiduciary Duty**
  - Attorney-Client Relationship
    - "The relationship between an attorney and his client is a fiduciary one and the attorney cannot take advantage of his superior knowledge and position." *U.S. Ice Cream Corp. v. Bizar*, 240 A.D.2d 654 (2d Dept. 1997) citing *Greene v. Greene*, 56 N.Y.2d 86; *Kurtzman v. Bergstol*, 40 A.D.3d 588 (2d Dep't 2007).

- o Attorney's Fiduciary Obligations
  - ▪ "As a fiduciary, the lawyer is obliged to exercise the highest degree of good faith, honesty, integrity, fairness, and fidelity and may not have personal interests antagonistic to those of his client. The fiduciary obligations are the foundation of the attorney client-relationship and enable a client to fully reveal confidences and to repose unhesitating trust in the attorney's ability to represent the client's interests diligently and competently." *U.S. Ice Cream Corp. v. Bizar*, 240 A.D.2d 654 (2d Dept. 1997); see also *Newman v. Silver*, 553 F. Supp. 485 (1982), modified on other grounds, 713 F.2d 14 (2d Cir 1983).

Generally, the proponent of a claim for a breach of fiduciary duty, must, at a minimum, establish that the defendant's actions were a substantial factor in causing the loss. *Gibbs v Breed, Abbott & Morgan,* 271 A.D.2d 180, 710 N.Y.S.2d 578 (1st Dep't 2000). The substantial factor is a less rigorous standard. *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills*, 10 A.D.3d 267, 780 N.Y.S.2d 593(1st Dep't 2004). When a breach of fiduciary duty claim is asserted against an attorney in conjunction with a legal malpractice claim then the more stringent "but for" analysis applies rather than substantial factor analysis. *Id*.

Breach of fiduciary duty claims against attorneys are treated as actions for legal malpractice. *See Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 865 N.Y.S.2d 14 (1st Dep't 2008) *citing Brooks v. Lewin*, 21 A.D.3d 731, 800 N.Y.S.2d 695 (1st Dep't 2005) *lv. den.* 6 N.Y.3d 713, 816 N.Y.S.2d 749 (2006); . Thus in order for a plaintiff to prevail on a breach of fiduciary duty claim against an attorney in a legal malpractice action, he must prove that the attorney committed legal malpractice. *Id*. Breach of fiduciary duty claims that are premised on the same facts and seek the identical relief sought in the legal malpractice cause of action, are redundant and should be dismissed. *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills*, 10 A.D.3d 267, 780 N.Y.S.2d 593(1st Dep't 2004). However, if the claims of legal malpractice and breach of fiduciary duty are not premised on the same facts and do seek the identical relief, then they are not duplicative and both can be asserted. *Ulico Casualty Co.*, 56 A.D.3d 1; *Neuman v. Frank* 82 A.D.3d 1642 (4th Dep't 2011) (Former client claims legal malpractice and breach of fiduciary duty were not duplicative because breach was alleged to have occurred after the termination of legal representation).

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Statutory Liability

- **Judiciary Law § 487**

> **JUDICIARY LAW**
>
> **ARTICLE 15. ATTORNEYS AND COUNSELLORS**
>
> **§487 Misconduct by attorneys**
>
> An attorney or counselor who:
>
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
>
> 2. Willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

- A violation of Judiciary Law § 487 may be established "either by the defendant's alleged deceit *or* by an alleged chronic, extreme pattern of legal delinquency by the defendant" *Izko Sportswear Co., Inc. v. Flaum*, 20 A.D.3d 392 (2d Dep't 2005); *Bender Burrows & Rosenthal, LLP v Simon*, 2011 N.Y. Misc. LEXIS 5363 (N.Y. Sup. Ct. Nov. 4, 2011).
- *Brotman v. Dickstein, Shapiro & Morin* (Sup. Ct., NY Cty 7/23/98)
  Court dismissed plaintiff's legal malpractice claim, but granted plaintiff leave to amend the complaint to assert a claim under Judiciary Law § 487, where plaintiff alleged she suffered pecuniary damage as a result of defendant law firm's deceitful conduct.

However, the alleged deceit forming the basis of such a cause of action, if it is not directed at a court, must occur during the course of a "pending judicial proceeding." *Hansen v Caffry*, 280 A.D.2d 704, 720 N.Y.S.2d 258 (3d Dep't 2001), *lv. den.* 97 N.Y.2d 603, 735 N.Y.S.2d 492 (2001); *Grucci v Rabinowitz*, 2011 N.Y. Misc. LEXIS 807 (N.Y. Sup. Ct. Feb. 9, 2011). Therefore, if the alleged misconduct is not related to a matter pending before a court §487 is inapplicable. *Costalas v. Amalfitano*, 305 A.D.2d 202, 760 N.Y.S.2d 422 (1st Dep't 2003).

Amalfitano v. Rosenberg, 12 N.Y.3d 8, 874 N.Y.S.2d 868 (2009) made it clear, among other things, that lawyers who allegedly deceive any party involved in a lawsuit, or willfully delay a client's suit to their own gain, violate Judiciary Law §487, are guilty of a misdemeanor, and are liable to the injured party for treble damages. Even if the deceit is unsuccessful, liability can be

found.

In *Amalfitano,* the proximately caused damages were $89,415.18 in plaintiff's litigation costs, which with the trebling that §487 provides, came to $268,254.54. Since *Amalfitano,* there appears to be a trend to add Judiciary Law §487 claims to the standard legal malpractice claims (negligence, breach of fiduciary duty, conflicts of interest, violations of disciplinary rules, breach of contract, fraud).

- **Wrongful Eviction – Real Property Actions and Proceedings Law 853**

> RPAPL 853 provides:
>
> If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefore against the wrong-doer.

  - *Mayes v. UVI Holdings*, 280 A.D.2d 153 (1st Dept. 2001), granting plaintiff, tenant, summary judgment on wrongful eviction claim against landlord and its attorneys and granting landlord summary judgment on its legal malpractice claim against its attorneys, where warrant of eviction served on plaintiff was invalid.

- **The Federal Debt Collection Practices Act of 1990 ("FDCPA")**
  - The act regulates the conduct of debt collectors: any person who regularly collects debts owed to others. This definition includes lawyers who perform debt collection services on a regular basis. Even where money is legitimately owed, a debt collector's conduct is restricted by this law. *Goldstein v. Hutton, Ingram, Yuzek, Gainen*, 374 F.3d 56 (2nd Cir. 2004).

- **Violations of FDCPA**
  - Debt collectors may not contact people other than the debtor to discuss the debt -- except to locate the debtor.
  - After making contact, debt collectors are required to send written notice informing the debtor of the amount of the debt, the name of the creditor, and the fact that the debt will be considered valid unless disputed within 30 days. ("30-day Notice Requirement")
  - Threatening to harm debtor's credit rating, repossess or garnishment, without actual intention of action on the threat.
  - Making repeated telephone calls or telephone calls at unreasonable times. (i.e. before 8:00 AM or after 9:00 PM) or placing telephone calls to an inconvenient place;
  - Seeking collection fees or interest charges not permitted by debtor's contract or by state law;
  - Requesting post-dated checks with intention to prosecute if bounced;
  - Suing in courts far removed from debtor's place of residence;

  - Using false claims to collect information about the debtor, such as pretending to be conducting a survey;
  - Threatening debtor with arrest if debtor does not pay the debt.

- **Other Sources of Statutory Liability**
  - Consumer Protection Statutes
    - Statutes usually held inapplicable to practice of law.
    - Conduct must have broad impact on consumers-at-large (GBL § 349)
  - ERISA - Claims by trustees of employee benefit plans. However, most attorneys are not fiduciaries. Must have discretionary authority and control. *See, e.g., Benvenuto v. Taubman*, 690 F. Supp. 149 (E.D.N.Y. 1988)
  - RICO - typical rendition of legal services does not meet the test. Attorney must participate in the conduct of the enterprise. A law firm is an enterprise. *See, e.g., Park South Associates v. Fischbein*, 626 F. Supp. 1108 (S.D.N.Y. 1986).
  - Securities Statutes
    - Securities Act of 1933
    - Securities Exchange Act of 1934

- **Conflicts of Interest and Violations of Disciplinary Rules**

  - A conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a legal malpractice cause of action. *Schafrann v. N.V. Famka, Inc.*, 14 A.D.3d 363 (1st Dept. 2005); *see also, Schwartz v. Frome & Rosenzweig*, 302 A.D.2d 193 (1st Dept. 2003).

In an action against an attorney for an alleged violation of the Code of Professional Responsibility's conflict of interest rules, liability can only follow if the plaintiff can prove that he suffered "actual damages" as a result of the conflict. *Tabner v. Drake*, 9 A.D.3d 606, 780 N.Y.S.2d 85 (3d Dep't 2004); *Stevens & Lee, P.C. v Levine*, 2011 N.Y. Misc. LEXIS 5044 (N.Y. Sup. Ct. Aug. 9, 2011).

Rule 1.7 of the Rules of Professional Conduct is the operative disciplinary rule concerning conflicts of interests and simultaneous representation, and states as follows:

Rule 1.7 Conflict of Interest: current clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

In *LaRusso v. Katz*, 30 A.D.3d 240, 818 N.Y.S.2d 17 (1st Dep't 2006), plaintiff, a passenger in an automobile accident, commenced an action against her attorney for legal malpractice based on an alleged conflict of interest when the attorney simultaneously represented the plaintiff's husband who was the driver, in an action against the driver of the other vehicle that allegedly caused the collision. After commencement of the action, the other vehicle's driver counterclaimed against plaintiff's husband. *Id*. The defendant attorney retained separate counsel to represent the driver on the counterclaim. The *LaRusso* court, relying upon DR 5-105, found that "[t]here is no question that defendant Katz did not inform the LaRussos of the risks inherent in dual representation of a passenger and driver in an automobile accident. However, disclosure alone does not, of itself, resolve the issues created by dual representation." *Id*. The court further held "'[b]ecause dual representation is fraught with the potential for irreconcilable conflict, it will rarely be sanctioned even after full disclosure has been made and the consent of the clients obtained.'" *Id. quoting Greene v Greene*, 47 N.Y.2d 447, 418 NYS2d 379 (1979). In light of the defendant attorney's alleged conflict of interest in representing plaintiff and her husband, the court found that "plaintiff pleaded sufficient 'factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client, that the breach was the proximate cause of the injuries, and that actual damages were sustained.'" *Id. quoting Dweck Law Firm v Mann*, 283 A.D.2d 292, 293, 727 N.Y.S.2d 58 (1st Dep't 2001).

- In *Guiles v. Simser*, 2006 NY Slip Op 09681 (3d Dept. 12-21-2006), the Third Department held that the "Defendant's [attorney] sexual encounters with plaintiff [client] clearly constituted ethical violations (see Code of Professional Responsibility DR 5-111(b)(3), 22 NYCRR 1200.29-a (b)(3); see also Code of Professional Responsibility DR 1-102 (a)(7), 22 NYCRR 1200.3 (a)(7)), but the violation of a disciplinary rule does not, without more, generate a cause of action" *See also, Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 A.D.2d 193 (2003).

- Fee forfeiture - "An attorney who engages in misconduct by violating a Disciplinary Rule is not entitled to legal fees for any services rendered." *Matter of Winston*, 214

A.D.2d 677 (2d Dept. 1995); *Pessoni v. Rabkin*, 220 A.D.2d 732 (2d Dep't 1995); *Doviak v Finkelstein & Partners, LLP*, 90 A.D.3d 696 (2d Dep't 2011).

D. The Burden of Proof

Traditionally, under the law of New York, "a plaintiff's burden of proof in a legal malpractice action is a heavy one." *Lindenman v. Kreitzer*, 7 A.D.3d 30 (1st Dep't 2004); *Sabalza v Salgado*, 85 A.D.3d 436 (1st Dep't 2011).

- **Causation**

  - **Case-Within-A-Case**

    "The requirement of proving a case-within-a-case…is a distinctive feature of legal malpractice actions arising from an attorney's alleged negligence in preparing or conducting litigation. It adds an additional layer to the element of proximate cause, requiring the jury to find the hypothetical outcome of other litigation before finding the attorney's liability in the litigation before it." *McKenna v. Forsyth & Forsyth, Kaufman*, 280 A.D.2d 79 (4th Dept. 2001); *see also, Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 780 N.Y.S.2d 593, 596-597 (1st Dept. 2004).

  - **"But for" Test**

    To meet case-within-a-case requirement, plaintiff must demonstrate that "but for" attorney's conduct plaintiff would have prevailed in the underlying matter or would not have sustained any ascertainable damages. *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 780 N.Y.S.2d 593, 596-597 (1st Dept. 2004); *Kozmol v. Law Firm of Allen L. Rothenberg*, 241 A.D.2d 484 (2d Dept. 1997)

  - **Lower Standard Adopted By Second Department**

    In *Barnett v. Schwartz*, 47 A.D.3d 197, 848 N.Y.S.2d 663 (2d Dep't 2007), the Second Department adopted a less stringent "substantial contributing cause" test, rejecting the notion that the alleged wrongdoing must be the "sole proximate cause."

- **Expert Opinions**

  - Expert opinion is required to establish standard of care and departure therefrom, except:
    - Errors that fall within common knowledge of lay persons
    - Legal theory not based on the standard of care
    - A concession by lawyer that conduct, if occurred, would be negligence

Merlin Biomed Asset v. Wolf Block Schorr, 23 A.D.3d 243 (1st Dep't 2005) – "The motion court properly concluded that plaintiffs were required to offer expert testimony in support of their claim for legal malpractice that raises issues regarding the standard of care of an attorney drafting purchasing and marketing agreements in the field of hedge funds and financial management companies, a subject that is not part of the jurors' ordinary, daily

experience. Defendants' expert submission was sufficient to meet their burden that they did not depart from the applicable standard of care. Since plaintiffs failed to offer expert testimony on the subject, they failed to raise an issue of fact and partial summary judgment was properly granted defendants." *See also, Zeller v. Anne Reynolds Copps*, 294 A.D.2d 683 (3d Dept 2002); *Fidler v. Sullivan*, 93 A.D.2d 964 (3d Dep't 1983); *Wo Yee Hing Realty Corp. v Stern*, 30 Misc. 3d 1237A (N.Y. Sup. Ct. 2011).

- **Damages**

  - **"Actual and ascertainable"**

1. In a legal malpractice action, the damages resulting from an attorney's negligence must be "'actual and ascertainable'" *DePinto v. Rosenthal & Curry*, 237 A.D.2d 482 (2d Dep't 1997); *Bua v Purcell & Ingrao*, P.C., 99 A.D.3d 843 (2d Dep't 2012).

  - **Measure of Damages**
    - When a cause of action is lost as the result of the attorney's negligence, the client's injury is measured by the amount that would have been collected on that lost cause of action. We further hold that the client bears the burden of proving that amount. *McKenna v. Forsyth & Forsyth, Kaufman*, 280 A.D.2d 79 (4th Dep't 2001).
    - In addition, litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct can be charged to the attorney *DePinto v. Rosenthal & Curry*, 237 A.D.2d 482 (2d Dep't 1997).

  - **Off-Setting Damages**
    - In *Campagnola v. Mulholland*, 76 N.Y.2d 38 (1990), defendant attorneys sought to offset against any damages recoverable by the plaintiff clients, the contingent fee provided for in the retainer agreement executed between them in respect to the underlying personal injury claim. The Court of Appeals held that such an offset is impermissible. However, the defendants are entitled to mitigate such damages, if any, by offering evidence that such damages would have been reduced by the collateral source rule.
    - Defendant is entitled to mitigate damages by offering evidence that such damages would have been reduced by the collateral source rule. *Stein v. Levine*, 8 A.D.3d 652 (2d Dep't 2004).
    - In *Lindenman v. Kreitzer*, 7 A.D.3d 30 (1st Dep't 2004), the First Department held that although the ultimate collectability of any judgment that could have been obtained in the underlying action is not an element necessary to establish plaintiff's legal malpractice claim, the defendant may prove that any judgment was not collectable and the non-collectability may be used as an off-set to any judgment awarded to the plaintiff.

E. <u>Trial Tactics and Motion Practice</u>

- **Jury Selection**

During jury selection in a legal malpractice action, the following issues may be explored:

1. Ensure the proposed juror is not biased against your client.
2. Ensure the proposed juror understands the "case within a case" concept.
3. Whether the proposed juror has previously been represented by a lawyer, and, if so, whether they were satisfied with the lawyer's representation.
4. Whether the proposed juror has previously brought a legal malpractice action.

5. Whether the proposed juror can understand and follow the applicable law regardless of his feelings about the law.

- **Motion Practice**

As set forth above, legal malpractice actions are essentially "a case within a case." Therefore, plaintiffs must prove that they would have prevailed in the underlying action and must allege and then prove that the attorney committed legal malpractice.

Upon service of a legal malpractice complaint, it should be analyzed to determine whether or not plaintiff has properly pleaded an action for legal malpractice. If the complaint does not plead an action for legal malpractice, a motion to dismiss, pursuant to CPLR 3211(a)(7), should be made. *Leder v. Spiegel*, 9 N.Y.3d 836, 840 N.Y.S.2d 888 (2007). However, in assessing a motion under CPLR 3211(a)(7), a court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Gaskin v Harris*, 98 A.D.3d 941 (2d Dep't 2012).

If the complaint adequately pleads legal malpractice, but the allegations are contradicted by documentary evidence, then a motion to dismiss pursuant to CPLR 3211(a)(1) can be made. However, under CPLR 3211(a)(1) a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994).

If the complaint is not subject to a viable pre-answer motion to dismiss, a legal malpractice defendant, upon receipt of adequate evidence, may move for summary judgment pursuant to CPLR 3212. At the summary judgment stage, the complaint will be dismissed if the plaintiff cannot prove at least one of the essential elements of legal malpractice. *J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 14 A.D.3d 482, 787 N.Y.S.2d 390 (2d Dep't 2005).

- **Jury Instructions**

The applicable pattern jury instruction in legal malpractice actions is found in PJI 2:152 (West 2008). PJI 2:152 states:

> An attorney who undertakes to represent a client impliedly represents that (he, she) possesses a reasonable degree of skill, that (he, she) is familiar with the rules regulating

practice in actions of the type which he or she undertakes to bring or defend and with the principles of law in relation to such actions as are well settled in the practice of law, and that he or she will exercise reasonable care. Reasonable care means that degree of skill commonly used by an ordinary member of the legal profession. However, an attorney is not a guarantor of the result of the case. Moreover, if an attorney points out to the client the nature of the risks involved in a certain course of procedure and the client elects to follow that course, the attorney is not responsible for the consequences.

[Here set forth bases of claimed malpractice and relate to above rules.]

Even though you find that defendant was negligent in failing to bring an action against T.P. on plaintiff's behalf, plaintiff may not recover in this action unless you further find that plaintiff would have been successful in an action against T.P. had one been brought. In order to decide the latter question, you must, in effect, decide a lawsuit within a lawsuit. Therefore, in order for the plaintiff to succeed, you would have to decide that on the evidence presented in this case plaintiff would have been successful in (his, her) action against T.P. had one been brought. If you find that on the evidence plaintiff would not have been successful, then you will find for the defendant on this issue.

In such an action *[insert rules that would govern burden of proof and substantive law in an action against T.P.]*.

As plaintiff must prove that he would have prevailed in the underlying action, the jury will be given the corresponding jury charge for that action.