Legal Malpractice 2019

Professional Liability Claims, Litigation Strategies, and Attorney Disciplinary Procedures

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TUESDAY, MARCH 19
Albany

WEDNESDAY, MARCH 20
Long Island

MONDAY, MARCH 25
New York City

THURSDAY, MARCH 28
Rochester

TUESDAY, APRIL 16
Westchester

Program time is from 9:00 a.m. – 1:00 p.m. at all participating locations.

4.0 MCLE Credits:
3.0 in Ethics, 1.0 Law Practice Management

Sponsored by the Committee on Continuing Legal Education and the Law Practice Management Committee of the New York State Bar Association

This program is offered for educational purposes.

The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Program Description

Lawsuits against lawyers arising from errors and/or omissions in the performance of legal services continue to rise. It is an essential part of a law firm’s business practice to evaluate its legal risk and malpractice insurance needs. This program is designed to educate attorneys on how to prosecute and/or defend a legal malpractice action. In addition, this program will educate attorneys about their legal malpractice exposures, what they should do in the event that a lawsuit or a grievance complaint is filed against them, and what they should do when situations arise that indicate that a legal malpractice claim is likely. Both solo practitioners and members of larger firms would benefit from knowing how to assess professional liability risk and manage legal malpractice litigation.

Program Agenda

8:30 a.m. - 9:00 a.m. **Registration**

9:00 a.m. - 9:10 a.m. **Welcome and Introduction**

9:10 a.m. – 10:00 a.m. **Legal Malpractice Causes of Action, Litigation Strategy and Ethics**

> Theories of Liability
* Negligence
* Breach of Fiduciary Duty
* Statutory Liability
* Violations of Disciplinary Rules and Ethical Considerations
* Conflicts of Interest

> Statute of Limitations
* Claim Accrual
* Continuous Representation Doctrine
* Concealment and Discovery

> Capacity to Sue and Standing
* Privity
* Ripeness and Mootness
* Collateral Estoppel and *Res Judicata*
* Release and Waiver

> The Standard of Care
* Negligence, Breach of Fiduciary Duty
* Statutory Liability/Violations of Disciplinary Rules
* Conflicts of Interest

> The Burden of Proof
* Causation
* Expert Opinions
* Damages

> Trial Tactics and Motion Practice
* Jury Selection
* Evidentiary Issues
* Expert Testimony
* Jury Instructions

(1.0 MCLE Credit in Ethics)

10:00 a.m. - 10:50 a.m. **Sources of Legal Malpractice Claims & Ethical Considerations**

Panel Discussion with Professional Liability Industry Leaders

>Typical Claim Scenarios
* Conflicts of Interest
* Failure to Investigate/Evaluate Claims or Defenses
* Failure to Comply with Statute of Limitations
* Neglect of Prosecution/Trial Errors
* Failure to Protect Secured Interests/Assets/Property

> Claimants and Vicarious Liability– Who Can Sue and Be Sued

* Liability to Clients/Third-Parties
* Liability of Law Firm/Partners for Acts of Another

> Legal Malpractice Claim Defense Strategy

* Pre-Suit Discussions/Settlement
* Discovery/Legal Malpractice Litigation Management
* Use of Experts
* Motion Practice
* Trial Strategies/Tactics

(1.0 MCLE Credit in Ethics)

10:50 a.m. - 11:00 a.m. **Break**

11:00 a.m. – 11:50 a.m. **Identifying and Responding to Professional Liability Claims**

> Claim Notification and Reporting Issues

* What Constitutes a "Claim"
* Responding to and Reporting of Potential Claims
* Representations in the LPL Application
* Notification of Claims

> What is Covered Under the Typical LPL Policy

* The Scope of Professional Services
* Non-Covered Acts, Errors or Omissions
* Damages Excluded from Coverage
* Intentional Acts/Fraud Exclusions
* Typical Exclusions

(1.0 MCLE Credit in Law Practice Management)

11:50 a.m. - 12:45 p.m. **Attorney Discipline and Risk Management for Lawyers**

Discussion of the NYS Attorney Disciplinary Process and Law Firm Risk Management

* Overview of the NYS Disciplinary Process
* New Client/Matter Intake
* Conflict Management and Avoidance
* Engagement Letters/Part 1215 Requirements
* Docket and Calendar Management
* Billing Systems and Controls
* File Closing and Disengagement Letters
* Training and Associate Supervision
* Fee Actions
* Client Management

(1.0 MCLE Credit in Ethics)

12:45 p.m. – 1:00 p.m. **Questions and Answers**

1:00 p.m. **Adjournment**

Accessing the Online Course Materials

Below is the link to the online course materials. These program materials are up-to-date and include supplemental materials that were not included in your course book.

www.nysba.org/LegalMalpractice2019Materials

All program materials are being distributed online, allowing you more flexibility in storing this information and allowing you to copy and paste relevant portions of the materials for specific use in your practice. WiFi access is available at this location however, we cannot guarantee connection speeds. This CLE Coursebook contains materials submitted prior to the program. Supplemental materials will be added to the online course materials link.


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These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and amended on several occasions thereafter. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

http://nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf

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Legal Malpractice Causes of Action, Litigation Strategy and Ethics

FURMAN KORNFELD & BRENNAN LLP

NYSBA WHITE PAPER 2019

Spring 2019

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NYSBA WHITE PAPER 2019

I. BASIC THEORIES OF ATTORNEY LIABILITY

A. Legal Malpractice/Negligence-Based Claim

Professional negligence is the most commonly pleaded cause of action against an attorney in a legal malpractice lawsuit. The elements of a legal malpractice claim are: (1) an attorney-client relationship between the parties, (2) negligence by the attorney-defendant in its legal representation, (3) proximate cause between the attorney-defendant's negligence and plaintiff's loss, and (4) actual and ascertainable damages suffered by plaintiff. See, e.g., Huffner v. Ziff, Weiermiller, Hayden & Mustico, LLP, 55 A.D.3d 1009, 1011 (3d Dept. 2008).

As discussed in greater detail herein, the most common method of defending a negligence-based legal malpractice claim (aside from statutory defenses, such as the statute of limitations), is to attack one or more of the affirmative elements of a legal malpractice plaintiff's claim. Similar to any simple negligence claim, a legal malpractice plaintiff's inability to establish one of the critical elements of her/his claim, renders the legal malpractice claim unsustainable.

1. Attorney-Client Relationship/Privity

"[A] threshold inquiry in a legal malpractice claim is whether an attorney-client relationship exists." See Barrett v. Goldstein, 2017 N.Y. Slip Op. 30010[U], at *3-4 (Sup. Ct., N.Y. Co. 2017) aff'd 161 A.D.3d 472 (1st Dept. 2018); Case v. Clivilles, 216 F.Supp.3d 367, 379 (S.D.N.Y. 2016) (failure to establish an attorney-client relationship prevents a plaintiff from proceeding on a legal malpractice claim).

Typically, an attorney-client relationship is formed where there is a mutual understanding that the attorney will undertake to render legal services on the client's behalf. In the absence of this mutual understanding between attorney and client, no attorney relationship is formed, as an attorney generally owes no duty of care to a non-client. See Sejfuloski v. Michelstein & Assoc., PLLC, 137 A.D.3d 549, 550 (1st Dept. 2016); Lombardi v. Lombardi, 127 A.D.3d 1038, 1042 (2d Dept. 2015); SPV-LS LLC v. Citron, 2018 NY Slip Op 30681[U] (Sup. Ct., N.Y. Co. 2018).

a. *Privity*

While the existence of an attorney-client relationship or privity, may seem to be a straightforward point, it is often the source of dispute. It is well settled that attorneys may be liable for their negligence both to those with whom they have actual privity of contract and to those with whom the relationship is "so close as to approach that of privity." Prudential Ins. Co. of Am. V. Dewey, Ballantine, Bushby, Palmer & Wood, 80 N.Y.2d 377, 382 (1992); Millennium Import, LLC v. Reed Smith LLP, 104 A.D.3d 190 (1st Dept. 2013).

Typically, in the absence of a duty owed by the attorney to the client, there can be no breach of duty and, therefore, no negligence. For example, a party generally may not pursue a

legal malpractice claim against an adversary's attorney and, in most jurisdictions, a non-client cannot sue a lawyer for legal malpractice. The well-established rule in New York is that absent fraud, collusion, malicious acts or other special circumstances, an attorney will not be liable to third parties who are not in privity, for harm caused by the attorney's professional negligence. See Gorbatov v. Tsirelman, 155 A.D.3d 836, 840 (2d Dept. 2017); Sutch v. Sutch-Lenz, 129 A.D.3d 1137 (3d Dept. 2015); cf. Keness v. Feldman, Kramer & Monaco, P.C., 105 A.D.3d 812 (2d Dept. 2013) (the absence of an attorney-client relationship is fatal to a claim for legal malpractice).

A plaintiff may sustain a claim for legal malpractice based on near privity, if the plaintiff establishes that the attorney was aware that his services were being used for a specific purpose, the plaintiff was relying on those services, and the attorney engaged in some conduct evincing some understanding of the plaintiff's reliance. See 71 Park Ave. S., LLC v. Fox Rothschild LLP, 2018 N.Y. Slip Op. 32451[U], at *8-9 (Sup. Ct., N.Y. Co. 2018) (citing Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 175 (1st Dept. 2004)). For example, in Estate of Schneider v. Finmann, 15 N.Y.3d 306 (2010), the Court of Appeals held that a relationship sufficiently approaching privity exists between the personal representative of an estate and the estate planning attorney. In doing so, the Court of Appeals explicitly narrowed its ruling to hold that New York's strict privity rule still applies to bar beneficiaries and other third-parties from commencing estate planning malpractice claims absent a claim of fraud or other intentional conduct, acknowledging that relaxing privity to permit such claims "would produce undesirable results -- uncertainty and limitless liability." Id.; see also Sutch v. Sutch-Lenz, 129 A.D.3d 1137 (2d Dept. 2015) (finding a lack of privity where "Plaintiff [did] not contend, and the record [did] not otherwise reflect, that he had a contractual relationship with defendants.").

"A plaintiff's unilateral belief does not confer upon him the status of client. Rather, to establish an attorney-client relationship there must be an explicit undertaking to perform a specific task." Volpe v. Canfield, 237 A.D.2d 282 (2d Dept. 1997). A court may look to various factors when determining whether a client had a reasonable, good faith basis to believe that an attorney-client relationship existed between the parties. See, e.g., Case v. Clivilles, 2016 U.S. Dist. LEXIS 147114 (S.D.N.Y. Oct. 24, 2016) (indicating that a fee arrangement, a written contract, and an informal pattern of gratuitous legal services are factors that may demonstrate the existence of an attorney-client relationship).

Moreover, the issue of whether an attorney owes a duty of care does not depend on the execution of a formal retainer agreement or whether the attorney is being paid, or has been paid, for the legal services provided. See Abramowitz v. Lefkowicz & Gottfried, LLP, 2012 N.Y. Slip Op. 31011(U) (Sup. Ct., Nassau Co. 2012) (citing Nelson v. Kalathara, 48 A.D.3d 528 (2d Dept. 2008) ("Since an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee, a court must look to the words and actions of the parties to ascertain the existence of such a relationship").

b. ***Scope of Representation***

It is well established in New York State that an attorney cannot be held liable for

malpractice for failing to act outside of his or her retainer. See AmBase Corp. v. Davis Polk & Wardwell, 8 N.Y.3d 428 (2007) (holding that a client could not unilaterally broaden a retainer agreement to include a requirement that the lawyer dispense general tax advice). For example, as recently held in Attallah v. Milbank, Tweed, Hadley & McCloy, LLP, 2019 N.Y. Slip Op. 00583 (2d Dept. 2019), the Appellate Division, Second Department dismissed a legal malpractice claim on the basis that the firm's letter of engagement with the client established that the firm did not owe the claimed duties to the client.

Additionally, it is important to note that when an attorney agrees to represent a corporate entity, the scope of the representation is limited to the representation of the company and does not extend to individuals within that company absent a special agreement for same. Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553 (2009); Campbell v. McKeon, 75 A.D.3d 479, 480-81 (1st Dept. 2010) ("[a] lawyer's representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent that individual."). However, this rule can be overcome if the corporate attorney and employee expressly agree that a private attorney-client relationship exists. Talvy v. American Red Cross, 205 A.D.2d 143, 149 (1st Dept. 1994), aff'd, 87 N.Y.2d 826 (1995).

2. Breach of the Standard of Care

Once the plaintiff has established that he or she was owed a duty of care by the attorney, the plaintiff must plead that the attorney *breached* the standard of care. The test is whether the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. See Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 442 (2007); Aristakesian v. Ballon Stoll Bader & Nadler, P.C., 165 A.D.3d 1023, 1024 (2d Dept. 2018).

"The standard to which the defendant's conduct is to be compared is not that of the most highly skilled attorney, nor is it that of the average member of the legal profession, but that of an attorney who is competent and qualified." Harris v. Barbera, 163 A.D.3d 534, 535 (2d Dept. 2018) (citations omitted). While an attorney has an affirmative duty to act with ordinary and reasonable skill and knowledge commonly possessed by members of his profession, he or she is not held to a rule of infallibility, and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt. See Hand v. Silberman, 15 A.D.3d 167 (1st Dept. 2005) (holding that "neither an error in judgment, nor in choosing a reasonable course of action constitutes malpractice"); DaSilva v. Suozzi, English, Cianciulli & Peirez, P.C., 233 A.D.2d 172, 176 (1st Dept. 1996) (in order to state a claim for malpractice, plaintiff must allege that the chosen course is "bereft of legal authority."). See section on the Professional Judgment Rule, directly below.

In accord with Rule 7.4 of the New York Rules of Professional Conduct, a lawyer or law firm may not state that the lawyer or law firm is a specialist or specializes in a particular area of law. In other jurisdictions, there is a trend to apply a heightened standard of care to attorneys who hold themselves out as specialists. See Fishman v. Brooks, 396 Mass. 643 (MA 1986).

a. Professional Judgment Rule

Pursuant to the professional judgment rule, allegations involving alleged errors in the exercise of an attorney's professional judgment in areas such as strategy, the selection of appropriate evidence, or argument, are not actionable as malpractice. The Court of Appeals has held "the selection of one among several reasonable courses of action does not constitute legal malpractice." See Darby & Darby, P.C. v. VSI Intl., 95 N.Y.2d 308 (2000), citing Rosner v. Paley, 65 N.Y.2d 736, 738 (1985). See also Brookwood Cos., Inc. v. Alston & Bird LLP, 146 A.D.3d 662 (1st Dept. 2017); Leon Petroleum, LLC v. Carl S. Levine & Assoc., P.C., 122 A.D.3d 686 (2d Dept. 2014); Bixby v. Somerville, 62 A.D.3d 1137, 1140 (3d Dept. 2009) (holding that "where allegations involve errors in the exercise of an attorney's professional judgment in areas such as strategy, the selection of appropriate evidence or argument, they are not actionable as malpractice"). To establish entitlement to the protection of the professional judgment rule, an attorney must offer a "reasonable strategic explanation" for the alleged negligence. See Pillard v. Goodman, 82 A.D.3d 541, 542 (1st Dept. 2011).

Thus, under New York law, the professional judgment rule recognizes that an attorney must make a myriad of judgmental decisions and that these judgmental decisions cannot be subjected to 20/20 hindsight and form the basis of a malpractice claim unless the decisions were palpably unreasonable. See Rodriguez v. Fredericks, 213 A.D.2d 176 (1st Dept. 2005) ("retrospective complaints about the outcome of defendant's strategic choices and tactics without demonstrating that [they] were so unreasonable to have manifested professional incompetence is not actionable").

In Hand, for example, the attorney/defendant made the strategic decision to stipulate at the outset of the underlying hearing that there was a "reasonable suspicion" that the plaintiff/client was under the influence of alcohol or drugs to avoid emphasis on plaintiff/client's pre-testing conduct, which would have been detrimental to other defenses, including the defense that the testing standards were insufficient. See Hand, 15 A.D.3d at 167. In upholding the lower court's decision, the First Department held that choosing a reasonable course of action does not support a claim for legal malpractice. Id.

Furthermore, "when a plaintiff's allegations amount to nothing more than dissatisfaction with his attorney's strategic choices, said allegations do not support a malpractice claim as a matter of law." See Siracusa v. Sager, 105 A.D.3d 937 (2d Dept. 2013); Allen v. Potruch, 282 A.D.2d 484 (2d Dept. 2001) (holding that the plaintiff's allegation that the defendant law firm failed to move for re-argument in connection with the award of expert fees in the underlying matrimonial matter, at most, constituted an error of judgment which did not rise to the level of legal malpractice). Similarly, attorneys are not liable in negligence for errors of judgment or the exercise of appropriate judgment that leads to an unsuccessful result. See Bua v. Purcell & Ingrao, P.C., 99 A.D.3d 843, 846-847 (2d Dept. 2012), citing Rubinberg v. Walker, 252 A.D.2d 466 (1st Dept. 1998). Findings of fact are unnecessary where the court concludes that an attorney's actions were reasonable as a matter of law. See Bernstein v. Oppenheim & Co., P.C., 160 A.D.2d 428 (1st Dept. 1990).

b. Standard of Care Experts

In New York, expert testimony is generally required to successfully establish or defend the standard of care element of a legal malpractice claim. To prevail at trial, a legal malpractice plaintiff must establish by expert testimony that the defendant failed to perform in a professionally competent manner. See Manard M. Gertler v. Sol Masch & Co., 40 A.D.3d 282 (1st Dept. 2007). Even on a motion for summary judgment, the movant must generally establish through expert opinion that the attorney's representation comported (or failed to comport) with the reasonable skill and care possessed by a competent member of the legal community. See Polanco v. Greenstein & Milbauer, LLP, 150 A.D.3d 449, 450 (1st Dept. 2017); Parklex Assoc. v. Flemming Zulack Williamson Zauderer, LLP, 118 A.D.3d 968, 970 (2d Dept. 2014). The expert affidavit should apply specific industry standards and/or practices to support a conclusion about whether the work at issue was done in a professionally competent manner. See Brady v. Bisogno & Meyerson, 32 A.D.3d 410 (2d Dept. 2018); Aur v. Manhattan Greenpoint Ltd., 132 A.D.3d 595, 596 (1st Dept. 2015). When the movant meets his or her *prima facie* burden on summary judgment, the opponent must submit his or her own expert's affidavit rebutting the expert's opinion to create an issue of fact. See Orchard Motorcycle Distribs., Inc. v. Morrison Cohen Singer & Weinstein, LLP, 49 A.D.3d 292, 293 (1st Dept. 2008); Schadoff v. Russ, 278 A.D.2d 222, 223 (2d Dept. 2000).

A major exception to the above rule exists when the issues to be determined are within a layperson's experience and comprehension. See Gourary v. Green, 143 A.D.3d 580, 581 (1st Dept. 2016) (expert affidavit on a summary judgment unnecessary because the contested issues rested on the "discrete factual question" of how a lay person would have reacted to certain information); Melnick v. Farrell, 128 A.D.3d 1371 (4th Dept. 2014) (same); cf. Suppiah v. Kalish, 76 A.D.3d 829, 832 (1st Dept. 2010) (allegation of attorney malpractice in an immigration matter involved complicated issues that could not be resolved without expert testimony).

The recent decision in Red Zone LLC v. Cadwalader, Wickersham & Taft LLP, 2018 N.Y. Misc. LEXIS 3346 (Sup. Ct. N.Y. Co. Aug. 1, 2018) illustrates the aforementioned exception, and underscores that expert testimony can be precluded if a court finds that the issues to be determined fall within "the ken of the typical juror." Shortly before trial, the plaintiff moved to preclude the defendant law firm from presenting any expert testimony, arguing that the case turned solely on a simple factual dispute about whether the law firm warned its client that a proposed amendment to an agreement may not protect against the possibility of owing an additional $8 million fee. Id. The court precluded both parties from presenting any expert testimony, reasoning that if the jury adopted the facts argued by plaintiff, the law firm's failure to memorialize the parties' agreement was "prima facie proof of professional malpractice." Id. Thus, the court held that "no expert testimony is needed" because this factual dispute did not "involve matters outside the ken of the typical juror" and would not "require[] specialized knowledge." Id.

3. Proximate or "But For" Causation

In addition to pleading a breach of the standard of care, a legal malpractice plaintiff must plead and ultimately prove that "but for" the attorney's negligence, the plaintiff would have been successful in the underlying action. In Sabalza v. Salgado, 85 A.D.3d 436, 437 (1st Dept. 2011), the First Department stated that:

> A plaintiff's burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation. (internal citations omitted).

Significantly, proximate causation can only be demonstrated where the plaintiff can plead and prove that but for the defendant's negligence, the plaintiff would have prevailed or received a better result in the underlying action. See Louzoun v. Kroll Moss & Kroll, LLP, 139 A.D.3d 680 (2d Dept. 2016); Levine v. Horton, 127 A.D.3d 1395 (3d Dept. 2015). The "but for" causation element in legal malpractice actions requires that the plaintiff prove "a case within a case," as it requires a hypothetical re-examination of the events at issue absent the alleged legal malpractice. See Aquino v. Kuczinski, Vila & Assoc., P.C., 39 A.D.3d 216, 219 (1st Dept 2007); see also Ruotolo v. Mussman & Northey, 105 A.D.3d 591, 592 (1st Dept 2013).

Where the plaintiff is unable to establish that the attorney's alleged unreasonable conduct proximately caused his or her injury, the legal malpractice cause of action must fail. See Davis v. Cohen & Gresser, LLP, 160 A.D.3d 484 (1st Dept. 2018); Brown-Jodoin v. Pirrotti, 138 A.D.3d 661 (2d Dept. 2016).

The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence. See Knox v. Aronson, Mayefsky & Sloan, LLP, 2018 N.Y. Slip Op. 09030 (1st Dept. 2018); Louzoun v. Kroll Moss & Kroll, LLP, 139 A.D.3d 680 (2d Dept. 2016). For example, in Wo Yee Hing Realty Corp., 99 A.D.3d 58 (1st Dept. 2012), the plaintiff alleged that it sustained damages as a result of the defendant attorney's negligence in connection with a failed real estate transaction. The defendant attorney argued that plaintiff could not establish damages proximately caused by such negligence as plaintiff failed to establish that it could have consummated the transaction in the absence of the attorney's negligence. Id. The Appellate Division affirmed the dismissal of the legal malpractice action on the grounds that plaintiff failed to demonstrate any causal connection between the alleged negligence and his damages. Id.

Furthermore, it is well-settled that contentions underlying a claim for legal malpractice which are couched in terms of gross speculations on future events and point to the speculative nature of a claim are insufficient, as a matter of law, to establish proximate causation. See Ferguson v. Hauser, 156 A.D.3d 425 (1st Dept. 2017). New York courts have held that allegations involving "speculative" alleged errors at trial are insufficient to state a claim for legal malpractice unless the plaintiff can prove that there would have been a different result in the underlying action. See Sevey v. Friedlander, 83 A.D.3d 1226 (3d Dept. 2011) (finding that

plaintiff's speculation as to how a court may have ruled if it had been presented with certain information was insufficient to establish a triable issue of fact); Financial Servs. Veh. Trust v. Saad, 137 A.D.3d 849 (2d Dept. 2016) ("conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action"); Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP v. Wilson, 136 A.D.3d 1326 (4th Dept. 2016) (holding counterclaim plaintiff's contentions that she would have received certain awards had the underlying matrimonial action gone to trial instead of settled to be "speculative and conclusory," and thus insufficient to raise a triable issue of fact.)

There are rare instances where the courts have relieved the plaintiff of the burden of establishing that plaintiff would have been successful in an underlying matter. For example, in Gotay v. Breitbart, 14 A.D.3d 452 (1st Dept. 2005), the First Department relaxed the "but for" requirement in a legal malpractice claim due to a twenty-five year delay in the prosecution of plaintiff's underlying medical malpractice claim. Specifically, the Court held that if plaintiff is unable to establish any element of the underlying medical malpractice action as a direct consequence of defendants' delay, such element will be deemed "admitted." Id.

Moreover, the Second Department has seemingly lessened the "but for" requirement through a series of holdings which require that the plaintiff need to prove only that the defendant's negligence was "a proximate cause" of damages rather than "*the* proximate cause" or the "but for" cause. See Ragunandan v. Donado, 150 A.D.3d 1289 (2d Dept. 2017); Stein v. Chiera, 130 A.D.3d 912 (2d Dept. 2015) ("[t]o state a cause of action to recover damages for legal malpractice, a plaintiff must allege…that the attorney's failure was a proximate cause of actual and ascertainable damages"); Held v. Seidenberg, 87 A.D.3d 616 (2d Dept. 2011).

Further, it appears that the trend is to relax the "but for" requirement in connection with a cause of action for breach of fiduciary duty, which often accompanies a plaintiff's complaint for legal malpractice. Ordinarily, an action for breach of fiduciary duty requires a plaintiff to merely identify a conflict of interest amounting to a substantial factor in the plaintiff's loss. See FJ Vulis, LLC v. Val, 166 A.D.3d 469 (1st Dept. 2018); Boone v. Bender, 74 A.D.3d 1111 (2d Dept. 2010). If the remedy sought by the plaintiff is a restitutionary one to prevent the fiduciary's unjust enrichment, the less stringent substantial factor standard would apply to the causation element of the claim for breach of fiduciary duty. See RSL Communs. PLC v. Bildirici, 649 F. Supp. 2d 184, 209 (S.D.N.Y. 2009). However, where damages are sought in connection with a plaintiff's claims of breach of fiduciary duty that are essentially claims of legal malpractice, plaintiff's claims are governed by the same "proximate causation" standard. See Boone, 74 A.D.3d 1111.

4. "Actual and Ascertainable" Damages

In order to establish the element of damages, a legal malpractice plaintiff must plead and prove actual, ascertainable damages as a result of an attorney's negligence. See Janker v. Silver, Forrester & Lesser, P.C., 135 A.D.3d 908 (2d Dept. 2016).

Generally, a plaintiff is entitled to recover the difference between his/her current

economic position and what it would have been "but for" the attorney's malpractice. See Kaminsky v. Herrick, Feinstein LLP, 59 A.D.3d 1 (1st Dept. 2008). Additionally, a plaintiff can recover the fees and expenses incurred to mitigate the loss caused by the attorney's malpractice. See Rudolf v. Shayne, 8 N.Y.3d 438 (2007); Barouh v. Law Offs. of Jason L. Abelove, 131 A.D.3d 988 (2d Dept. 2015). However, mere speculation about incurring additional attorney's fees is not sufficient to sustain a cause of action for legal malpractice. See Dempster v. Liotti, 86 A.D.3d 169 (2d Dept. 2011). A legal malpractice plaintiff may also attempt to disgorge the legal fees paid to the attorney-defendant, which claims are generally disfavored. Geraci v. Munnelly, 85 A.D.3d 1361, 1362 (3d Dept. 2011) (Damages in a legal malpractice case are designed to make the injured client whole, not to provide the former client with a windfall); Seth Rubenstein, P.C. v. Ganea, 41 A.D.3d 54, 63 (2d Dept. 2007) (accord); Koeth v. Koeth, 2002 N.Y. Misc. LEXIS 208, at *19 (Sup. Ct. Nassau Co. Mar. 22, 2002) (forfeiture of attorneys' fees is "an unduly harsh penalty, one which is reserved for attorneys guilty of misconduct"); see also Restatement (Third) of the Law Governing Lawyers, ' 37, Comment (a) (Denying the lawyer all compensation would be an excessive sanction, giving a windfall to a client.).

In some instances, unpaid interest (including prejudgment interest on a lost claim) is recoverable as damages in a legal malpractice action. See Barnett v. Schwartz, 47 A.D.3d 197, 203 (2d Dept. 2007); DiTondo v. Meagher, 85 A.D.3d 1385 (3d Dept. 2011); Baker v. Dorfman, 239 F.3d 415 (2d Cir. N.Y. 2000). The applicable interest rate to be applied in such instances is 9% per year, as codified by CPLR § 5004. Interest is to be computed from the date(s) that the damages were incurred or, if impractical, from a single reasonable intermediate date. See Barnett, 47 A.D.3d at 208; Horstmann v. Nicholas J. Grasso, P.C., 210 A.D.2d 671 (3d Dept. 1994).

a. ***Proof of Actual and Ascertainable Damages***

A plaintiff cannot advance a legal malpractice action for speculative damages. See Dempster v. Liotti, 86 A.D.3d 169 (2d Dept. 2011). The mere possibility, or even probability, that a plaintiff will suffer damages at some future point is not enough to sustain a legal malpractice action because the damages are not "actual and ascertainable." See Janker v. Silver, Forrester & Lesser, P.C., 135 A.D.3d 908 (2d Dept. 2016); Gourary v. Green, 143 A.D.3d 580 (1st Dept. 2016) (ruling that since there was no way to know whether the allegedly negligently omitted advice would have altered the outcome, the claim of damages is therefore speculative); MacDonald v. Guttman, 72 A.D.3d 1452 (3d Dept. 2010).

If a plaintiff's alleged damages are covered by other sources, they cannot be asserted in a legal malpractice claim. In Kaufman v. Medical Liab. Mut. Ins. Co., 121 A.D.3d 1459 (3d Dept. 2014), plaintiff-physician was unable to recover damages for alleged legal malpractice where she was fully covered by the hospital and insurance and therefore "actual" damages based upon an inability to find work were too speculative, particularly when the plaintiff voluntarily left her prior position. The Court also found plaintiff's claimed taint on her reputation resulting from the verdict and associated media coverage unavailing, as it represented a non-pecuniary form of damages unrecoverable in a legal malpractice action.

However, even if the plaintiffs' damages cannot be precisely calculated, expenses to the client resulting from attorney delays are deemed to be ascertainable damages in connection with a legal malpractice cause of action. See Iannucci v. Kucker & Bruh, LLP, 161 A.D.3d 959 (2d Dept. 2018) (the defendants' styling of the plaintiffs' damages theory as "speculative" was merely an effort to point out gaps in the plaintiff's proof, which was insufficient to meet the defendants' burden as the party moving for summary judgment); see also, Brookwood Cos., Inc., 146 A.D.3d 662 (ruling that a malpractice allegation did not depend on the possibility of success on the merits of the underlying case, but rather, absent the attorney's negligence, would the Plaintiff have sustained the expense of having to proceed to trial and further defend the underlying plaintiff's claims against him).

The loss attributable to malpractice must be real and not hypothetical, and the damages must be readily measurable in economic terms. See Zarin v. Reid & Priest, 184 A.D.2d 385, 388 (1st Dept. 1992) (in dismissing legal malpractice case in its entirety, found that "the damages claimed by plaintiffs are too speculative and incapable of being proven with any reasonable certainty"). Likewise, purported damages stemming from a loss of profits must "be capable of measurement based upon known reliable factors without undue speculation." Bykowsky v. Eskenazi, 72 A.D.3d 590, 590 (1st Dept. 2010) (quoting Ashland Mgt. v. Janien, 82 N.Y.2d 395, 403 (1993)). Courts regularly find that claims of lost profits in legal malpractice actions are too speculative and not established with reasonable certainty. See Brodeur v. Hayes, 18 A.D.3d 979,981 (3d Dept. 2005), *lv dismissed and denied* 5 N.Y.3d 871 (2005) ("Plaintiffs also failed to establish damages that were actual and ascertainable, rather than speculative" Credit costs, lost business revenues, lost profits are unrecoverable "[a]bsent any evidence to support plaintiffs' claims or amounts, any claim of damages is speculative and unsubstantiated"); Lombard v. Giannattasio, 192 A.D.2d 512, 513 (2d Dept. 1993) (dismissing claims for lost profits and rental income in a legal malpractice case because "as a matter of law [they] are too speculative to support recovery"); Brown v. Samalin & Bock, P.C., 168 A.D.2d 531, 532 (2d Dept. 1990) (affirming partial summary judgment where plaintiff's claim of lost profits from a real estate transaction was speculative).

b. *Proving Damages that are Not Liquidated – Collectability*

A necessary element of a cause of action for legal malpractice is the collectability of the damages in the underlying action. See Williams v. Kublick, 41 A.D.3d 1193 (4th Dept. 2007). The majority rule, followed by the Second, Third, and Fourth Departments of New York, and the majority of other jurisdictions, holds that a plaintiff is required to prove "the value of the claim lost" or collectability of the judgment in the underlying action in order to establish a prima facie claim for legal malpractice. See, e.g., McKenna v. Forsyth & Forsyth, 280 A.D.2d 79 (4th Dept. 2001) (holding that it is the plaintiff's burden to prove the amount that would have been collected in the underlying action). The damages recoverable are limited to the amount that "could or would have been collected" in the underlying action, to limit a potential windfall by a plaintiff. Id. In Jedlicka v. Field, 14 A.D.3d 596 (2d Dept. 2005), the Second Department held that the plaintiff bore the burden of establishing the "hypothetical judgment" that would have been collectible in the underlying action.

In the First Department, however, the burden of proving collectability is borne by the defendant attorney. See Lindenman v. Kreitzer, 7 A.D. 3d 30 (1st Dept. 2004). Proof of collectability, or non-collectability, must be introduced by the defendant attorney as "as a matter constituting an avoidance or mitigation of the consequences of the attorney's malpractice." Id. The defendant's burden of proving non-collectability is generally limited to between the date of the alleged malpractice and a reasonable period of time after the legal malpractice trial, short of the full 20–year viability period of a judgment (after which the judgment would be deemed "uncollectible"). Id. However, the time period is case-sensitive and will be determined by a trial court, consistent with the life span of any judgment and any other relevant information necessary to balance the equities.

c. *Emotional Damages*

It is well-established in New York that a plaintiff may not recover emotional damages in a legal malpractice action based upon an attorney's conduct in an underlying civil action. See Guiles v. Simser, 35 A.D.3d 1054 (3d Dept. 2006); Wolkstein v. Morgenstern, 275 A.D.2d 635 (1st Dept. 2000); Dirito v. Stanley, 203 A.D.2d 903 (4th Dept. 1994).

Similarly, a plaintiff may not recover emotional damages in a legal malpractice action stemming from a criminal action. The Court of Appeals ruled that a plaintiff may not recover non-pecuniary damages for legal malpractice arising out of an attorney's conduct in an underlying criminal action. See Dombrowski v. Bulson, 19 N.Y.3d 347 (2012).

B. Breach of Fiduciary Duty

Apart from the obligations set forth in the New York Rules of Professional Conduct, New York Courts have held that an attorney owes separate fiduciary obligations to their client, including confidentiality and undivided loyalty. A breach of either of those duties may give rise to a separate cause of action for breach of fiduciary duty.

In general, "[i] n order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." Guarino v. North Country Mtge. Banking Corp., 79 A.D.3d 805, 807 (2d Dept. 2010). "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." People v. Coventry First LLC, 13 N.Y.3d 108, 115 (2009). An attorney is a special type of fiduciary, and the attorney-client relationship requires that the attorney "deal fairly, honestly and with undivided loyalty…including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's." Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1, 9 (1st Dept. 2008).

While it is typically pleaded in conjunction with a legal malpractice claim, a claim for breach of fiduciary duty is broader in scope because the duties of confidentiality and undivided

loyalty "extend[ ] both to current clients and former clients." Neuman v. Frank, 82 A.D.3d 1642 (4th Dept. 2011); see also Exeter Law Group LLP v. Wong, 2016 N.Y. Slip. Op. 32425[U], at *7 (Sup. Ct., N.Y. Co. 2016) (holding that a breach of fiduciary duty claim can be stated where the attorney allegedly used confidential information to disadvantage a former client even though it was also a disciplinary rule violation).

Where breach of fiduciary duty and legal malpractice claims are both pleaded, and they arise from the same operative facts and allege identical or substantially similar damages, courts will dismiss the breach of fiduciary duty claim as duplicative. See Section III(F), infra, on Redundant Pleadings.

A plaintiff should not assert a claim for breach of fiduciary duty with the expectation of a diminished, or less stringent, pleading standard than that of a claim for legal malpractice. To the contrary, where a claim for breach of fiduciary duty is pleaded against an attorney, it is subject to the same exacting standards of a legal malpractice claim. In other words, where a client brings a breach of fiduciary duty claim against and attorney, they are still required to "establish the elements of proximate cause and actual damages, where the injury is the value of the claim lost," and "the client must meet the 'case within a case' requirement, demonstrating that 'but for' the attorney's conduct the client 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., 10 A.D.3d 267, 271-272 (1st Dept. 2004); Miazga v. Assaf, 136 A.D.3d 1131, 1135 (3d Dept. 2016) (finding that "plaintiff's claims of breach of fiduciary duty… suffer from the same deficiencies as his legal malpractice claims inasmuch as plaintiff is unable to adequately demonstrate causation or actual damages….").

Furthermore, an attorney acting in the capacity of a trustee or an escrow agent can be charged with fiduciary duties over non-clients. It is well-settled that an escrow agent is also held to a fiduciary standard as to persons who can claim a beneficial interest to the escrowed funds. See Talansky v. Schulman, 2 A.D.3d 355, 359 (1st Dept. 2003). In order to establish a fiduciary relationship regarding escrow agents, a non-client plaintiff must defeat a defendant's prima facie showing that no escrow agreement existed. See Ehrlich v. Froehlich, 72 A.D.3d 1010, 1012 (2d Dept. 2010). Similarly, a trustee owes a duty of undivided loyalty to a trust's beneficiaries, and they must be "free from any conflicting personal interest" and must "not to profit at the possible expense of his beneficiary." Beck v. Manufacturers Hanover Trust Co., 218 A.D.2d 1 (1st Dept. 1995).

C. Judiciary Law § 487

New York Judiciary Law § 487 is a punitive statute that allows an injured party to recover treble damages from an attorney who has engaged in willful misconduct. Judiciary Law § 487 provides that an attorney who:

1) is guilty of any deceit or collusion, or consents to any deceit or collusion, with the 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 is liable for treble damages to the aggrieved party.

Judiciary Law § 487 (1) requires that any alleged deceit must occur in the course of a pending judicial proceeding, if the deceitful act was not directed at a court. See Sun Graphics Corp. v. Levy, Davis & Maher, LLP, 94 A.D.3d 669 (1st Dept. 2012); Barouh v. Law Offs. of Jason L. Abelove, 131 A.D.3d 988 (2d Dept. 2015) (holding statute only applies to wrongful conduct by an attorney in a pending proceeding in which the plaintiff was a party). Additionally, Judiciary Law § 487 does not apply to conduct before courts outside of New York, as New York's legislature was primarily concerned with "the integrity of the truth-seeking processes of the New York courts." See Schertenleib v. Traum, 589 F.2d 1156 (2d Cir. N.Y. 1978); see also Ranasinghe v. Kennell, 2017 U.S. Dist. LEXIS 10512 (S.D.N.Y. Jan. 25, 2017).

The Court of Appeals has held that the "deceit or collusion" referenced in the statute need not be successful to fall under Judiciary Law § 487 (1), and the recovery of treble damages does not depend upon the court's belief in a material misrepresentation of fact in a complaint – indeed, the mere existence of such misrepresentation is sufficient, as the lawsuit could not have gone forward without said material misrepresentation. See Amalfitano v. Rosenberg, 12 N.Y.3d 8 (2009).

1. Asserting Judiciary Law § 487 in Separate Actions

In cases where an opposing party or attorney is making a claim under Judiciary Law § 487, where a complaint fails to allege that the misconduct giving rise to a Judiciary Law § 487 claim was "merely a means to the accomplishment of a larger fraudulent scheme" which is "greater in scope than the issues determined in the prior proceeding" then "the claim is not properly asserted" in a new action, but rather appropriately raised in the "underlying action, where the alleged misconduct occurred." Little Rest Twelve, Inc. v. Zajic, 137 A.D.3d 540 (1st Dept. 2016); see also Pieroni v. Phillips Lytle LLP, 140 A.D.3d 1707 (4th Dept. 2016); Specialized Indus. Servs. Corp. v. Carter, 68 A.D.3d 750 (2d Dept. 2009); Lipin v. Hunt, 2015 U.S. Dist. LEXIS 35700 (S.D.N.Y. Mar. 20, 2015) (dismissing a Judiciary Law § 487 claim in part because "Plaintiff should have raised these misconduct allegations before the courts in which the allegedly improper conduct occurred"); Alliance Network, LLC v. Sidley Austin LLP, 43 Misc. 3d 848, 858 (Sup. Ct. N.Y. Co. 2014) citing Yalkowsky v. Century Apartments Assocs., 215 A.D.2d 214 (1st Dept. 1995).

Conversely, a Judiciary Law § 487 claim may be brought as a separate action where a plaintiff seeks to recover only excess legal fees and expenses, rather than to collaterally attack a prior adverse judgment on the grounds that it was procured by fraud. Melcher v. Greenberg Traurig LLP, 135 A.D.3d 547 (1st Dept. 2016); cf. Seldon v. Bernstein, 503 Fed. Appx. 32 (2d Cir. N.Y. 2012) (clarifying that the exception does not apply under circumstances where the proponent of the Judiciary Law § 487 claim "was aware of the alleged misconduct at the time of the prior action.").

2. Chronic, Extreme Pattern of Legal Delinquency and Requisite Intent

In order to set forth a Judiciary Law § 487 claim, a plaintiff must plead the essential elements under the statute: intentional deceit and damages proximately caused by the deceit. Jean v. Chinitz, 163 A.D.3d 497 (1st Dept. 2018). The First Department has held that in order to prevail on a Judiciary Law § 487, a plaintiff must plead and prove that the defendant attorney engaged in a "chronic, extreme pattern of legal delinquency." See Freeman v. Brecher, 155 A.D.3d 453, 454 (1st Dept. 2017) (dismissing Judiciary law § 487 claim "as the conduct alleged does not evince a chronic and/or extreme pattern of legal delinquency"); see also Shawe v. Elting, 161 A.D.3d 585, 588 (1st Dept. 2018) (holding that a "'single alleged act of deceit [is] not sufficiently egregious to support a claim under' §487").

The Second Department, however, has eliminated the "chronic, extreme pattern of delinquency" predicate for liability, holding, "to the limited extent that decisions of this Court have recognized an alternative predicate for liability under Judiciary Law § 487 based upon an attorney's 'chronic, extreme pattern of legal delinquency' … they should not be followed, as the only liability standard recognized in Judiciary Law § 487 is that of an intent to deceive." Dupree v. Voorhees, 102 A.D.3d 912, 913 (2d Dept. 2013). See also Schiller v. Bender, Burrows & Rosenthal, LLP, 116 A.D.3d 756, 759 (2d Dept. 2014) (holding that "a chronic extreme pattern of legal delinquency is not a basis for liability pursuant to Judiciary Law § 487").

3. Basis for a Judiciary Law Claim

Judiciary Law § 487 claims are generally disfavored by the courts. See Gonzalez v. Gordon, 233 A.D.2d 191 (1st Dept. 1996), lv denied 90 N.Y.2d 802 (1997) (vacating the awards of treble damages under Judiciary Law § 487). "Negligence is not sufficient to state a claim for violation of Section 487[.]" Samms v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, 112 F. Supp. 3d 160, 167 (S.D.N.Y. 2015). See also O'Callaghan v. Sifre, 537 F. Supp. 2d 594, 596 (S.D.N.Y. 2008) (claims that an attorney made meritless or unfounded allegations in state court proceedings would not be sufficient to set forth a violation of § 487.). Even an attorney's antics during discovery, which unreasonably and vexatiously multiplied the proceedings and warranted the imposition of sanctions, does not amount to a chronic and extreme delinquency such that the attorney is liable under the Judicial Law. See Brignoli v. Belch, Hardy & Scheinman, Inc., 126 F.R.D. 462 (S.D.N.Y. 1989); but see Kurman v. Schnapp, 73 A.D.3d 435 (1st Dept. 2010) (allegation that attorney knowingly submitted a fictitious letter to the court was sufficient to state a cause of action).

II. COMMON SOURCES OF LEGAL MALPRACTICE CLAIMS

There are many different types of legal malpractice claims and many different sources from which potential claims can arise. Some of the more common sources of legal malpractice claims are listed below:

A. Time Limitations

One of the most common sources of legal malpractice is caused by the failure to comply with certain time limitations or deadlines. This is true regardless of an attorney's practice area.

A large number of legal malpractice claims arise out of the failure of a personal injury plaintiff's counsel to timely file a lawsuit on behalf of his or her client within the applicable statute of limitations. Often the failure to timely file suit is attributable to misunderstanding the applicable statute of limitations, failing to comply with Notice of Claim provisions against public entities, or simply letting the matter "slip through the cracks." The latter often occurs due to communication issues between the attorney and the client, or after a loss of interest in the matter after it is revealed that the injuries claimed (and the attendant recovery) are not as substantial as initially believed.

It can be difficult to overcome liability, or a finding of a breach of the applicable standard of care, when a legal malpractice claim results from the failure to comply with a time limitation. Despite this, even if it is clear that the lawyer's failure to meet the time limitation was an obvious departure of the standard of care, the legal malpractice plaintiff must still prove causation, namely that she would have prevailed in the underlying matter if the error had not occurred- i.e., the proverbial "case within a case." See Section I, supra.

B. Conflicts of Interest

Another primary source of legal malpractice and breach of fiduciary duty claims stems from conflicts of interest. This is a universal problem, faced by lawyers in every practice area, whether practicing in a large firm capacity or as a solo practitioner. Often the conflict arises when the lawyer acts for both parties in a transaction – i.e. representing both a seller and a purchaser in a real estate matter. In other situations, the conflict arises when the lawyer represents an adverse party in an unrelated matter. When an attorney takes on a representation in which a conflict of interest exists without disclosure and consent (if the representation is permissible in the first instance), there is a breach of the duty of loyalty which may form the basis for disciplinary proceedings, a motion to disqualify the attorney from continued representation, and/or a legal malpractice lawsuit.

Conflicts of interest claims are fact specific, rarely clear cut and require the weighing of competing interests. See Crawford v. Antonacci, 297 A.D.2d 419 (3d Dept. 2002). While a conflict of interest (even ones that violate the Code of Professional Responsibility) generally will not alone support a cognizable claim for legal malpractice, liability can follow where the client can show that he or she sustained damages as a result of the conflict. See Davis v. Davis, 2014 N.Y. Misc. LEXIS 2259 (Sup. Ct. Suffolk Co. 2014); see also Kimm v. Chang, 38 A.D.3d 481, (1st Dept. 2007). In other words, to establish liability based upon an alleged conflict of interest, a plaintiff must prove a causal relationship between the conflict of interest and the damages sustained. See Esposito v. Noto, 132 A.D.3d 944 (2d Dept. 2015); see also Bryant v. Monaghan, 2018 U.S. Dist. LEXIS 130146, at *13 (S.D.N.Y. Aug. 1, 2018); Kaminsky v. Herrick, Feinstein LLP, 59 A.D.3d 1, 13 (1st Dept. 2008); Amodeo v. Gellert & Quartararo, P.C., 26 A.D.3d 705

(3d Dept. 2006).

For example, the First Department reversed the dismissal of a legal malpractice claim, based in part upon an alleged conflict of interest that "compromised the level of advocacy" and contributed to an outcome that was less favorable than would otherwise have been achieved, such that the former client's allegations were sufficient to state a claim that "but for" the conflict of interest, the client could have obtained a more favorable result. See Weil, Gotshal & Manges, LLP, 10 A.D.3d 267.

Conversely, a plaintiff will be unable to maintain an actionable cause of action for legal malpractice based upon an alleged conflict of interest, where a plaintiff's interests are sufficiently aligned with and do not differ from those simultaneously represented by a defendant attorney, as to ensure that their interests were protected. See In re Adoption of Gustavo G., 9 A.D.3d 102 (1st Dept. 2004); see also Allegretti-Freeman v. Baltis, 205 A.D.2d 859 (3d Dept. 1994) (court held that the risk of a conflicting interest was non-existent and found that a law firm could represent multiple homeowners in a related breach of contract action against a real estate developer given the multiple homeowners' unity of interests). Moreover, conclusory allegations based on speculation are insufficient to sustain a cause of action for malpractice based upon an alleged conflict of interest. See Stonewell Corp. v. Conestoga Title Ins. Co., 678 F. Supp. 2d 203 (S.D.N.Y. 2010).

It is important to remember that as a fiduciary, attorneys are charged with the "duty to deal fairly, honestly, and with undivided loyalty… honoring the clients' interests over the lawyers." See Ulico Cas. Co., 56 A.D.3d 1; see also Saint Annes Dev. Co. v. Batista, 165 A.D.3d 997, 997-998 (2d Dept 2018); Pillard, 82 A.D.3d 541 ("liability can follow where the divided loyalty results in malpractice."). Conflict of interest claims are difficult to defend, as the equities (and sympathies of jurors) balance in favor of the client in situations of non-disclosure. Since an undisclosed conflict of interest is a "ticking time-bomb" waiting to explode, a comprehensive, electronic and searchable database for conflicts clearance should be in place to try to avoid conflicts from arising in the first place. Full disclosure should occur immediately upon even the slightest inclination that a conflict exists.

C. Negligent Advice

It is well established that attorneys are not held to a rule of infallibility and are not liable for honest mistakes of judgment, where the proper course of action is open to reasonable doubt. See Section I(A)(2)(a), supra, on the Professional Judgment Rule. The best way to minimize liability in situations where a choice is made among several different possible strategies is to engage the client in the decision-making process. This can be done by keeping him or her apprised of the risks and benefits of each situation to permit the client's informed participation in the process. While it may be time consuming, furnishing clients with written correspondence outlining the mutually agreed upon litigation strategy is a good course of practice in reducing the lawyer's exposure.

D. Failure to Investigate/Evaluate

While a legal malpractice action is unlikely to succeed where an attorney erred because an issue of law was unsettled or debatable, an attorney may be liable for a failure to conduct adequate legal research or due diligence. See Eurotech Constr. Corp. v. Fischetti & Pesce, LLP, 155 A.D.3d 437 (1st Dept. 2017); Kempf v. Magida, 37 A.D.3d 763 (2d Dept. 2007). If the attorney is not familiar with the relevant law or practice area, the attorney must inform himself or herself of the law relating to the matter. See Wo Yee Hing Realty, Corp., 99 A.D.3d 58.

While omissions in investigation or evaluation can be expected, the issue of whether there is liability hinges upon whether the omissions were reasonable or whether they were a deviation from the applicable standard of care. An attorney's failure to investigate or evaluate the sufficiency of the claims or defenses available can serve as the basis for a malpractice action. Whether, and to what extent, the attorney should have investigated facts can raise an issue to be governed by the standard of care and to be determined by the trier of fact. See Thompson v. Seligman, 53 A.D.3d 1019 (3d Dept. 2008).

E. Failure to Prosecute/Appear

An attorney may be liable for his ignorance of the rules of practice, his failure to comply with conditions precedent to suit, his neglect to prosecute an action, or his failure to conduct adequate legal research. See Dempster v. Liotti, 86 A.D.3d 169 (2d Dept. 2011); Mortenson v. Shea, 62 A.D.3d 414 (1st Dept. 2009). An attorney's failure to prosecute or appear in a matter is a common basis for a legal malpractice action. Lawsuits may be dismissed because of failure to comply with discovery procedures or failure to answer court calendar calls. Where a dismissal is solely attributable to the attorney's neglect, the client whose case was dismissed will have a viable cause of action for legal malpractice. See Conklin v. Owen, 72 A.D.3d 1006 (2d Dept. 2010). To prevail on a cause of action for legal malpractice, however, the client must still demonstrate "but for" proximate causation. See Section I, supra.

F. Waiver of Defenses

The mere failure to plead a specific defense is not necessarily actionable. Under the attorney judgment rule, an attorney's selection of one among several reasonable courses of action does not constitute malpractice. See Section I(A)(2)(a), supra, on the Professional Judgment Rule. However, an attorney's failure to raise or pursue a defense, usually in connection with the preparation of pleadings, is a common basis for a legal malpractice claim. If the client can prove that the omitted defense was meritorious and that the failure to raise the defense proximately caused the client damages, liability will then be imposed. See Breslin Realty Dev. Corp. v. Shaw, 17 Misc.3d 1110(A) (Sup. Ct. Nassau Co. 2007) (holding "[w]here the malpractice plaintiff was the defendant in the prior proceeding, the test is whether a proper defense would have altered the result of the prior action").

III. LEGAL MALPRACTICE DEFENSES

A. Statute of Limitations

1. Accrual of a Legal Malpractice Claim

Legal malpractice claims must be commenced within three (3) years of the accrual of damages by the plaintiff. See CPLR §214(6). An action to recover damages for legal malpractice accrues on the date that the alleged malpractice is committed, not when it was discovered. See Quinn v. McCabe, Collins, McGeough & Fowler, LLP, 138 A.D.3d 1085 (2d Dept. 2016); Hahn v. Dewey & LeBoeuf Liquidation Trust, 143 A.D.3d 547 (1st Dept. 2016). There is no exception to the majority rule that the accrual date of a legal malpractice claim is calculated from the date of the attorney's alleged malpractice. See Byron Chemical Co v. Groman, 61 A.D.3d 909 (2d Dept. 2009). Legal malpractice actions commenced outside the limitations period provided by the CPLR are subject to dismissal on the pleadings. See Papa v. Fairfield on the Green, 123 A.D.3d 990 (2d Dept. 2014).

For example, in Shivers v. Siegel, 11 A.D.3d 447 (2d Dept. 2004), the plaintiff argued that her cause of action for legal malpractice did not accrue, and the statute of limitations did not begin to run, until she sustained actual damages. Specifically, the plaintiff maintained that she could not have asserted a legal malpractice claim, as actual damages could not be ascertained until there was a resolution in favor of the last remaining defendant sued in the underlying action. The Second Department found that the plaintiff's position was in contravention to New York law, holding that the legal malpractice claim accrued at the latest on the date when the plaintiff discharged the defendant as her counsel, which was over four (4) years prior to the commencement of the malpractice action. Id. citing Daniels v. Lebit, 299 A.D.2d 310 (2d Dept. 2002). The Second Department's reasoning in Shivers has been repeatedly reiterated by other courts in subsequent decisions. See, e.g., Perkins v. Am. Transit Ins. Co., 2013 U.S. Dist. LEXIS 6703, 2013 WL 174426 (S.D.N.Y. Jan. 14, 2013) ("The Court notes that 'accrual is not delayed until the damages develop or become quantifiable or certain.'"); McCormick v. Favreau, 82 A.D.3d 1537 (3d Dept. 2011).

2. The "Continuous Representation" Doctrine

Although a cause of action for legal malpractice accrues on the date of the act of the alleged malpractice, the statute of limitations in a legal malpractice action may be "tolled" in circumstances when there is continuous representation of the client for the same matter by the attorney. See 3rd & 6th, LLC v. Berg, 149 A.D.3d 794 (2d Dept. 2017); Tantleff v. Kestenbaum & Mark, 131 A.D.3d 955 (2d Dept. 2015); Deep v. Boies, 121 A.D.3d 1316 (3d Dept. 2014). Pursuant to the continuous representation doctrine, a legal malpractice action is tolled until the attorney's on-going representation of the plaintiff in connection with the particular matter in question is completed. The parties must have a 'mutual understanding' that further representation is needed with respect to the matter underlying the malpractice claim. See Debevoise & Plimpton LLP v. Candlewood Timber Group LLC, 102 A.D.3d 571 (1st Dept. 2013); Krichmar v. Scher, 82 A.D.3d 1164 (2d Dept. 2011).

The continuous representation doctrine is not applicable when the client no longer manifests a desire to have the attorney complete the services for which the attorney was retained, formal termination is not required. See Debevoise & Plimpton LLP, 102 A.D.3d at 572. To invoke the tolling of the statute of limitations pursuant to the "continuous representation" doctrine, the plaintiff is required to establish, by sufficient evidentiary facts, a clear indicia of an ongoing, continuous, developing and dependent relationship between her and the attorney. Id.; see also Schrull v. Weis, 166 A.D.3d 829 (2d Dept. 2018); Farage v. Ehrenberg, 124 A.D.3d 159 (2d Dept. 2014).

The continuous representation doctrine hinges on a relationship of trust and confidence between the attorney and the client, and ceases to apply when the attorney-client relationship ends for any reason. See Waggoner v. Caruso, 68 A.D.3d 1 (1st Dept. 2009). Where a client explicitly terminates his or her attorney's legal services and subsequently files a legal malpractice action, the statute of limitations will only be extended until the date the attorney-client relationship was terminated. See Perkins, 2013 U.S. Dist. LEXIS 6703.

It is also well-established that the attorney-client relationship ends when a plaintiff retains new counsel. See Knobel v. Wei Group, LLP, 160 A.D.3d 409 (1st Dept. 2018); Rupolo v. Fish, 87 A.D.3d 684 (2d Dept. 2011). A client's retention of other counsel breaks the ongoing, continuous, developing and dependent relationship between the client and his or her attorney thus breaking the chain of continuous representation. See Amusement Industry, Inc. v. Buchanan Ingersoll & Rooney, P.C., 2013 U.S. Dist. LEXIS 8569, 2013 WL 264684 (S.D.N.Y. Jan. 22, 2013).

Moreover, consultations between a client's former attorney and new attorney regarding pending litigation cannot be equated with ongoing representation. See Rupolo, 87 A.D.3d 684, citing Tal-Spons Corp. v. Nurnberg, 213 A.D.2d 395 (2d Dept. 1995). New York courts have routinely held that the continuation of a general professional relationship with former counsel, not concerning the specific matter from which the client's purported legal malpractice claim arose, is insufficient to extend the limitations period. See Berger & Assoc. Attorneys, P.C. v. Reich, Reich & Reich, P.C., 42 N.Y.S.3d 16 (2d Dept. 2016); Nuzum v. Field, 106 A.D.3d 541 (1st Dept. 2013); see also Dischiavi v. Calli, 125 A.D.3d 1435 (4th Dept. 2015); Deep, 121 A.D.3d at 1318. The continuous representation doctrine tolls the running of the statute of limitations only if the defendant attorney continues to advise the client in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship. See Davis v. Cohen & Gresser, LLP, 160 A.D.3d 484 (1st Dept. 2018); Pace v. Raisman & Associates, 95 A.D.3d 1185 (2d Dept. 2012).

In Offshore Express v. Milbank, Tweed, Hadley & McCloy, LLP, 291 Fed.Appx. 358, (2d Cir. N.Y. 2008), the plaintiff alleged that the defendant law firm committed malpractice in its negotiation of a restructuring of a corporation. Seven (7) months later, the defendant represented the plaintiff in an arbitration over the tax obligations of the successor corporations. In affirming the lower court's decision to dismiss the legal malpractice claim, the Second Circuit reasoned that the "continuous representation" doctrine is intended to protect litigants from jeopardizing his or her pending case or relationship with the attorney handling that case during the period that the

attorney continues to represent that person. Id. at 359; see also Waggoner, 68 A.D.3d at 7. Based upon this reasoning, the court found that by the time the transaction was consummated and the restructuring of the corporation had been completed there was no "pending case" to "jeopardize." Thus, at the time the defendant law firm was subsequently retained to represent plaintiff with regard to the tax dispute, there was nothing to indicate a "mutual understanding" of the need for further litigation representation. Id.

In Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoebel & Conway, LLP, 52 A.D.3d 566 (2d Dept. 2008), the defendant law firm represented the plaintiff in connection with a real estate transaction in 1996. Following the 1996 transaction, the defendant law firm represented the plaintiff in several other matters involving the subject real estate as late as 2003. In 2005, the plaintiff commenced a legal malpractice action, arguing that the defendant was negligent in its handling of the 1996 real estate transaction. The Second Department held that the 2005 action was untimely, and that the continuous representation did not toll the applicable statute of limitations because the later transactions were "unrelated to the specific subject matter that gave rise to the alleged malpractice" and was "insufficient to toll the statute of limitations." See id. In other words, the Court held that the defendant's representation of the plaintiff in the 1996 transaction amounted to a complete representation that was separate and apart from the subsequent representations, even though those subsequent representations involved the same property that was the subject of the 1996 transaction. See id.

Similarly, in Nuzum, 106 A.D.3d 541, the plaintiff claimed that the defendant attorney committed malpractice in connection with alleged defective promissory notes prepared in 1999. Although the defendant represented the plaintiff in connection with a matter related to the proceeds of those promissory notes in 2004, the First Department held that plaintiff's 2007 lawsuit was untimely, and that the subsequent representation "was insufficiently related to the matter sued upon to bring it within the continuous representation." Id. at 541.

Moreover, in Farage, 124 A.D.3d 159, the court addressed application of the continuous representation doctrine finding that it does not apply where the defendant-attorney only engages in ministerial acts. The Farage court upheld dismissal of the legal malpractice action as untimely, finding that documentary evidence established that the attorney-client relationship had sufficiently deteriorated nearly six months prior to the date that a Consent to Change Attorney was filed with the Court. Id. (finding that the attorney client relationship ceased, not when substitution of attorney is filed, but rather once there is evidence of a lack of continuing trust and confidence between the attorney and client); see also Mazario v. Snitow Kanfer Holtzer & Millus, LLP, 2018 N.Y. Misc. LEXIS 2058, at *4-5 (Sup. Ct. N.Y. Co. 2018) (finding that the attorney-client relationship ended prior to the attorney's formal withdrawal as counsel and the subsequent order relieving the attorney as counsel).

B. ***Res Judicata*** **and Collateral Estoppel**

Legal malpractice claims may be defended under the related doctrines of collateral estoppel and/or *res judicata* where there has been a prior determination on an issue or claim regarding representation or the facts surroundings a legal malpractice claim. Guidance

Endodontics, LLC v. Olshan Grundman, Frome Rosensweig & Wolosky, LLP, 157 A.D.3d 508 (1st Dept 2018) (finding a legal malpractice claim to be barred by the doctrine of collateral estoppel).

Res judicata, or claim preclusion, will bar an attorney malpractice claim when there is a judgment on the merits in existence from a prior claim between the same parties involving the same underlying facts and subject matter.[1] Knox v. Aronson, Mayefsky & Sloan, LLP, 2018 N.Y. Slip. Op. 09030, at *3 (1st Dept. 2018).

Collateral estoppel, or issue preclusion, is a narrower form of *res judicata*, which prevents "a party from re-litigating in a subsequent action or proceeding an issue clearly raised in the prior action or proceeding, and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." Breslin, 72 A.D.3d 258, 263 (emphasis added). New York Courts will apply the doctrine of collateral estoppel when there was a determination in a prior matter on the issue at hand and the plaintiff had a full and fair opportunity to litigate the issue in the prior matter. See, e.g., Guidance Endodontics, 157 A.D.3d 508. In Guidance Endodontics, the Court found that "an identity of issues" in the plaintiff's related malpractice action in New Mexico was decisive in the New York action. Id. The burden is on the party seeking to invoke collateral estoppel to "show the identity of the issues, while the party trying to avoid application of the doctrine must establish the lack of a full and fair opportunity to litigate." Karakash v. Trakas, 163 A.D.3d 788, 789 (2d Dept. 2018).

These doctrines apply to defend a claim for legal malpractice when there has been a prior determination as to disputed legal fees. As the trial court noted in Cie Sharp v. Krishman Chittur, 2014 N.Y. Misc. LEXIS 2289, at *1 (Sup. Ct. N.Y. Co. 2014), "it has long been the law in New York that a judicial determination fixing the value of a professional's services necessarily decides there was no malpractice." Id. The rationale is that an attorney may not collect a legal fee in the face of legal malpractice; thus, if a court awards a legal fee, it is deemed to have determined that there was no legal malpractice.

The doctrines of *res judicata* and collateral estoppel are widely applicable, including when the underlying issue or claim determination came from a quasi-judicial arbitration and not a proper court ruling. Reines v. Raoul Felder & Partners, P.C., 2018 N.Y. Slip Op. 32332[U], at *7 (Sup. Ct., N.Y. Co. 2018) (finding that "[i]n the context of a malpractice suit following an arbitration, collateral estoppel may apply where the arbitrator has found as a matter of law that arbitration counsel was not the cause of the client plaintiff's losses"), citing Bernard v. Proskauer Rose, LLP, 87 A.D.3d 412, 416 (1st Dept. 2011); see also Wallenstein v. Cohen, 45 A.D.3d 674, 675 (2d Dept. 2007)(Court found the determination fixing the value of the defendants' services by an arbitrator necessarily meant there was no malpractice).

Further, the doctrines are applicable to Judiciary Law § 487 claims, and other claims often brought by plaintiffs against former counsel in legal malpractice matters. In Brady v.

[1] The doctrine of *res judicata* stands for the proposition that, "a final judgment precludes reconsideration of all claims which could have or should have been litigated in the prior proceedings against the same party." Breslin Realty Dev. Corp. v. Shaw, 72 A.D.3d 258, 263 (2d Dept. 2010).

Friedlander, 121 A.D.3d 431 (1st Dept. 2014), the Appellate Division ruled that the client-plaintiff's Judiciary Law § 487 claim was precluded when the underlying court granted an attorneys' motion to withdraw as counsel because the Judiciary Law § 487 claim had previously been determined and should not be relitigated a second time. Id. Similarly, in Gillen v. McCarron, 126 A.D.3d 670 (2d Dept. 2015), the Second Department found that "[s]ince the plaintiff had a full and fair opportunity to address the alleged violations [in the underlying case] and those applications were denied, he is barred by the doctrine of collateral estoppel from relitigating those issues." Id. at 671, citing Izko Sportswear Co., Inc. v. Flaum, 63 A.D.3d 687, 688 (2d Dept. 2009).

C. Third Party Exposure

With a few exceptions, New York adheres to a strict privity rule whereby legal malpractice plaintiffs must establish they were in contractual privity with defendant attorneys. See Section I(A)(1)(a), supra, on Privity.

Non-clients who seek to bring suit against an attorney can avoid the strict privity rule by pleading a fraud-based cause of action. However, like all fraud claims, each element must be pled with sufficient particularity pursuant to CPLR 3016(b). Notably, a plaintiff cannot reasonably rely on the legal opinions or conclusion of another party's attorney. Aglira v. Julien & Schlesinger, P.C., 214 A.D.2d 178 (1st Dept. 1995) ("As far as reliance is concerned, it is a well-settled principle that neither a party nor his attorney may justifiably rely on the legal opinion or conclusions of his or her adversary's counsel"); see also Cascardo v. Stacchini, 100 A.D.3d 675 (2d Dept. 2012) (in action against the attorneys who represented her adversaries in unrelated litigation, litigant could not properly plead reasonable reliance on the representations of another party's counsel); Pecile v. Titan Capital Group, LLC, 96 A.D.3d 543 (1st Dept. 2012) (former employee failed to sufficiently allege fraud, collusion, malice or bad faith on part of employer's attorney, sufficient to overcome attorney's immunity for advice given employer); Stone v. Sutton View Capital, LLC, 2017 U.S. Dist. LEXIS 202778 (S.D.N.Y. Dec. 8, 2017) ("a plaintiff cannot properly plead reasonable reliance on the representations of another party's counsel . . . to support her claim of fraud").

D. The Professional Judgment Rule

See Section I(A)(2)(a), supra, on the Professional Judgment Rule.

E. The "Sophisticated Client" Doctrine

The "sophisticated client" doctrine is a versatile defense to a legal malpractice claim which, depending on the factual circumstances in which it arises, can serve as a complete defense or as supplemental support for other defenses, such as comparative fault or mitigation of damages. The "sophisticated client" possesses a higher level of expertise than an average client, is fully advised of all legal issues, and directs the attorney to take a particular course of action. The premise of the "sophisticated client" doctrine is that a defendant-attorney ought not to be held liable where a "sophisticated client" independently determines his or her own strategy for

the handling of a legal matter by weighing legal considerations against his or her own objectives and constraints.

1. The "Sophisticated Client" Doctrine As a Complete Defense to a Legal Malpractice Claim

a. *Standard of Care Defense*

The courts have suggested that an attorney's standard of care is lower when representing a "sophisticated client." In 4777 Food Serv. Corp. v. DeMartin & Rizzo, P.C., 2013 N.Y. Misc. LEXIS 5520 (Sup. Ct., Suffolk Co. 2013), the plaintiff alleged that the defendant law firm failed to properly advise the plaintiff of the amount of rent payable in a lease agreement. In granting a defense verdict after a bench trial, the court found that the plaintiff, the president of an IHOP restaurant franchise, was "a sophisticated and experienced salesman, skillful and accomplished" who had likely lead the lease negotiations, while the less-experienced attorney simply memorialized the agreement. Id. at *22-23. The court concluded that because of the client's experience and involvement in the negotiations, the defendant law firm was not required to provide advice concerning the amount of rent payable under the lease. Id.; see also Merz v. Seaman, 265 A.D.2d 385, 389 (2d Dept. 1999) (plaintiff could not establish proximate causation because as a sophisticated client, plaintiff understood the risks of which the lawyer had allegedly not advised him).

Additionally, where a client has multiple options available in how to proceed and directs his counsel to pursue one path in particular, no claim for legal malpractice will lie, as the client, not the attorney, determined the course of the matter. See Bellinson Law, LLC v. Iannucci, 102 A.D.3d 563 (1st Dept. 2013); see also Fletcher v. Boies, Schiller & Flexner LLP, 44 Misc. 3d 1216(A) (Sup. Ct., N.Y. Co. 2014) (plaintiff's claim for legal malpractice based on insufficient settlement dismissed where plaintiff chose to settle regardless of other litigation options).

In SS Marks LLC v. Morrison Cohen LLP, 2014 N.Y. Misc. LEXIS 1835 (Sup. Ct., N.Y. Co. 2014), the plaintiff brought a legal malpractice action alleging that the defendant law firm failed to advise of the effect of a subordination clause in a lease agreement. In granting summary judgment to defendant, the court found that "[i]t beggars belief that Marks, a sophisticated long-time real estate mortgage broker, would not know the effect of a subordination clause…." Id. at *13.

Similarly, in Goldman v. Akin, Gump, Strauss, Hauer & Feld, LLP, 11 Misc.3d 1077(A) (Sup. Ct., N.Y. Co. 2006) the plaintiffs were general partners of seven limited partnerships who retained the defendant attorneys to assist them in negotiating the sale of facilities without a release from the other limited partners. Subsequently, the dissenting partners commenced arbitration against plaintiffs, which resulted in a series of awards against plaintiffs. The plaintiffs then commenced an action against their attorneys for legal malpractice, contending that the attorneys negligently advised them concerning the sale. While the case was dismissed based on other grounds, the court noted that the action would have otherwise been dismissed on the basis of the "sophisticated client" defense, as plaintiffs were "obviously sophisticated businessmen

who knew the risks they were taking." Id.

The "sophisticated client" need not be an attorney, but rather may be any client with a sophisticated knowledge of the subject matter. For example, in Stolmeier v. Fields, 280 A.D.2d 342 (1st Dept. 2001), the plaintiff was a home improvement contractor who alleged that the defendant attorney did not advise him that he needed a contractor's license in order to enter into an enforceable contract with a client. Id. at 342. In granting summary judgment, the court determined that "Stolmeier was plainly a sophisticated home improvement professional at all relevant times, with many years of experience in the building trades in New York City and elsewhere, who had served as general contractor on other substantial home improvement jobs." Id. Accordingly, based on Stolmeier's knowledge prior to entering into the contract that his company was required to hold a contractor's license, any alleged failure by the defendants to advise him of the need for the license could not be, as a matter of law, the proximate cause of his alleged losses. Id. at 343.

It should be noted, however, that the courts are more cautious in applying the "sophisticated client" defense when the client is a lay person. For example, in Kram Knarf, LLC v. Djonovic, 74 A.D.3d 628 (1st Dept. 2010), plaintiffs alleged that the defendant attorneys failed to disclose certain liabilities contained in a contract to purchase real property. In response, the defendant attorneys moved to dismiss, arguing that all of the necessary information was contained in the transaction documents, which the plaintiffs, as sophisticated clients, were presumed to have read and understood. The First Department refused to apply the sophisticated client doctrine, holding that the defendants were required to advise plaintiffs correctly regarding the contract, regardless of plaintiffs' sophistication in the real estate industry. Id. at 628-629; see also Comer v. Krolick, 2015 N.Y. Misc. LEXIS 4395 (Sup. Ct., N.Y. Co. 2015) (the principles that a party is under an obligation to read a document before he or she signs it, and that a party cannot generally avoid the effect of a document on the ground that he or she did not read it or know its contents, will not defeat a claim for malpractice based on an attorney's failure to accurately explain the terms of a contract to his client).

b. ***Proximate Causation Defense***

Pursuant to the "sophisticated client" defense, the imposition of a strategic decision on an attorney by the client may sever the "but for" chain of causation in a legal malpractice claim. See Town of North Hempstead v. Winston & Strawn LLP, 28 A.D.3d 746 (2d Dept. 2006); see also Jeremias v. Allen, 146 A.D.3d 623 (1st Dept. 2017) (the sole cause of the damages was shown to result from the sophisticated plaintiffs-investors' informed choice to take a calculated risk); DiPlacidi v. Walsh, 243 A.D.2d 335 (1st Dept. 1997) (documentary evidence demonstrated that the failure to close on a proposed sale was due solely to plaintiffs' own actions, and that there was otherwise no causal relationship between plaintiffs' loss and the defendants' malpractice).

In Town of North Hempstead, the Second Department held that "where a sophisticated client imposes a strategic decision on counsel, the client's actions absolve the attorney from liability for malpractice." 28 A.D.3d at 748. There, the defendant law firm represented the

Town of North Hempstead (the "Town") in defense of a breach of contract action, where the Town was found liable for breach of a related consent agreement requiring mitigation of damages. The Town subsequently commenced a legal malpractice claim against the defendant firm, alleging a failure to challenge the validity of the consent agreement. In defense, the defendant firm established that the Town Attorney had directed it not to challenge the consent agreement out of concern for further exposure. The Second Department dismissed the legal malpractice action on the basis that the Town had imposed the strategy on the defendant firm and therefore could not establish the element of proximate cause. Id. at 748-49.

In the First Department's decision in 180 Ludlow Dev. LLC v. Olshan Frome Wolosky LLP, 165 A.D.3d 594 (1st Dept. 2018), the court held that the alleged loss, a failure to obtain an easement from a neighboring property prior to construction, was not a proximate cause of defendant's negligence but rather the unilateral decision of plaintiff, especially where plaintiff had retained separate zoning counsel. Id.

2. The "Sophisticated Client" Doctrine in Support of Affirmative Defenses

Where it is not a complete defense to liability, the "sophisticated client" doctrine may serve to bolster the affirmative defenses of comparative negligence and mitigation of damages. In SF Holdings Group, Inc. v. Kramer Levin Naftalis & Frankel LLP, 56 A.D.3d 281 (1st Dept. 2008), the plaintiff alleged that the defendant attorneys failed to classify certain assets of the plaintiff as "working capital" in a merger agreement. The defendant argued that "working capital" was clearly defined in the merger agreement, which plaintiff's principal, a sophisticated businessman, reviewed and executed with full knowledge of its terms. The Appellate Division rejected the defense, but held that "any negligence on the part of the client in reviewing the agreement is merely a factor to be assessed in mitigation of damages." Id. at 282, *quoting* Mandel, Resnik & Kaiser, P.C. v. E.I. Electronics, Inc., 41 A.D.3d 386 (1st Dept. 2007). In Mandel, the First Department reinstated legal malpractice counterclaims dismissed by the lower court even though the court agreed that the defendant was a sophisticated client. The court rather found that the client's negligence, if any, was solely a mitigating factor, not a complete defense. Id. at 388; see also Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300 (2001) ("[t]he culpable conduct of a plaintiff client in a legal malpractice action may be pleaded by the defendant attorney, by way of affirmative defense, as a mitigating factor in the attorney's negligence").

The First Department reaffirmed this principle in 180 E. 88th St. Apt. Corp. v. Law Off. Of Robert Jay Gumenick, P.C., 84 A.D.3d 582 (1st Dept. 2011). There the plaintiff alleged the defendant attorney was liable for legal malpractice in failing to consider tax implications when structuring a contract of sale. The defendant attorney cross-claimed, seeking contribution and indemnity based on plaintiff's direction of the strategy. While affirming the dismissal of the action for legal malpractice, the First Department noted that the dismissal of the counter-claims was also appropriate, as a claim of culpability by the client may only be asserted as an affirmative defense, "as a mitigating factor in the attorney's negligence." Id. at 583.

Practitioners should also be aware that the defense may not be applicable where the

defendant attorney has provided erroneous advice which has been relied upon by the client. See Board of Mgrs. of Bridge Tower Place Condominium v. Starr Assoc., LLP, 38 Misc. 3d 1203(A) (Sup. Ct., N.Y. Co. 2012), aff'd. 111 A.D.3d 526, 527 (1st Dept. 2013) (dismissing defendant's "sophisticated client" affirmative defense even though the client representative was an attorney, as the client relied on the defendant law firm's advice rather than imposing his own decisions).

F. Redundant Pleadings

Where a plaintiff brings separate causes of action, but the allegations supporting those causes of action are identical to those supporting the legal malpractice cause of action, the other causes of action will be found to be redundant of the malpractice claim and subject to dismissal. Oftentimes, in addition to alleging a cause of action for legal malpractice, a plaintiff will also allege claims sounding in breach of contract, breach of fiduciary duty, fraud, intentional misrepresentation, unjust enrichment, and/or tortious interference. Where the defendant is able to establish that the claims are based on the same set of operative facts as the legal malpractice claim, they will be dismissed. See Valenti v. Going Grain, Inc., 159 A.D.3d 645 (1st Dept. 2018) (dismissing claims for breach of implied covenant of good faith and fair dealing on the basis that it is duplicative of the breach of contract claim); Antonelli v. Guastamacchia, 131 A.D.3d 1078 (2d Dept. 2015) (dismissing allegations of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, and aiding and abetting fraud were dismissed as duplicative of claim alleging legal malpractice); Bibeaj v. Acocella, 120 A.D.3d 1285 (2d Dept. 2014) (dismissing causes of action for fraud and breach of contract as duplicative of the legal malpractice claim because they did not allege distinct damages); see also Goldin v. Tag Virgin Is. Inc., 2014 N.Y. Misc. LEXIS 2300, at *19 (Sup. Ct. N.Y. Co. 2014) (the statute of limitations for an unjust enrichment claim which "alleges the same facts and the same wrong as Plaintiffs' legal malpractice and aiding and abetting fiduciary duty claims…is the same as for the malpractice and aiding and abetting claims-three years").

In considering whether claims are redundant of the legal malpractice claim, the Courts analyze whether the plaintiff has alleged distinct damages flowing from the other causes of action. For example, in Postiglione v. Castro, 119 A.D.3d 920 (2d Dept. 2014), the Appellate Division reversed the trial court's decision dismissing plaintiff's causes of action for fraud and breach of contract. The Appellate Division found that the plaintiff sufficiently alleged distinct damages arising from the defendant's alleged fraud and breach of contract. Similarly, in Brenner v. Reiss Eisenpress, LLP, 155 A.D.3d 437, 437-438 (1st Dept 2017), the First Department reinstated a breach of fiduciary duty claim based upon alleged overbilling, which the court saw as separate and distinct from allegations that the attorney had mishandled the underlying federal trial by committing strategic errors. See also TVGA Eng'g, Surveying, P.C. v. Gallick, 45 A.D.3d 1252, 1256 (4th Dept. 2007).

Conversely, in Bibeaj, 120 A.D.3d 1285, the Appellate Division, Second Department found that the trial court should have granted defendant's motion for summary judgment dismissing fraud and breach of contract causes of action as duplicative of Plaintiff's legal malpractice cause of action, as the fraud and breach of contract causes of action "arose from the same set of facts as the legal malpractice cause of action, and do not allege distinct damages."

See also Vermont Mut. Ins. Co. v. McCabe & Mack, LLP, 105 A.D.3d 837 (2d Dept. 2013) (holding that where tortious conduct independent of the alleged legal malpractice is alleged, a motion to dismiss a cause of action as duplicative is properly denied).

A plaintiff may attempt to avoid asserting a legal malpractice claim in an effort to take advantage of the longer statute of limitations associated with breach of contract and/or breach of fiduciary duty claims; however, the Courts generally treat the "disguised" cause of action as a claim for legal malpractice and apply the applicable legal malpractice law. See Walter v. Castrataro, 94 A.D.3d 872 (2d Dept. 2012) (the complaint is "nothing more than a rephrasing of the claim of malpractice in the language of breach of contract"); see also Matter of HSBC Bank U.S.A. (Littleton), 70 A.D.3d 1324 (4th Dept. 2010) ("the breach of fiduciary claim against respondent law firm was, in essence, a claim for legal malpractice and thus was barred by the three-year statute of limitations"); Kinberg v. Garr, 60 A.D.3d 597 (1st Dept. 2009) (affirming dismissal of plaintiff's breach of contract and fraud claims which were essentially legal malpractice claims barred by the three year statute of limitations); Giarratano v. Silver, 46 A.D.3d 1053 (3d Dept. 2007) ("Plaintiff's breach of contract claim was merely a rephrasing of the malpractice claim and, in any event, was covered by a three-year statute of limitations").

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.
>
> 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
>
> The following actions must be commenced within three years:
>
> 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).

- 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).

.

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.

Sources of Legal Malpractice Claims & Ethical Considerations

2019 NYSBA Risk Management Seminars – Insurance Considerations

Greg Cooke, Vice President
USI Affinity

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Insurance Considerations

Greg Cooke

Vice President

Bar Association Programs

USI Affinity

2018 NYSBA Risk Management Seminars

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Agenda

- The Policy
- Prior Acts
- Who is Insured?
- Are all policies the same?
- **Cyber Insurance**
  - Why the need?
  - What is it?
- Selecting Appropriate Coverage
- Selecting a Carrier

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Claims Made vs. Occurrence Policy

- An LPL policy generally provides coverage for demands made upon the policyholder for damages brought forth during the policy period resulting from an error or omission within the firms covered prior acts date.
- An “occurrence” policy (such as a homeowner’s policy) normally insures an unexpected event within the policy period that result in bodily injury or property damage.

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Prior Acts Coverage

- "Retroactive Date"
- The date continuous coverage was first obtained
- Claims triggered before this date are not covered
- Changing Carriers

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Extended reporting periods

- "ECRP or Tail Coverage"
- Available for attorneys who retire from the practice of law
- Provides coverage for claims arising from conduct within the policy period which would otherwise be covered by the policy but the claim is first made during the extended reporting period.
- Claim must have occurred while policy was in force.

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Who is Insured?

- The Named Insured
- Is coverage provided to:
  - Shareholders or partners?
  - Employees?
  - Former employees?
  - "Of Counsel" lawyers?
  - Independent contractors?
  - The estate/heirs/executors/administrators of an insured?

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Common Exclusions

- Intentional Acts
  - Dishonesty
  - Fraudulent or Criminal Acts
- Bodily Injury / Property Damage
- Insured vs. Insured
  - Unless Attorney Client relationship exists and professional services are being rendered.
- Owned Equity
  - Normally greater than 10%-15%

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Proper and timely notice

- Report incidents or situations to your carrier immediately
- Provide written notice of claim
- These circumstances may be considered a claim:
  - A demand is received for money or services
  - Service of suit
  - Institution of alternative dispute resolution or arbitration proceedings
  - Disciplinary action is threatened or filed
  - Notice received by any insured that is the intention of a person or entity to hold the insured responsible for the consequences of an alleged wrongful act
  - Any request to waive a statute of limitations

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Are all insurance policies the same?

- Deductible Options (Per Claim vs. Aggregate)
- Expense Allowances (Inside Limits vs. Outside Limits)
- Definition of Professional Services
- Consent to Settle Provision
- Exclusions
- Supplementary Coverages
  - Disciplinary Proceedings
  - Subpoena
  - Loss of Earning
  - Public Relations Expense*
  - Breach Notification Expense*

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Why Law Firms?

- Why are law firms at risk?
  - Rich collection of confidential information
  - Security vulnerabilities
    - Lack of technology sophistication
    - Failure to detect a breach
  - Smaller law firms are easier targets than larger law firms

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Insurance Coverage Gaps

	Property	General Liability	Crime/Bond	K&R	E&O	Cyber / Privacy
1st Party Privacy / Network Risks						
Physical Damage to Data						
Virus/Hacker Damage to Data						
Denial of Service attack						
B.I. Loss from Security Event						
Extortion or Threat						
Employee Sabotage						
3rd Party Privacy/Network Risks						
Theft/Disclosure of private Info						
Confidential Corporate Breach						
Technology E&O						
Media Liability (electronic content)						
Privacy Breach Expense						
Damage to 3rd Party's Data						
Regulatory Privacy Defense/Fines						
Virus/ Malicious Code Transmission						

Coverage Provided:
Limited Coverage:
No Coverage:

Traditional Insurance Gaps to name a few:

- Theft or disclosure of Third Party Information – GL
- Security & Privacy – "intentional act" exclusion – GL
- Data is not tangible Property – GL, Prop. and Crime
- Bi/PD Triggers – GL
- Value of Data if corrupted, destroyed or disclosed – Prop & GL
- Contingent Risks from external hosting, etc .
- Commercial Crime policies require "intent" and only cover "money securities and other Tangible Property"
- Territorial Restrictions
- Sublimits or long waiting periods applicable to any virus coverage available – Prop.

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What Does Cyber Insurance Cover?

Cyber Liability

First Party	First Party	Third Party	Third Party
Breach Notice Costs	**Other Business Costs**	**Civil Lawsuits**	**Regulatory Actions**
▪ Forensic Investigation	▪ Business interruption	▪ Consumer class action	▪ State AG investigations
▪ Crisis management/PR	▪ Data repair /replacement	▪ Corporate or financial institution suits	▪ FTC investigations
▪ Notification costs	▪ Cyber-extortion	▪ Credit card brands	▪ Health & Human Services – OCR (enforcement arm)
▪ Credit monitoring	▪ Social Engineering	▪ PCI fines, penalties, and assessments	▪ Foreign Privacy Entities

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What is appropriate coverage?

- The dollar value of transactions or cases you work on
- The cost of defending a claim
- The value of assets you want to protect
- Potential billable hours lost

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What can cause premiums to be high?

- Step Rating
- Area of Practice
- Dabbling
- Geographic Location
- Attorney to Staff Ratios
- Retainer Agreements
  - Engagement Letters
  - Disengagement Letters
  - No engagement Letters
- Docket Systems
- Fee Suits

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What features should I look for when selecting a Liability Carrier?

- Experience
- AM Best Rating
- Claims Handling
- Panel Counsel
- Distribution
- Risk Management Services
  - Website
  - Claims Hotline
  - CLE
  - Newsletter & Email Alerts

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Identifying and Responding to Professional Liability Claims

IDENTIFYING AND RESPONDING TO PROFESSIONAL LIABILITY CLAIMS

New York State Bar Association

Legal Malpractice 2019

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IDENTIFYING AND RESPONDING TO PROFESSIONAL LIABILITY CLAIMS

Any discussion of professional liability claims should start with a discussion of the lawyers' professional liability insurance policies which most private lawyers and law firms have. This article will discuss the provisions of the typical lawyers' professional liability policy, and the identification and reporting of claims so that the insurance coverage is there when it is needed most: when the attorney or firm becomes a defendant in a lawsuit.

1. The Lawyers' Professional Liability Insurance Policy – In General

Although New York does not mandate it, all lawyers and law firms should maintain professional liability insurance coverage. The terms of lawyers' professional liability ("LPL") policies differ depending on the company which issues the policy, but LPL policies typically provide coverage for "wrongful acts" or "acts, errors or omissions" which "arise out of the rendering of professional legal services."

"Professional legal services" is usually defined in LPL policies and typically includes services rendered by the attorney, for others, as a lawyer, arbitrator, mediator, title agent or as a notary public. Professional legal services may also include services performed as a court-appointed fiduciary, an administrator, receiver, executor, guardian or any similar fiduciary capacity. However, some policies may limit the coverage for administrators, executors or similar fiduciaries to situations where the act or omission in question is in the rendering of services ordinarily performed as a lawyer.

LPL policies are "Claims Made" or "Claims Made and Reported" policies, which means that coverage is triggered by the reporting of a claim, not the act or omission which gave rise to the claim. However, there are important exclusions to coverage - including the Known Claims and Circumstances Exclusion - which could eliminate coverage for a claim based on an act or omission which occurred prior to the inception of the policy. Also, LPL policies typically contain "Prior Acts Exclusions," which eliminate coverage for conduct occurring before a specific date, which is usually the first date that the particular insurer provided coverage to the attorney or firm.

2. What Constitutes a Claim?

Since the coverage is triggered by the claim, it is essential to know when a claim is first made. Courts have held that the word "claim," as used in liability insurance policies, is "unambiguous and generally means a demand by a third party against the insured for money damages or other relief owed." *See Schlather, Stumbar, Parks & Salk, LLP v. One Beacon Insurance Company*, 2011 WL 6756971 (N.D.N.Y. 2011).

The policy defines what a claim is. Some typical policy definitions are set forth below:

- "Claim means a demand received by you for money or services, including the service of suit or institution of arbitration proceedings against you, or a disciplinary proceeding."

- **"Claim** means a demand received by the **Insured** for money arising out of an act or omission, including **personal injury,** in the rendering of or failure to render **legal services.** A demand shall include the service of suit or the institution of an arbitration proceeding against the **Insured."**

It is important to note that a claim is not necessarily a formal lawsuit. In fact, the summons and complaint often is not the first notice an attorney receives of a claim. The action can come months or even years after a claim is first made. The first notice may be an oral complaint of alleged wrongdoing, or it can be a letter or email sent by a disgruntled client or former client.

The case of *Schlather, Stumbar, Parks & Salk, LLP v. One Beacon Insurance Company*, 2011 WL 6756971 (N.D.N.Y. 2011) addressed the issue of when a claim is deemed to have been made under an attorney's LPL policy. It provides a good illustration of how LPL policies work, and also serves as a cautionary tale for attorneys regarding the importance of identifying and reporting claims.

In *Schlather*, the law firm brought a declaratory judgment action against its insurance company, seeking a declaration that the company was required to defend and indemnify the firm in a malpractice action brought by a former client of the firm. The former client learned in May of 2007 that a wrongful death action that the firm had commenced on behalf of her deceased husband had been dismissed a year earlier. She immediately set up a meeting with the firm's managing partner and gave him a three page letter, alleging deficiencies in performance, including the failure to respond to inquiries and phone calls, and other professional misconduct. She also asked a number of questions about the firm's handling of the wrongful death action.

The firm responded by saying that the action was voluntarily dismissed because the handling attorney had concluded that it did not have merit. There was apparently some meeting between the former client and the handling attorney before the dismissal where the lack of merit to the action and the attorney's desire to discontinue it were discussed, but the client said she never agreed to the dismissal.

2007 drew to a close and the firm did not hear from the former client again. The firm's professional liability carrier at the time was Zurich, and the firm did not put Zurich on notice of a claim from the former client. In September of 2008, the firm's

LPL policy with Zurich expired, and through their broker they filed an application for insurance with One Beacon. The matter involving the former client and her wrongful death action was not mentioned in the application. One Beacon issued a policy to the firm, effective October 1, 2008.

Two months later, in December of 2008, the former client resurfaced. She retained an attorney who sent the firm a letter, alleging that the firm mishandled the wrongful death action. One month later, she filed a malpractice action against the firm.

The firm gave notice to One Beacon after it received the letter in December of 2008. One Beacon argued that the claim was made in 2007, when the former client went in with the three pages of notes and started complaining about the way her case was handled. The firm argued that it did not receive notice of the claim until December of 2008 when they received the letter from the former client's new attorney.

The court agreed with the firm, and denied One Beacon's motion for summary judgment on that issue, ruling that the 2007 letter from the former client did not constitute a "claim" under the policy. The court said that a "request for information is insufficient to constitute a claim." The former client alleged wrongdoing and demanded answers in 2007, but she did not demand money.

The court noted that an accusation of wrongdoing "is not by itself a claim…; nor is a naked threat of a future lawsuit . . . or a request for information or an explanation. A claim requires, in short, a specific demand for relief."

The *Schlather* firm no doubt breathed a sigh of relief after reading the first few pages of the judge's decision, but the relief was short lived. The judge went on to address the "Known Claims Exclusion" of the policy. That portion of the decision is discussed below.

The safest course for all attorneys is to err on the side of treating serious client complaints about errors or alleged errors as claims and reporting them to their professional liability carrier. The judge in the *Schlather* case was generous in concluding that the three page complaint letter from the firm's former client was not a claim. In *McCabe v. St. Paul Fire & Marine Ins. Co*., 79 A.D. 3d 1612, 914, N.Y.S. 2d 814 (4th Dept. 2010), *lv. to appeal granted*, 16 N.Y.3d 711, 923 N.Y.S.2d 415 (Table) (May 3, 2011), the court concluded that a letter from a client which demanded that the attorney "rectify their problem," and which clearly alleged that the attorney was negligent fell within the definition of a claim under the attorney's policy, which defined a claim as "alleging an error, omission or negligent act in the rendering of or failure to render professional legal services for others by you."

3. Giving Notice to Your Insurance Company of Claims and Potential Claims

Claims:

An attorney must give written notice of a claim to his/her insurance company. Under most policies, the written notice must be given "as soon as practicable." The giving of the written notice is, under many policies, a condition precedent to coverage. The "as soon as practicable" requirement has been interpreted by courts to mean within a reasonable time under all of the facts and circumstances. *See Heydt v. American Home Assurance*, 146 A.D.2d 497, 536 N.Y.S.2d 770 (1st Dept. 1989). Some courts have held that delays of only a few months in reporting claims or potential claims are unreasonable as a matter of law.

The landscape for late notice disclaimers changed significantly in January of 2009, when New York, by statute, eliminated the "no prejudice" rule. Under the no prejudice rule, an insurance carrier could disclaim coverage for late notice regardless of whether it suffered any prejudice or harm as a result of the late notice. In 2008, Insurance Law §3420(a) was amended to provide that, for insurance policies issued after January 17, 2009, an insurer is prohibited from denying coverage based on late notice unless the insurer can establish that it suffered prejudice as a result of the delay in reporting the claim.

There is some question as to whether the new legislation exempts claims-made policies. Insurance Law §3420(a)(5), as amended, states that "with respect to claims-made policies, however, the policy may provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period." Some have argued that this language indicates that claims-made policies are exempt from the amendment. The only appellate court to have addressed the issue thus far concluded that claims-made policies are not excepted from the provisions of the new law, *see McCabe v. St. Paul Fire & Marine Ins. Co*., 79 A.D. 3d 1612, 914 N.Y.S. 2d 814 (4th Dept. 2010), *lv. to appeal granted*, 16 N.Y.3d 711, 923 N.Y.S.2d 415 (Table) (May 3, 2011), but the commentary following Pattern Jury Instruction 4:77 states unequivocally that "[t]he new law does not apply to claims-made policies."

It seems likely that other courts will reject the holding of the Fourth Department in *McCabe* and conclude that, under claims-made policies, if notice is not given within the policy period or any extended reporting period, the claim will not be covered, regardless of whether the carrier can demonstrate prejudice.

Potential Claims & the "Discovery Clause":

A potential claim is one where the attorney knows that he or she made an error, but the client or former client (a) has not complained, (b) has not made any demand for money or services and (c) has not given any indication of an intent to bring a claim against the attorney.

A typical Discovery Clause might provide that if the insured attorney first becomes aware during the policy period of an act or omission which may reasonably be expected to lead to a claim (even though no claim has been made), and if the attorney provides written notice of the act or omission along with "full particulars" regarding the act or omission, then, if the claim is subsequently made, the company will deem the claim to have been made when it received the written notification of the act or omission. This provision allows the attorney to protect him or herself from claims which might be made after the policy expires.

4. How is Notice Given?

The policy provides that you must give written notice to the insurer, and you will typically be given an address and fax number where the written notice can be sent. Usually, however, attorneys and firms send the written notice to their insurance broker rather than the insurer. On occasion, insurance brokers have failed to forward the notice to the insurance company, or failed to forward it timely. The best practice is to send the written notice to both the broker and the insurance company. If it is sent solely to the broker, the attorney or firm should follow up to ensure that the notice has been received by the company.

It should be noted that, even where the notice of a claim has already been provided - such as, for example, where the claim is first made by a pre-suit demand letter from the former client's new attorney, rather than the filing of an action - the attorney must immediately notify the company if he or she is served with a summons or complaint.

5. What is Excluded From the LPL Policy?

Every LPL policy has a list of claims which are expressly excluded from coverage. The following is a non-exhaustive list of exclusions typically found in an LPL policy:

a. Claims arising out of dishonest, fraudulent, criminal or malicious acts or omissions of the insured;
b. Claims for bodily injury;
c. Claims made by one insured under the policy against another insured under the policy (but this can be qualified by the language of the

policy to exclude claims by one insured against another insured "unless an attorney/client relationship exists");

d. Generally, claims arising from any act performed by the attorney in his or her capacity as a public official or an employee or representative of a public body or governmental agency;
e. Claims made for legal services rendered to any organization or corporation in which the insured and/or the insured's spouse has a controlling or equity interest (10% ownership interest or more);
f. In some policies, claims based on or arising out of financial or investment advice;
g. Claims arising from "Known Claims or Circumstances."

The last of these exclusions - the "Known Claims or Circumstances" exclusion - is perhaps the most important. A typical provision excludes claims for which you gave notice to a prior insurer, but it goes beyond that and includes claims which should have been reported to a prior insurer or disclosed in the application process. A typical "known claims or circumstances" clause will exclude coverage for "any claim arising out of a wrongful act occurring prior to the policy period if ... you had a reasonable basis to believe that you had breached a professional duty, committed a wrongful act, violated a Disciplinary Rule, engaged in professional misconduct, or to foresee that a claim would be made against you."

The "Known Claims or Circumstances" exclusion was the second issue litigated in the *Schlather* case discussed above, and it was based on this exclusion that the firm was found not to have coverage under its policy.

The firm's LPL policy provided that:

> This policy does not apply to ... any claim arising out of a wrongful act occurring prior to the policy period if, prior to the effective date of [the Policy]: ... you had a reasonable basis to believe that you had committed a wrongful act or engaged in professional misconduct; [or] ... you could foresee that a claim would be made against you[.]

The insurer, relying on this exclusion, argued that it did not have an obligation to defend and indemnify the firm in the former client's action because a reasonable basis existed, prior to the inception of the insurer's policy, to believe that a wrongful act was committed, professional misconduct had occurred, and a claim might be made against the firm.

The court noted that, under New York law, there is a two-pronged test to determine the applicability of a known claims exclusion.

> First, the court "must ... consider the subjective knowledge of the insured [.]" Second, the court must then consider "the objective understanding of a reasonable attorney with that knowledge." The "first prong requires the

> insurer to show the insured's knowledge of the relevant facts prior to the policy's effective date, and the second requires the insurer to show that a reasonable attorney might expect such facts to be the basis of a claim."

See 2011 WL 6756971, at *7 [citing *Liberty Ins. Underwriters, Inc. v. Corpina Piergrossi Overzat & Klar, LLP*, 78 A.D.3d, 604, 913 N.Y.S.2d 31, 33 (1st Dept. 2011)].

The court in *Schlather* found that both prongs were satisfied and that the exclusion applied. The court cited five provisions of the Code of Professional Conduct which were implicated by the former client's 2007 letter. Most importantly, the firm voluntarily dismissed the former client's action without her consent. The firm acknowledged that the former client voiced her displeasure with the firm's handling of the action in 2007, and therefore, the court found, subjectively the firm was aware in 2007 that professional misconduct may have occurred and that a claim might be coming. Similarly, employing the objective standard, the court concluded that a reasonable attorney with the knowledge possessed by the firm might expect a claim to arise because the conduct alleged fell below the minimum level of professional conduct expected of attorneys.

Thus, the court found that in 2007 (a) the firm knew, and (b) any reasonable attorney would have known, that a basis for a claim existed, even though one had not been made. The potential claim was not disclosed in the application process, and the court granted the insurer summary judgment based on the known claims exclusion.

6. <u>What Damages Are Covered by the LPL Policy?</u>

The damages which are covered under an LPL policy are judgments, awards or settlements. The following are typically <u>not</u> included in the definition of damages under LPL policies:

a. fines and statutory penalties;
b. sanctions;
c. punitive damages;
d. the return or restitution of legal fees;
e. the multiplied portion of multiplied damages awards.

A question recently litigated is whether an insurance company is required to indemnify an attorney for any part of an award of treble damages under Judiciary Law §487, a statute which is seen often in attorney liability cases.

Section 487 of the Judiciary Law, entitled "Misconduct by Attorneys," provides:

> "An attorney or counselor who,

a. is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party;

b. wilfully delays a client's suit with a view to his own gain; or, wilfully 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 therefore by the Penal Law, he forfeits to the party injured *treble* damages, to be recovered in a civil action."

See Judiciary Law § 487 (emphasis added).

In *McCabe v. St. Paul Fire & Marine Ins. Co*., 79 A.D. 3d at 1612, 914, N.Y.S. 2d at 814, the Fourth Department addressed the issue of whether an attorney's professional liability insurance carrier was required to indemnify the attorney for damages assessed against him for violating Judiciary Law §487. The court noted that "New York public policy precludes insurance indemnification for punitive damages awards, . . . including awards of statutory treble damages." *See* 224 A.D.2d at 1614, 914 N.Y.S.2d at 817 (citations and internal quotation marks omitted). Citing the Second Department's decision in *Jorgensen v. Silverman*, 224 A.D.2d 665, 638 N.Y.S.2d 482 (2nd Dept. 1996), the Fourth Department held that damages awarded under section 487 are punitive, not compensatory, and that the carrier was not obligated to indemnify the attorney. *See id.*, 914 N.Y.S. 2d at 817 (quoting *Jorgensen*, 224 A.D.2d at 666, 638 N.Y.S.2d at 483). Although the Court of Appeals granted leave to appeal, the case settled before the Court of Appeals heard arguments.

The Fourth Department did not address the issue of whether the insurance carrier could be required to indemnify the attorney for the compensatory damages aspect of the award, *i.e.*, the amount of damages before trebling, but a recent decision from the Appellate Division, Second Department, suggests that the entire award is punitive and that even the compensatory portion of the award is not insurable. In *Specialized Industrial v. Carter*, 99 A.D.3d 692, 952 N.Y.S.2d 97 (2d Dept. 2012), the defendant-attorney was accused of violating Judiciary Law Section 487 by obtaining a default judgment against the plaintiff Specialized Industrial based on false invoices. The defendant-attorney brought a contribution claim against the plaintiff's former attorneys, claiming that their malpractice contributed to the plaintiff's damages. The third-party defendants moved to dismiss the contribution claim on the grounds that an award of treble damages under Judiciary Law 487 is punitive and a party cannot obtain contribution for punitive damages. The defendant responded that he could seek contribution for the compensatory aspect of the damages award, i.e., the damages before trebling. The lower court granted the third-party defendants' motions and dismissed the defendant's contribution claim.

In affirming the dismissal, the Second Department held:

> Treble damages awarded under Judiciary Law § 487 " 'are not designed to compensate a plaintiff for injury to property or pecuniary interests' " (*McCabe v. St. Paul Fire & Mar. Ins. Co.*, 79 A.D.3d 1612, 1614, 914 N.Y.S.2d 814, quoting *Jorgensen v. Silverman*, 224 A.D.2d 665, 666, 638 N.Y.S.2d 482). They are designed to punish attorneys who violate the statute and to deter them from betraying their "special obligation to protect the integrity of the courts and foster their truth-seeking function" (*Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 14, 874 N.Y.S.2d 868, 903 N.E.2d 265). Allowing an attorney who violates Judiciary Law § 487 to seek contribution for any part of the award would run counter to this intent (*but see Trepel v. Dippold*, 2006 WL 3054336, 2006 U.S. Dist. LEXIS 78050 [S.D.N.Y.2006]).

Id. at 693, 952 N.Y.S.2d at 98.

Given the conclusions of the Fourth Department in *McCabe* and Second Department in *Specialized Industrial*, it would seem that an insurance carrier would not be required to indemnify an attorney for any portion of an award of damages under Judiciary Law 487. This may all be an academic discussion, though, as the same conduct which gave rise to the Judiciary Law liability would likely give the insurer grounds to disclaim coverage under the dishonest, fraudulent and criminal acts exclusion.

7. Conclusion

The professional liability insurance policies that attorneys and firms pay for will have limited value if claims and potential claims are not properly identified and reported. In order to protect themselves and give themselves peace of mind, attorneys should keep the claim reporting and "Known Claims Exclusions" in mind during both the application process and the life of the policy.

FURMAN KORNFELD & BRENNAN LLP

Identifying and Responding to Professional Liability Claims

ANDREW R. JONES, ESQ.

1

Introduction

Andrew R. Jones, Esq. - FKB LLP (New York City)

Overview:

- Claim Notification and Reporting Issues;
- What is Covered Under a Typical Policy;
- Typical Exclusions from Coverage;
- Other Significant Policy Provisions.

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Claim Notification and Reporting Issues

- What Constitutes a "Claim"?;
- Notices of Circumstances that May Lead to a Claim;
- Late Notice/Prejudice;
- Misrepresentation.

3

What Constitutes A Claim?

- Claims Made Coverage.
- Claims Made and Reported.
- Policy Language Controls

"…a demand received by the Insured for money or services, including the service of a lawsuit."

- Written v. Oral Demand.

4

Notice of Circumstances that May Lead to a Claim

- Obligation again governed by policy.
- Acts, errors or omissions that could be reasonably expected to lead to a claim (objective standard).
- Locks in coverage—claims later made based on those circumstances go back to date of notice.

5

Late Notice/Prejudice

- Differs from claim made/reported issue.
- Notice "as soon as reasonably practicable" or as required by policy.
- Notice to Insurer NOT Broker.
- Prejudice may be required—amendment to NY Insurance Law.

6

Misrepresentation/Rescission

- Information in Application.
- Questions regarding claims/potential Claims.
- Materiality of misrepresentation.
- Innocent misrepresentations sufficient for rescission.

7

What Is Covered Under a Typical Policy

- Wrongful Acts.
- Professional Services.
- Damages covered by policy
- Exclusions and "Reservation of Rights" Letters

"The duty to defend is broader than the duty to indemnify."

8

Typical Exclusions From Coverage

- Intentional Acts/Fraud
  Will often not apply to one who did not personally commit, participate in committing, or remain passive after learning about acts or omissions described in the exclusion (the "Innocent Insured provision").
- Known Claims or Circumstances.
- Retroactive Date.
- Insured v. Insured.
- Reimbursement of Professional Fees.
- Grievance Proceedings .

9

Other Significant Provisions

- Consent to Settle
  the *insured* must generally be given the ultimate choice regarding settlement in order for the carrier to satisfy its duty of good faith to the insured.
- "Hammer" Clauses
  "… If the Insured refuses to consent to any settlement recommended by Carrier, Carrier may then withdraw from the defense of the Insured by tendering control of the defense to the Insured, and the Insured shall thereafter be obligated to pay all Costs, Charges and Expenses and defend such Claim independently of Carrier.
- Assistance and cooperation

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Conclusion

1. **Be familiar with your Policy**. The policy and any endorsements should be carefully reviewed.
2. **Provide timely information with respect to Claims and Potential Claims to your insurer**. Call and ask your carrier or broker if you have any questions.
3. **If a defense is provided under reservation of rights, review the ROR letter**. Seek guidance if you have any questions or concerns.
4. **Maintain good communication with your defense counsel and insurer**, particularly with respect to any settlement discussions.
5. **Try to view your insurer as your business partner.**

11

Attorney Discipline and Risk Management for Lawyers

RISK MANAGEMENT - TIPS ON HOW TO AVOID BEING A DEFENDANT IN A LEGAL MALPRACTICE LAWSUIT

By: Jonathan B. Bruno, Esq.
Rivkin Radler LLP

I. Why Risk Management is Essential

When it comes to handling clients, lawyers rarely practice law defensively. We would rather tell a client what we will do for them as opposed to what we will not. Most lawyers would prefer to keep their contact with clients friendly and continuous, and avoid written communications that suggest that their wonderful attorney-client relationship (at least with respect to a particular matter) is over. Ignoring the well-worn professional liability adage "no good deed goes unpunished," many lawyers will go outside their comfort zone, and take on work in unfamiliar practice areas and/or ignore conflict situations for their clients. But it is the *clients* who pose the greatest risk to lawyers and their law firms.

Unfortunately, precious little time and energy is spent on risk management — most lawyers would rather focus on tasks that will further their practice and profitability rather than focus on identifying and reducing potential legal malpractice exposures. In today's litigious environment, the economic and reputational threats presented by legal malpractice claims make basic law firm risk management essential.

When cases are lost, contracts are breached, deals go poorly, or negotiations break down, clients will often seek to hold their attorneys responsible. Often when a client suffers a financial loss, the search for "blame" will focus on the professionals assisting the client in the transaction at issue. Whether the financial loss involves a commercial sale, a real estate deal, a securities transaction or any other type of endeavor, big or small, where a client suffers an economic loss and there is a lawyer involved, invariably the lawyer will become the focus of the blame. The fact of the matter is that the practice of law has increased in complexity, and the risks faced by clients are often shared by the unsuspecting law firm.

For the most part, legal malpractice claims can be devastating – they can cause considerable financial exposure that could threaten the financial viability of the law firm, regardless of the extent of professional liability insurance coverage available with respect to the claim. Beyond the apparent/actual financial loss involved, legal malpractice claims drain valuable attorney and staff time and other resources from the law firm. Moreover, the repercussions of a legal malpractice claim within the law firm's client base are incalculable.

Legal malpractice claims can also have a negative impact on the relationships within the law firm. Often times, the partner(s) and/or associate(s) responsible for the legal malpractice claim are treated like pariahs within the law firm. It is not unusual for the lawyer(s) responsible for a significant legal malpractice claim to eventually leave the law firm or be "cast out" within a year after the claim has arisen. The more significant the legal malpractice claim, the more tension is created within the law firm. Once a significant legal malpractice claim has been made, the relationships within the law firm are never quite the same.

The threat of legal malpractice claims has increased in recent years for a variety of reasons. First, the trust and loyalty that has been the hallmark of so many attorney-client relationships has eroded to the point where lawyers are seen as "fungible," and clients will often seek a "second opinion" and possibly change counsel if they are unsatisfied with the services rendered, no matter how unrealistic their expectations may be. Clients now see themselves as consumers, and are more prone to take action if they do not get what they want. Second, the stigma associated with taking on a plaintiff's legal malpractice case – i.e., "suing another lawyer" – is a thing of the past. Lawyers now have no problem taking on a plaintiff's legal malpractice case and suing another member of the bar, and several small law firms holding themselves out as "specialists" in legal malpractice litigation have emerged.

To add insult to injury, lawyers are often inviting targets of legal malpractice claims. In lean times, law firms will eagerly take on new work without taking the time to assess the client, their motives, past history, and financial viability. Often, lawyers are so eager to originate/develop new business, they will ignore obvious conflicts of interest in order to "get the assignment" for the firm. In competitive times, law firms do little to protect themselves by placing limits on the scope of the representation of the prospective client. Instead of turning away business that is beyond its capabilities, the law firm will accept assignments in areas for which they are unfamiliar and/or understaffed, all in an effort to keep their client from looking elsewhere for legal services. This is true now more so than ever, given that law firms have increased the array of services they provide to clients and have become even more financially dependent on the client's financial status.

When law firms expand practice areas and/or add regional offices in different geographical locations, their risks increase as well. New practice areas add risk to the law firm, especially in situations where supervision of the new work is thin, and the expertise is lacking. In addition, new locations strain law firm resources, and test the strength of the internal management structure essential to maintaining a low risk environment.

With increased risk exposures and legal malpractice claim activity, insurance premiums for professional liability insurance have increased substantially. Moreover, once a claim has been made, the law firm's insurance premiums may be increased on renewal.

This article sets forth basic tips to avoid being a defendant in a legal malpractice lawsuit. These tips are organized in a manner that can be easily applied and considered in the context of everyday law firm practice.

II. Formation and Structure of the Law Firm

The first issue in analyzing a law firm from a risk management perspective is to review the form and structure of the firm. How a law firm is organized helps set the stage for how responsibilities are delegated within the firm, how lawyers are supervised, how legal tasks are undertaken, and how legal services are performed for clients.

From a law firm risk management perspective, the law firm should have a structure for important elements such as:

1. Training and supervision of attorneys and staff (including mentoring programs that young lawyers have direction/someone to talk to about client difficulties that could lead to claims);

2. Reporting structure so that every attorney and staff member in the law firm is accountable to a supervising attorney/Partner (who in turn is accountable to the Management Committee and/or Executive Committee);

3. A set of procedures for file opening (including systematic conflict checks and Partner review of new clients);

4. A structured accounts system that is responsible for billing and accounts receivable;

5. Regularly scheduled Partner meetings and associates' meetings (to ensure effective communications); and

6. Formal procedures to retire files (including closing letters to clients).

Law firms with a clear management structure are in a better position to avoid claims, through effective and systematic supervision and training. The added benefit is that a clear management structure allows for more effective communication within a law firm - so that when an associate and/or Partner has a problem with a client, they are in a position to discuss it openly, rather than hide the potentially dangerous situation (which only allows the problem to fester, and potentially ripen into a legal malpractice claim).

III. Financial Planning Considerations

An often over-looked consideration is the law firm's financial planning and internal financial/accounting controls. Competent financial management in a law firm simply means that the firm's management has accurately/realistically anticipated its financial requirements and budgeted accordingly. Quality law firm financial management serves an important and immeasurable risk management function. For example, if a law firm has planned appropriately, it will not face the financial pressure of accepting cases for which it is not suited, and/or for which a

conflict of interest arises. In addition, proper financial planning leads to less employee dissatisfaction/turnover, which in turn lowers law firm risk. Moreover, a law firm that is well-managed financially may be able to withstand the difficulties which result from a substantial legal malpractice claim, and would be in a position to devote the resources to adequately respond to and defend the claim.

Adequate control over a law firm's accounts receivable is also the hallmark of proper law firm risk management. Simply put, a law firm that is not being paid for its work is a law firm in trouble. If the law firm is forced to sue its clients for unpaid legal fees, the inevitable result is that the clients will respond with legal malpractice counterclaims to the fee suit, which may not be time-barred by the statute of limitations for legal malpractice claims. But fee suits are only the tip of the iceberg: many times there is a reason that the client does not wish to pay legal fees. Putting aside the occasional "deadbeat" client, a large accounts receivable problem can be a sign of widespread client dissatisfaction, which in turn is a red flag of potentially significant law firm risk exposure.

IV. File Opening

Several law firm risk management considerations arise when a file is first opened and a new matter is introduced to the law firm. These factors include the following:

1. Know Your Client

Generally, and in the absence of exceptional circumstances, only clients can sue an attorney for legal malpractice. Hence, the critical risk management questions then become:

a. **Who** is the client?;

b. **What** does he[she] do?; and

c. **Why** does he [she] want us, and why do we want this client?

These questions should be answered because "knowing your client" is an essential law firm risk management tool. Is the client a referral from a reliable source? Has the firm been introduced to the client previously? What do you know about the client's history? Have you checked references? Is it foreseeable that this relationship could lead to a claim being made against the law firm? The answer to these questions is complex and, of course, requires an analysis of many factors. One critical area to examine is the personal aspect of the attorney-client relationship.

If the attorney-client relationship is open and honest, the lawyer will not be hesitant in making clear to the client the boundaries of the law firm's handling of a particular matter. In such a relationship, the lawyer will make clear to the client what aspects of the particular transaction the lawyer is responsible for, and, importantly, what aspects of the transaction the lawyer is not responsible for. For example, if a corporate client wishes that the lawyer represent it in the closing of a loan transaction, a lawyer with an open and honest relationship with the client will make clear that the responsibility to conduct a due diligence review of the borrower's financials or of the loan collateral is the client's responsibility, unless otherwise directed by the client.

When the attorney-client relationship is built on effective communications, the lawyer will not hesitate to advise the client of problems when they surface. If problems are notified to the client in a timely manner, then the client is in a position to act. But when the law firm delays the

delivery of bad news – especially in situations where the firm is afraid to deliver "bad news" – then what was initially the *client's* problem suddenly also becomes the *law firm's* problem.

However, when the relationship between attorney and client is strained, communications with the client suffer. In such instances, the lawyer may not express the boundaries of the law firm's handling of a particular matter, perhaps out of fear of losing the client, or to keep the client from a competitor or some other reason borne of self-interest, or perhaps merely out of inattention and laziness. In such a situation, the client's expectations of the legal services may become misguided. In those instances, the client will blame the lawyer if something goes wrong with a particular transaction, for failing with regard to responsibilities that the law firm never believed that it had assumed.

Using the same example as above, in which the corporate client wishes that the lawyer represent it in the closing of a loan transaction, and the lawyer fails to make clear that it is the client's responsibility to conduct any due diligence review of the financial viability of the borrower and/or of the loan collateral, the stage is set for problems to arise. In the case of a loan default and/or if the value of the collateral is less than anticipated, then the lawyer may become a target of a legal malpractice claim. In essence, the law firm becomes a form of "financial guarantor" of the client's transaction. This, of course, is never the intended result, and is the reason why open and clear communications with a client are so important to effective law firm risk management.

2. <u>The New Client – Self-Audit</u>

When a new client is introduced to the law firm, there is a short list of basic "self-audit" risk management questions that a lawyer should ask:

(1) What are the client's expectations?

(2) Are the prospective client's expectations reasonable?

(3) Has the scope of the law firm's representation been made clear?

(4) Is it likely that this client will blame the law firm if things go wrong? If so, should the client be accepted? If the client is accepted, what resources/personnel should be involved to handle this relationship?

(5) How will the law firm manage this client's expectations?

(6) Does the law firm need to protect itself from risk exposure by first investigating the prospective client, the prospective client's background and history, and their objectives before it agrees to the representation?

(7) What does the law firm need to do throughout the life of the file to maintain clear and open communications with the client so that the scope of the law firm's responsibilities are made clear?

The answers to these questions will help determine whether a new client poses an unreasonable risk to the law firm.

3. Conflicts of Interest

The proper identification and resolution of conflicts of interest is one of the most significant law firm risk management concerns facing lawyers today. If a conflict exists, it must be identified, and where possible, resolved through the use of appropriate conflict waiver agreements. These issues must be addressed before proceeding with the matter for the client.

The increased need for scrutiny in connection with conflicts of interest is due to the recent trends of law firm mergers, the mobility of both lawyers *and* clients from firm to firm, and the

restructuring of corporate clients and their use of outside legal counsel. These changes make it imperative to not only assess conflicts of interest the moment a new client or matter is introduced to the firm, but also when a lateral attorney joins a law firm, or a client merges/acquires a new entity.

If a known conflict of interest is not immediately addressed, the law firm basically is a "sitting duck" for a legal malpractice claim if a problem subsequently develops. This is because at any point where a client loses a case or suffers a financial loss in connection with a matter involving a transaction in which the "conflicted" law firm is providing legal services, the client will blame the law firm once the conflict is revealed.

Legal malpractice claims arising from conflict of interest situations are difficult to defend. While ultimately the client would still need to prove that the conflict of interest was the proximate "but for" cause of the loss, the appearance of impropriety from an undisclosed conflict of interest is highly inflammatory to jurors.

4. Conflicts Checklist

To avoid conflict problems, law firms should employ the following procedures:

(a) Conflict Checks Done Before File Opening:

The best practice is to stop a file from being opened until a conflicts check has been performed. If this procedure is employed, it will prevent a file number from being assigned, and will prevent a lawyer from doing any work and billing the client until the conflict search is complete and documented.

(b) Institute Formal Conflict Procedures:

The law firm should prepare clear, formal, written conflict checking and resolution procedures which set forth the law firm's position with respect to conflicts of interest.

(c) Computerized Conflict Check:

Conflicts software is readily available, and law firms of all sizes should utilize such software to search all active and closed files upon the opening of a new file to ensure up to date conflicts awareness.

(d) Evaluation of the Conflict:

The law firm should have a conflicts committee set up to address any potential conflicts situation. If there is no formal conflicts committee, one should be formed on an *ad hoc* basis. The originating attorney should not be involved in the evaluation and determination of the potential conflict. Financial interests and other factors make it clear that the originating attorney cannot be expected to be objective in this evaluation process.

(e) Quality Control:

A conflict check is only as good as the information submitted to the conflicts computer system. The most technologically advanced conflicts software in the world is useless if the information submitted is not accurate. Therefore, quality control is essential.

(f) A Must: Avoid Known Conflicts:

Although this is obvious, a law firm should avoid at all costs the acceptance of representation of multiple or successive clients with actual or potentially conflicting interests. Even though conflict waivers are often executed, conflict situations pose great risk, and the law firm cannot guarantee that circumstances will not arise where the conflict will be simply unwaivable.

In such situations, the client loses, having invested fees in one law firm (only to have to retain new counsel), and the law firm itself may be exposed to a disqualification on the matter. Worse, in the case that the client is disappointed in the result of the underlying transaction, the conflict could form the basis of a legal malpractice suit (alleging that the client would not have proceeded with the underlying transaction "but for" the undisclosed conflict).

5. The Client's Financial Viability

The financial status of a new client is also an important factor when assessing a new matter from a law firm risk management perspective. Lawyers often see with "rose-colored glasses" and do not objectively assess the financial viability of a new client. This is a big mistake – if the client suffers a financial loss, not only is the law firm's bottom line (i.e., its accounts receivable) impaired, the law firm's legal malpractice risk has also increased.

The recovery of fees invariably leads to friction with the client. Fee disputes and lawsuits to recover unpaid legal bills are a source of substantial legal malpractice activity. Non-paying clients invariably assert negligence/malpractice counterclaims in response to any proceedings brought by the law firm to collect unpaid fee bills and, as explained below, such claims may not be time-barred even if asserted after expiration of the relevant statute of limitations. Although often wholly unfounded, these allegations of legal malpractice remain affirmative defenses or equitable offsets that financially unsound clients will assert in order to resist payment of the outstanding legal fees. Thus, if a client is financially unsound, no matter how attractive the business may be, the potential downside in terms of the threat of legal malpractice counterclaims and lawsuits is too great to ignore.

V. Engagement Letters

After a new client/new matter is introduced to the law firm, and the conflicts check is completed, the next step in an effective attorney risk management regimen is to draft an appropriate letter of engagement. The purpose of this written communication with the client is to confirm the

scope of representation, chart out what the lawyer's responsibilities are, and how the lawyer will seek payment for such services from the client. From an attorney risk management perspective, this letter is critically important.

1. The Engagement Letter: A Risk Management Perspective

Engagement letters help manage the client's expectations, and avoid subsequent misunderstandings that could leave the lawyer and his/her law firm exposed in the event that the client suffers a loss in the transaction. Many lawyers, especially those with a long-standing relationship with a particular client, will balk at sending such letters, under the theory that the client would be offended by such a correspondence. Such excuses are not credible in today's business environment. First, almost all clients will transact the purchase of goods and services *via* written agreement. Thus, the fact that a letter has been sent confirming the services to be performed and the manner in which the law firm will seek reimbursement for such services is hardly a threat – in fact, it is something that a client should actually expect to see. Moreover, the letter need not be drafted in cold-blooded "legalese," but can be drafted in such a way that incorporates the lawyer's familiarity with the client and the client's business, while making clear exactly what the lawyer will be doing in connection with a particular representation, so that there is no misunderstanding of the scope of the services to be performed.

2. Part 1215 Written Letter of Engagement

Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York, entitled "Written Letter of Engagement," requires attorneys, in most instances,

to provide many clients with a "letter of engagement." The purpose of Part 1215, as explained by the New York State Office of Court Administration, is "to ensure that there is a memorialized meeting of the minds with regard to the basic terms of the engagement."

There are three essential elements that have to be included in the letter to ensure compliance with Part 1215:

(1) the scope of legal services to be performed;
(2) the basis for the fees and expenses to be charged to the client; and
(3) the client must be advised of the right to arbitration of any fee dispute that may arise under Part 137 of the Rules of the Chief Administrator.

Not all new matters require a letter of engagement. First, the Part 1215 letter of engagement requirements do not apply to matters where the legal fees to be generated are expected to be less than $3,000. Second, the rules under Part 1215 do not apply if the legal services to be performed are of the same general kind and on the same terms as services previously rendered to the client. Third, Part 1215 does not apply to domestic relations matters. Fourth, a separate letter of engagement pursuant to Part 1215 is not required if the lawyer and the client previously entered into a written retainer agreement that already includes the items required to be included in the letter of engagement. Finally, the letter of engagement requirements under Part 1215 do not apply where the attorney is admitted to practice in another jurisdiction and maintains no office in New York, or where no material portion of the legal services are to be performed in the State of New York.

3. Part 1210 Statement of Client's Rights

In addition to the letter of engagement, New York attorneys are required to post (in a manner visible to clients, such as in the reception area) a "statement of client's rights" in the form

set forth in Part 1210 to Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York, which states in pertinent part:

PART 1210. Statement of Client's Rights

§ 1210.1 Posting

Every attorney with an office in the State of New York shall insure that there is posted in that office, in a manner visible to clients of the attorney, a statement of client's rights in the form set forth below. Attorneys in offices that provide legal services without fee may delete from the statement those provisions dealing with fees. The statement shall contain the following:

STATEMENT OF CLIENT'S RIGHTS

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.

2. You are entitled to an attorney capable of handing your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).

3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.

4. You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and in the event of a fee dispute, or upon your request.

5. You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.

6. You are entitled to be kept informed as to the status of your matter.

7. You are entitled to have your legitimate objections respected by your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters).

8. You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.

9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the Code of Professional Responsibility.

10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability.

4. Sample Letter of Engagement

The following is a sample engagement letter that meets the requirements under Part 1215:

Dear [Name of Client]:

We write to memorialize the terms of our Firm's engagement to represent you in connection with [subject matter of the representation]. As we agreed, our Firm will undertake to perform the following services on your behalf [ ].

In conformance with Part 1215 of the Joint Rules of the Appellate Division of New York and in conjunction with the enclosed Statement of Client's Rights, please note that all of our services in this matter will end, unless otherwise agreed upon in a writing signed by us, when there is a final agreement, settlement, decision, or judgment by the court.

Please note that appeals from any judgments or orders of the court are not included within the scope of our representation, and that such appeals are subject to separate discussion and negotiation between our Firm and you. Please further note that the scope of this agreement does not include services you may request of us in connection with any other matter, action, or proceeding.

As we have previously agreed, we intend to submit a fee bill to you no less frequently than every 60 days. We will charge expenses separately on the fee bill.

This will confirm that you have agreed to pay a retainer of $ _____, and that our fees will be based on time charges of $____ per hour, charged upon minimum increments of six (6) minutes per hour. The retainer is a minimum fee and is to be applied to our time charges. The time initially spent on your matter will be charged against the minimum fee. However, if your matter is concluded, whether by settlement or by judicial action, in less time than would be required to spend the minimum fee on the basis of time alone, we shall retain the retainer amount and there would be no refund of any part of the minimum fee. An additional retainer may be required as time charges warrant.

In the event that a dispute arises as to our fees, you may have the right to arbitration of the dispute pursuant to Part 137 of the Rules of the Chief Administrator of the Courts, a copy of which is available upon request.

[Signed]

VI. Calendar/Docketing/Billing Controls

1. Calendar Control

Effective controls over deadlines and other date-sensitive matters are vital to prevent legal malpractice claims. The important first step is to have an appropriate calendar/docket control system in place. The type of calendar/docket control system that should be utilized varies, depending on the size of the firm, the areas of law practiced, and the complexity of the computer systems maintained in the office.

The key to effective calendar control is a "checks and balances" system. The most basic, rudimentary system used is a dual-calendar/docket control system that basically contains a personal calendar maintained by an attorney and an office calendar maintained by another party, generally a non-attorney staff member. To make this work, the calendars should be cross-checked on a daily (or at worst, weekly) basis to assure that dates are docketed correctly. The dual calendar

is the minimum acceptable calendar/docket control system a law firm should employ in order to assure effective risk management.

Law firms with more substantial calendar/docketing issues should utilize computerized calendar control systems, which can manage a perpetual calendaring system, which is readily capable of handling voluminous time-sensitive dates such as statutes of limitations, court appearances, motion dates, appeal deadlines, depositions, discovery limitations, etc. As with any system, the key to the effective use of a computerized calendar control system is quality assurance. The system is only as good as the information provided.

The law firm's established calendar/docket control system should be centralized and used uniformly. Allowing individual lawyers to utilize separate calendar controls is not advisable. Firm-wide controls avoid individual error, as the cross-checks built into the calendar/docket control system will alert the firm administrators/attorneys of the date in question.

Additionally, if an attorney is not available for a scheduled court appearance/deadline, another attorney can be notified by a designated docket clerk or other party of the immediate need to act or appear on the matter. This can help prevent a court appearance from being missed, a blown statute of limitations, and other problems.

2. Limitations of Calendar/Docket Control Computer Software

The best calendar/docketing computer software will not protect a law firm against an inattentive, irresponsible attorney who fails to verify that deadlines have not changed, or that unique circumstances have arisen in a matter, requiring alterations to schedules and/or additional

attention to time-sensitive issues. If the computer system does not have the information and programming necessary to apply the deadlines correctly, then the law firm will be exposed to legal malpractice claims. This is principally a law firm supervision issue, and can only be handled effectively by the application of hands-on law firm management techniques such as peer review, mentoring, and other person-to-person approaches.

In addition, effective calendar/docket control is not just about deadlines; it requires scheduling work efficiently. Good law firm calendar/docketing software should allow entry and use of "soft" deadlines – dates to begin working on specific tasks and dates for completing portions of certain tasks. In this manner, workflow and deadlines are managed effectively.

3. Case Management Software

Case management software has become so sophisticated and user-friendly that the future of "paperless files" is not at all far away. Indeed, for many attorneys, the "paperless file" already exists. The benefits of case management software is that it can be utilized in conjunction with the calendar/docket control system and increase the amount of cross-checking and attention a particular file is given in a law firm. This will invariably reduce the risk that errors will occur by way of missed deadlines, statute of limitations, court appearances, etc.

Case management software could include the following information:

(1) **Docket information** -- dates, times and places of all significant deadlines, court appearances and meetings, including reminders of upcoming dates.

(2) **Case file information** -- names, contact information, and background information on clients, parties, witnesses, attorneys and experts, filing and

service dates, forums, judges assigned, etc. This would assist other attorneys in the law firm to step in if the attorney assigned to the file is unavailable.

(3) **Substantive case information** -- the factual background of the case, the causes of action and substantive legal issues involved, information disclosed by investigations, summaries of evidence and litigation strategy, interview notes, deposition summaries, hearings, negotiations, court rulings on motions, and records of client communications.

4. Billing Controls

Poor billing controls and runaway accounts receivable are the indication of potentially serious legal malpractice risks. Aside from the obvious problems such billing and accounting deficiencies generate (loss of income stream, disruption of vendor relations, inability to pay employees/failure to meet overhead expenses, etc.), there are profound law firm risk management issues that arise.

When a law firm's accounts receivable are increasing in size, it is a tell-tale sign of a burgeoning risk management problem. More often than not, when a client does not pay a bill, they are not paying for a reason. Sometimes, the reason for non-payment is that the client has become genuinely dissatisfied with the legal services provided. In such instances, a legal malpractice claim is inevitable, most likely to be made in the form of a counterclaim if and when the firm sues to recover the unpaid fees. Sometimes, the reason that a client does not pay its fee bill is because, whether legitimate or not, the client claims to be financially unable to do so. In such instances, the law firm's exposure to a legal malpractice situation remains high, as experience has shown that

financially-strapped clients are not above filing otherwise meritless legal malpractice claims to stave off pursuit of the unpaid fees.

When an account receivable is growing, the law firm should take immediate steps to ascertain why the client is not paying, and make early decisions about whether to terminate the relationship with the client, while weighing the risks of pursuing fees against the likelihood that a legal malpractice claim will be filed in response. The best risk management technique is to keep a close watch on the accounts receivable so that they do not grow to such an extent that legal malpractice claims are inevitable. The risk of a legal malpractice claim only increases over time when there is a large account receivable, as the client will be less inclined to pay and more motivated to file a legal malpractice claim.

In addition to the accounts receivable problem, there are also risk management concerns when the law firm fails to get the fee bills out to the client on a timely basis. If the fee bill is sent to the client on a timely basis, the likelihood that the fee bill will be paid increases, as the services provided are fresh on the mind of the client, and the interaction with the law firm was a recent event. If too much time passes, then the immediacy of the services provided (as well as payment of the fee bill) become less apparent, and the client may be more inclined to put the bill aside, or worse, come up with reasons (legitimate or otherwise) to not pay for the services provided. At that point, the risk of a legal malpractice claim as a method to avoid payment of legal fees increases significantly.

Finally, oversight over the manner in which individual attorneys bill the clients is also an important risk management issue. Overcharging clients for legal services is not only a matter of

dire long-term consequences for the law firm, it is also a source of significant legal malpractice risk, as clients who resist the payment of fees will inevitably assert claims against the law firm if they are pressed for payment of fees that the client believes (justifiably) are overreaching. Law firms should always have senior members review fee bills prior to the time that they are sent to the client, to ensure that the fees charged accurately reflect the services provided.

5. Fee Suits

Fee disputes are a primary source of legal malpractice claims. Often, the claim of legal malpractice (made in the form of a counterclaim), is completely unjustified under the circumstances. However, since legal malpractice is an affirmative defense to the filing of fee suit, claims of negligence, breach of contract, or breach of fiduciary duty are virtually unavoidable. Thus, it is advisable for a law firm to give serious consideration to the filing of any lawsuit for unpaid fees, and to investigate the matter thoroughly before filing suit.

An important issue here is that waiting for the statute of limitations on a potential legal malpractice claim to expire before commencing a fee action may not be a bar to a client being able to recover on the legal malpractice counterclaim within the same fee action. Pursuant to CPLR 203(d), as long as the counterclaim arises out of the same transaction upon which the fee claim depends (usually, the representation), the client will not be time-barred from asserting it, even if the counterclaim is brought after expiration of the three-year or six-year statute of limitations for legal malpractice or breach of fiduciary duty for equitable relief.

An independent review of the file should always be conducted before a fee suit is commenced. The file review should include a frank assessment of the services provided, and a

determination as to whether the file indicates exposure to a legitimate legal malpractice counterclaim. It is advisable that the lawyer primarily responsible for the file *not* be the one to make the ultimate decision as to whether the fee action should be commenced, as he or she cannot be objective in this process.

VII. Closing the File

Written confirmation of the termination of the attorney-client relationship in connection with a matter to a client once the services in connection with that particular matter have been completed is not only good for the client relationship, it is an essential risk management tool.

If the end of the attorney's representation of a client on a particular matter is not made clear, then the attorney remains a potential target if problems subsequently arise in connection with that particular transaction. Moreover, the statute of limitations for legal malpractice claims – three (3) years in New York under CPLR 214(6) – may be extended under the "continuous representation" doctrine, which tolls the statute of limitations for legal malpractice claims until the law firm's representation concerning the particular matter giving rise to the malpractice claim is terminated. Thus, good risk management practice is to effectively communicate the termination of the law firm's representation of a client in connection with a matter so that the law firm's exposure to potential legal malpractice claims is not unnecessarily extended.

VIII. Conclusion

There is no single formula to prevent legal malpractice claims. Conscientious risk management requires diligence and attention from the entire law firm. With the institution of

internal checks and balances, significant legal malpractice exposures can be reduced, and a law firm and its lawyers can help avoid unnecessary legal malpractice suits.

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(In Alphabetical Order)

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Rachel Aghassi is a partner focusing in professional liability and legal malpractice defense. Ms. Aghassi has successfully defended lawyers and other professionals in high-exposure malpractice lawsuits in all phases of litigation, including trial and appeals, in state and federal courts arising from a wide range of complex legal areas including commercial litigation, foreclosure actions, real estate matters, medical malpractice, accounting malpractice, administrative review, tax preparation, zoning, matrimonial matters, personal injury, construction litigation, probate law, bankruptcy actions, forfeiture actions, Employee Retirement Income Security Act (ERISA) litigation, cybercrime, and criminal actions. Ms. Aghassi has successfully obtained defense verdict at trial avoiding millions in liability.

Prior to joining Furman Kornfeld & Brennan LLP in 2014, Ms. Aghassi was an associate at an employment litigation firm concentrating in multi-million dollar class and collective action matters. Ms. Aghassi began her legal career as an Assistant District Attorney in the Kings County District Attorney's Office where she investigated and prosecuted criminal cases from one of the busiest police precincts in the country. Prior to her legal education, Ms. Aghassi worked as an environmental scientist in Philadelphia.

Ms. Aghassi earned her J.D. from Fordham University School of Law in 2009 and her B.A. from the University of Pennsylvania. Ms. Aghassi is admitted to practice law in the New York State, the United States District Courts in the Southern, Eastern, and Northern Districts of New York and the United States Court of Appeals for the Second Circuit.

Ms. Aghassi was selected for the 2015, 2016, 2017, and 2018 Super Lawyers New York Metro Rising Stars list and was also featured in Super Lawyers Top Women Attorneys of New York. The Rising Stars list recognizes no more than 2.5 percent of attorneys in each state.

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Harvey B. Besunder has been practicing law since 1967 and has been a partner in MargolinBesunder since 2010. He concentrates his practice in condemnation and tax certiorari, real property, estate and municipal litigation, and professional responsibility matters. He has an “AV” attorney rating from Martindale-Hubbell.

Mr. Besunder began his career in the public sector in Suffolk County as a law clerk to District Court judges and as an assistant county attorney in the Family Court and Condemnation bureaus. He has been in private practice since 1980 and has been a partner in firms in Smithtown, Riverhead and Hauppauge.

Mr. Besunder is a past president of the Suffolk County Bar Association, and has chaired the Condemnation, Grievance, Judiciary, and Bench-Bar committees of that organization. He currently co-chairs SCBA’s Commercial Division committee. His New York State Bar Association activities have included membership in the House of Delegates, the Executive Committee of the Real Property Section, and the By-laws and Nominating Committees. He is a past chair of the Committee on Lawyer Discipline and remains a member.

“When it comes to dealing with other lawyers or the courts, we have to find a way to meld effectiveness with our obligation to behave civilly, which can be a challenge in contentious litigation. I pride myself on finding that balance.”

Mr. Besunder has also served as a court-appointed member of the Grievance Committee for the Tenth Judicial District; the Judicial Salaries Commission; the Independent Judicial Qualifications Commission, and is a current member of the Committee on Character and Fitness. In 2014 he was appointed to the Commercial Division Advisory Counsel on which he continues to serve.

Mr. Besunder has lectured extensively on such topics as ethics and the disciplinary process, real property issues, condemnation, and property valuation matters, and commercial law. He has been honored by his peers with awards of recognition and for

pro bono service. The Suffolk County Bar Association has given him both the prestigious President's Award for Service to the Legal Profession and a Lifetime Achievement Award.

His devotion to the law has been passed on to his children, both of whom are lawyers: his daughter, Alison, practices in the areas of trusts and estates and trademark law in Manhattan, and his son, Eric, is in-house counsel to an insurance company in Chicago.

In his own words:

"A lawyer's ethical responsibilities are the touchstone of my practice. When it comes to dealing with clients, our ethical obligation means that we make sure that we provide competent representation, meaning we are well-versed in the applicable law and totally knowledgeable about the particulars of the client's case. It also means that our focus is always on trying to reach an expeditious solution for our clients with the least cost."

Education
Adelphi University (B.A. 1964)
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Jim Bradley, Vice President, Professional Liability of Crum & Forster Insurance, brings over thirty years of experience in insurance product development, marketing and management. He began his insurance career in 1984 with Wausau Insurance Company focusing on all lines of Property & Casualty insurance. Joining Marsh & McLennan, Inc. in 1987 he continued his focus in the area of Property & Casualty insurance while also developing and implementing specialty niche insurance products and programs. Mr. Bradley continued to refine his focus in the area of specialty lines insurance programs when he moved to JLT Services Corp, in 1992. This allowed him to create, implement and expand many professional liability insurance products and programs designed for specific types of professionals.

These professionals include Lawyers, Investment Advisors, Risk Managers, Financial Planners, Executive Search Consultants, Management Consultants as well as many other miscellaneous professions. Mr. Bradley then joined Aon Affinity Insurance Services as part of their Lawyers Professional Liability Division. He was directly responsible for the development and implementation of a state specific Lawyers Professional Liability Insurance program. This program quickly became the largest lawyer's professional liability insurance program within Aon Affinity, representing over a third of their business nationwide.

Prior to joining Crum & Foster, Mr. Bradley was instrumental in the creation of Valiant Insurance Company. He then joined Crum & Forster as part of their acquisition of Valiant in 2011.

In addition to the above, Mr. Bradley is also a member of the Professional Liability Underwriting Society and is active in supporting the Professional Insurance Agents Association and the New York State Bar Association.

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Mat Broderick is Claims Counsel for Travelers in Morristown, New Jersey. In that role, Mat handles primarily Lawyers Professional Liability claims. Mat has previously handled claims involving employment practices, directors and officers as well as general liability claims.

Prior to joining Travelers, Mat practiced law both in New Jersey and New York, focusing primarily on the defense of attorney malpractice claims. Mat is a 2006 graduate of Seton Hall University School of Law, and a 2003 graduate of the State University of New York at Plattsburgh.

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Jonathan B. Bruno is a partner at Rivkin Radler LLP in New York City. As a member of the firm's Professional Liability Group he focuses his practice on the defense of professionals including lawyers, accountants and insurance agents and brokers. He has been a recurring speaker for the New York State Bar Association's Legal Malpractice Program as well as the New York City Bar Association's Bridge-the-Gap Program on the topic of Legal Malpractice & Risk Management. New York SuperLawyers magazine named Jonathan as one of the top attorneys in professional liability defense in the greater Metropolitan New York area for the years 2013 to 2018. He is also rated "AV Preeminent" by Martindale-Hubbell. He received his B.S. from Fordham University in 1992 and his J.D. from New England Law | Boston in 1995.

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Elizabeth presently works in the Professional Programs Claims Department at Zurich North America. She handles claims against lawyers, real estate agents/brokers, employment staffing companies, and various public entities. Prior to her employment with Zurich, Elizabeth worked for a large insurance defense firm and handled similar professional liability claims. Elizabeth is admitted to practice law in New Jersey.

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Greg Cooke is the Vice President, Sales and Client Management at USI Affinity for their Lawyer's Professional Liability Division. He works directly with law firms on their Professional Liability Insurance, Employment Practices Liability (EPLI) and Cyber Insurance. He is a regular speaker and panelist on Insurance and Risk Management topics relative to the legal industry.

Greg has 10+ years of experience in the insurance industry, specifically handling Professional Liability Insurance. Prior to joining USI Affinity, Greg spent over 5 years with Aon in a variety of different roles within Professional Liability Insurance. He handled both Lawyers and Insurance Agents, in both the admitted and non-admitted segments. Greg has now been with USI for over 5 years, with all of them dedicated to the Lawyer's Professional Liability Team.

Greg has both his P&C Insurance License and his Life & Health Insurance License in Pennsylvania, and has his non-resident licenses in all states. He graduated from Pennsylvania State University with a Bachelors Degree in Business Management.

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Jennifer Faas is a Claims Consulting Director for Program Lawyers Professional Liability at CNA and the Co-Chair of CNA's Women Impacting Leadership (WIL) Employee Resource Group. Jennifer joined CNA in 2002 and since then has directly handled and also led teams who handle Lawyers Professional Liability, Miscellaneous Professional Liability, Directors & Officers, Fiduciary and Fidelity claims. Prior to joining CNA, Jennifer was an attorney at a law firm where she represented parties involved in insurance coverage litigation, and also worked as a claims professional at another carrier. Jennifer graduated summa cum laude from Wagner College with a B.A. in English and received her J.D. from Pace University School of Law with a Certificate in Environmental Law. She is admitted to practice law in both New York and New Jersey.

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Matthew Flanagan is a 1989 graduate of Fordham University and received a Juris Doctorate degree from St. John's University School of Law in 1992. He is a skilled litigator with extensive trial and appellate experience in the area of legal malpractice defense, professional liability and general litigation. He has successfully argued numerous appeals in the Appellate Divisions for the First, Second and Third Departments, and New York's highest court: the Court of Appeals.

Mr. Flanagan has been named annually to the New York Super Lawyers list as one of the top attorneys in the New York Metropolitan area since 2012, and has been awarded a rating of AV PreeminentTM by Martindale-Hubbell. The Rating is the Highest Possible Rating in both Legal Ability and Ethical Standards, and was awarded following a Peer Review Rating Process, which included surveys of judges and other attorneys. He has also been named annually as one of the top professional liability and legal malpractice defense attorneys on Long Island by LexisNexis Martindale-Hubbell, and has been given an AVVO rating of "Superb" (10.0 out of 10.0).

Mr. Flanagan is admitted to practice before the Courts of the State of New York, the United States District Courts for the Southern and Eastern Districts of New York, and the United States Court of Appeals for the Second Circuit. He is a member of the American Bar Association, New York State Bar Association, the Nassau County Bar Association and the Theodore Roosevelt American Inn of Court.

Mr. Flanagan is a frequent lecturer regarding legal malpractice prevention and defense, and ethics and professional liability.

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Michael Furman, born in Brooklyn, NY, is a partner focusing on the defense of lawyers and other professionals in complex professional liability litigation in Federal and State courts. Mr. Furman has extensive trial and appellate experience, having tried numerous jury trials in both Federal and State Courts throughout his career, and argued numerous appeals involving professional liability and insurance coverage matters.

Prior to entering private practice, Mr. Furman served as an assistant district attorney in the Trial Division of the New York County District Attorney's Office under Hon. Robert M. Morgenthau from 1989 to 1994.

Mr. Furman holds the AV® Peer Review Rating from Martindale-Hubbell, its highest rating for ethics and legal ability, has been annually designated a Metro New York "Super Lawyer."

Mr. Furman has been appointed to the American Bar Association's Standing Committee on Lawyer's Professional Liability, and is a member of the Executive Committee and is the current Chair of the Trial Lawyers Section of the New York State Bar Association, and has previously served as Secretary (2012-13) and Treasurer (2011-12).

Mr. Furman is also a member of the Professional Liability Committee of the Torts, Insurance & Compensation Law Section of the New York State Bar Association, and the author of "Professional Liability Insurance," *Insurance Law Practice*, §37 (2d Ed 2006, NYSBA). Mr. Furman previously served as Chair of the Lawyers Professional Liability and Ethics Committee (Trial Lawyers Section) of the New York State Bar Association from 2009 to 2013, and is a member of the Association of Professional Responsibility Lawyers (APRL).

Mr. Furman is the Overall Planning Chairman of the Bi-Annual New York State Bar Association-sponsored bi-annual CLE statewide Legal Malpractice Seminar (2003, 2005, 2007, 2009, 2011 and 2013) and editor-in-chief of the NYSBA CLE Legal Malpractice course-book.

Mr. Furman also drafts insurance policies and represents insurers in coverage disputes involving financial institutions, professional liability, marine and non-marine risks. From 1997 to 1999, he worked in London for a major Lloyd's syndicate, served on various London market committees, and was co-chair of the Int'l/London Sub-committee of the Insurance Coverage Committee of the ABA Section of Litigation.

Mr. Furman has been involved in high exposure matters throughout his career, and represents the Lloyd's insurance market in the World Trade Center/September 11, 2001 liability insurance coverage litigation in the Southern District of New York.

Mr. Furman has lectured extensively in the United States and Europe on various insurance-related topics, including professional liability issues and insurance coverage, and has written several insurance-related articles.

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Crystal is the Assistant Vice President, Claims & Liability, at Corporate Solutions, Swiss RE America Corporation since 2005, handling insurance agent's and attorney's liability claims. Crystal was previously employed as a Senior Claims Attorney at Executive Liability Division, Great American Insurance from 1998-2005, handling varied professional liability claims, including director's and officer's liability claims, financial entity's liability claims, non profit executive 's liability claims, and employment practices liability claims. Additionally, Crystal held various management positions in human resources and risk management at W.H. Smith and Federated Department Stores. Crystal is a graduate of Smith College in Northampton, Massachusetts, receiving a Bachelor of Arts degree with a double major in Government and Economics and of DePaul University School of Law, receiving a Juris of Doctorate in law. Presently, she resides in Chicago with her family and remains active in numerous community projects and youth focused volunteer activities.

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Andrew R. Jones, born in London, England, is a partner of Furman Kornfeld & Brennan LLP focusing on legal malpractice, professional liability, and insurance coverage and litigation matters. His practice includes the representation of insurers in complex insurance coverage matters and in the representation of law firms in professional liability claims. Mr. Jones's practice includes direct defense of lawyers and other professionals, as well as monitoring local counsel and protecting insurers' interests in professional liability matters, including coverage analysis and coverage litigation.

Mr. Jones has drafted various insurance policy forms for international insurers, and has advised on coverage matters both in the U.S. and abroad. Mr. Jones also represents the Lloyd's insurance market in connection with the World Trade Center/September 11, 2001 litigation pending in the Southern District of New York.

Mr. Jones is a graduate of Kings College London, School of Law, where he received an LLB law degree with honors. During and after his law degree, Mr. Jones worked for a prominent Lloyd's insurance broker, and insurance defense law firms in both Toronto and New York City.

Mr. Jones has written and contributed to numerous articles on insurance coverage and insurance defense matters, and has been a speaker at professional liability conferences in both London and New York. Mr. Jones is admitted to practice in the State of New York and in the U.S. District Court, Southern and Eastern Districts of New York.

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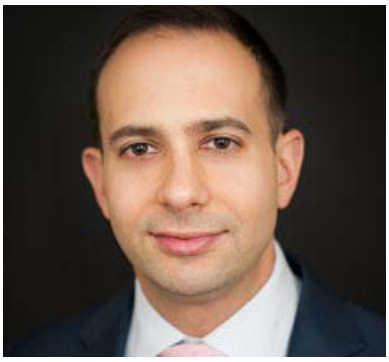

Andrew S. Kowlowitz is a partner focusing on attorney malpractice, professional liability and the defense of high exposure construction liability claims. Mr. Kowlowitz has successfully defended professionals, property owners and large construction companies in all phases of litigation in federal and state court, including trial. His practice also involves representing lawyers in grievance matters and partnership disputes. Mr. Kowlowitz has extensive appellate experience having argued numerous appeals involving attorney malpractice, professional liability and general liability.

Mr. Kowlowitz frequently lectures to attorneys and conducts risk management seminars. He has appeared as a lecturer in connection with numerous New York State Bar Association-sponsored CLE programs. Mr. Kowlowitz is frequently published in the New York Law Journal, the New York State Bar Association Journal, the New York State Bar Association, Trial Lawyers Section Digest and the Professional Liability Underwriting Society (PLUS) Journal.

Mr. Kowlowitz is the editor of the New York State Bar Association, Trial Lawyers Section Digest, and a member of the New York State Bar Association, Law Practice Management Committee.

Mr. Kowlowitz also drafts insurance policies and represents insurers in coverage disputes involving financial institutions, professional liability, marine and non-marine risks both in the London and U.S. insurance markets. Mr. Kowlowitz has represented the London insurance market in several high-profile, high exposure matters including the World Trade Center/September 11, 2001 liability insurance coverage litigation, IPO Laddering litigation, Adelphia class action lawsuit and the Lernout & Hauspie-related litigation.

Mr. Kowlowitz is a graduate, cum laude, of the State University of New York at New Paltz with a Bachelors of Science in accounting, and has received a Juris Doctorate from the Benjamin N. Cardozo School of Law with a concentration in taxation. He is admitted to practice in the State of New York, New Jersey and Florida, the U.S. District

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EDUCATION

Benjamin N. Cardozo School of Law, J.D. – 2002
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Karin Kruidenier is a senior claim executive at Travelers. She has been employed at Travelers handling professional liability claims for over 25 years, including over 15 years in legal malpractice. Ms. Kruidenier handles primary and surplus line LPL claims throughout the US with a focus on the Northeast region. She has worked with small, medium and large size firms but more recently works with smaller firms: 2-20 attorneys.

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George C. Landrove has worked for Zurich American Insurance since 2006. George investigates, analyzes, and resolves lawyers' and other professional liability claims to minimize loss and expense payout. He works closely with defense counsel to develop strategies, and balances the handling of numerous and varied claims involving different competencies.

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Tom Leghorn's practice is focused on the defense of professional liability claims against lawyers, insurance producers, securities broker-dealers and others. He is among the most experienced lawyers in New York in this area. Tom also handles intellectual property claims, including issues arising from cyber-liability exposures. As trial lawyer with experience in state and federal courts across the United States, Tom assists clients to put in place procedures to help avoid repeat claims and mitigate future exposures. With the dramatic increase in cyber exposures, Tom has put his experience with intellectual property claims to use guiding clients in the response to data-security breaches.

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New York University School of Law, LLM, 1987
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Florence N. Lishansky, Esq. is a Claims Consultant for Large Law Professional Liability Claims and serves as the Intellectual Property Program Law Liaison at CNA. Ms. Lishansky joined CNA in 2017 and since then has directly handled complex and high severity Lawyers Professional Liability claims.

Prior to joining CNA, Ms. Lishansky worked as a Senior Associate Attorney in a New York City firm focusing on insurance coverage analysis and litigation, monitoring counsel and program/claims administration, lawyers professional liability and miscellaneous professional liability litigation. Ms. Lishansky served as monitoring and coverage counsel to London and U.S. insurers on numerous professional liability and miscellaneous errors and omissions insurance programs. She has drafted insurance policies and risk management guidelines and has advised on coverage matters both in the U.S. and abroad.

Ms. Lishansky has represented the London and U.S. insurance markets in high-profile, high exposure matters including the World Trade Center/September 11, 2001 liability insurance coverage litigation and Rating Agency related matters. Ms. Lishansky represented insurers in coverage disputes involving financial institutions, professional liability, general liability, marine and non-marine risks. Ms. Lishansky has successfully defended lawyers and other professionals in all phases of litigation in federal and state court, including trial. Ms. Lishansky has written and contributed to articles on insurance coverage and insurance defense matters, and has been a speaker at professional liability conferences in the U.S.

Ms. Lishansky graduated *magna cum laude* from Rutgers, The State University of New Jersey - Rutgers College with a Bachelors of Arts in Political Science and received her Juris Doctorate from Benjamin N. Cardozo School of Law with a concentration in taxation. Ms. Lishansky is admitted to practice in the States of New York and New Jersey and the United States District Court for the District of New Jersey.

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Ms. Marlow-Jones joined the firm as an associate in August of 1999. She became a partner in January 2006. Her practice includes liability defense, insurance coverage, appellate law and commercial litigation. A primary area of her practice has been the representation of professionals, predominantly lawyers, in civil actions.

Marlow-Jones received her bachelors degree from the State University of New York at Geneseo in 1994 and her law degree, magna cum laude, from Syracuse University College of Law in 1997. She was selected to the Order of the Coif and the Justinian Honor Society.

Prior to joining the firm, Ms. Marlow-Jones served as an appellate court attorney at the Supreme Court, Fourth Department. During this two-year period, she assisted members of the intermediate appellate court on pending civil and criminal appeals. She also served as a confidential law clerk to the Honorable John P. Balio prior to his retirement.

Ms. Marlow-Jones is admitted to practice before all New York State Courts and the U.S. District Court for the Northern and Western Districts of New York. She is a member of the Onondaga County, New York State and American Bar Associations.

Ms. Marlow-Jones serves on the board of directors of the Central New York Chapter of the Juvenile Diabetes Research Foundation. Nicole has been selected as a delegate for the JDRF Council of Chapters & Affiliates. In her role as Advocacy Chair, she fosters relationships between local advocates and elected legislators to ensure Congress continues to support the funding of Type 1 Diabetes research. She is also serves on the Board of Directors and Judicial Screening Committee of the Central New York Women's Bar Association.

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Mr. McCaffery's practice concentrates in the areas of legal malpractice defense, professional liability, commercial litigation, and general liability defense. He is experienced in both trial and appellate practice.

Among other areas of professional liability and defense litigation, he represents attorneys and law firms that have been sued for legal malpractice in cases ranging from real estate and personal injury matters to complex business transactions and commercial litigation.

Prior to joining L'Abbate Balkan in 2001, Mr. McCaffery had a general practice in which he handled real estate transactions, business formations, commercial litigation, will drafting, and personal injury matters. Prior to his general practice, he was associated with two defense firms in New York City, where he defended Labor Law actions, dental malpractice actions, general liability claims and represented individuals, small businesses and large, self-insured corporations. This broad range of experience enables Mr. McCaffery to better represent his clients in the varied subject matter that arises in the context of legal malpractice actions and other defense litigation.

Mr. McCaffery has received an AV rating from Martindale-Hubbell, their highest rating for general ethical standards and legal ability. He has been named to the 2016, 2017, and 2018 New York Metro "Super Lawyers" list in the area of "Professional Liability Defense." He has received a 10.0 out of 10.0, "Superb" rating from AVVO.

He is a member of the Claims and Litigation Management Alliance (CLM) and a member of CLM's Professional Liability Committee. He is also a member of the American Bar Association, the New York State Bar Association, the Nassau County Bar Association, the University of Scranton Council of Alumni Lawyers, and the Chaminade Lawyers Association. He has authored articles for the New York Law Journal ("Trusts and Estates Lawyers Face Increasing Risks of Malpractice Claims," "Build a Stronger Firm Through Risk Management," "Basic Principles Make Exceptional Attorneys," and "Avoiding Attorney Fee Claim Litigation"), Nassau Lawyer ("Time Management for Lawyers"), and he co-authored the CLM Claims Handling Resources for New York.

Mr. McCaffery is a regular speaker on matters of legal malpractice, professional liability, risk management, and litigation before insurance carriers and groups such as the New York State Bar Association, the Nassau County Bar Association, the Suffolk County Women's Bar Association, St. John's University School of Law (CLE), Lawline.com, AttorneyCredits.com, Esquire-CLE.com, and ClearLawInstitute.com.

He received his Juris Doctorate from St. John's University School of Law in 1996 and his undergraduate degree from the University of Scranton in 1993. He is admitted to practice law in the State of New York and is admitted to the United States District Courts for both the Southern and Eastern Districts of New York.

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Mollie's litigation practice includes medical malpractice defense, personal injury, business litigation, representation of professionals, and criminal defense.

Mollie earned dual B.A.s, summa cum laude, in English and History from Canisius College, and her J.D. magna cum laude from the State University of New York at Buffalo Law School. As a law student, she served as an editor of the Buffalo Law Review, and was a member of the Jessup International Moot Court and Buffalo Moot Court Boards. Mollie also represented her school at the ABA National Appellate Advocacy Competition. Upon graduation, Mollie was awarded the David Kochery Award for service to the student community and exceptional performance in courses in procedures and remedies. She was also a member of the All-College Honors Program and was inducted into the Sigma Tau Delta and Phi Alpha Theta honor societies.

Mollie has run two marathons, including the 2015 Boston Marathon, and has competed in several local half-marathons. She currently serves on the board of trustees for Mount St. Mary Academy.

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Laura began her career as an insurance defense and coverage attorney with a national law firm based in Chicago. She joined an insurance company in 2008 and has handled professional liability claims, mostly lawyers', from coast to coast since then. She joined AmTrust North America, where she is a Claims Counsel, in 2017. Laura employs a hands-on claim management style and regularly attends mediations in multiple jurisdictions. Laura earned her law and bachelor of arts degrees from the University of Michigan.

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Mike Mooney is the Senior Vice President and Professional Liability Practice Leader for USI Affinity. Mike's responsibility is to drive growth and provide strategic leadership in the area of professional liability. Mike's key focus is the management and development of existing programs, new programs, business development and marketing planning. Mike oversees the underwriting, operations, and sales departments that support the professional liability programs.

.Mike is also responsible for coordinating the program management for USI Affinity's endorsed insurance programs, including The New York State Bar Association, The New Jersey State Bar Association, DC Bar, Boston Bar, and Exponent Philanthropy.

With more than 10 years of industry experience, Mike has worked extensively on many facets of insurance programs for professional service firms. Prior to joining USI Affinity, Mike spent over 8 years with Aon in a variety of management roles. Most notably, Mike was the Assistant Vice President and National Sales Manager for Aon Affinity's Healthcare Division, and also spent time as the National Sales Manager for the AICPA Accountant's Professional Liability Program.

Mike currently sits on the Law Practice Management Services Committee of the DC Bar. Mike is a regular speaker and panelist for the Law Practice Sections of the NYSBA, NJSBA, and NJICLE regarding Insurance and Risk Management topics relative to the legal industry.

Mike holds a Property and Casualty Insurance License in New Jersey and many non-resident Producer Licenses in a variety of other states. He graduated from Rowan University in New Jersey with a Bachelors Degree in Business Management.

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Mr. Perley is chair of the Litigation Department and a member of the firm's Board of Directors. He focuses his practice in municipal law, product liability, professional liability, complex litigation and catastrophic injury litigation. Mr. Perley has significant experience defending corporations, municipalities, employers, building owners, contractors and insurance carriers in a wide range of litigated matters including labor law, premises and product liability. Mr. Perley has extensive experience in litigation involving commercial vehicles, having represented numerous commercial carriers in his career. He leads the firm's 24-Hour Emergency Response Team, and is regularly engaged in complex catastrophic property damage, fire loss and bodily injury litigation. Mr. Perley also counsels clients on issues pertaining to lien resolution and Medicare Secondary Payer issues and has testified as an expert witness on the applicability of the Medicare Secondary Payer Act.

An accomplished trial attorney and client advocate, Mr. Perley served as a Town Attorney with 22 years of governmental experience in zoning and land development. In addition to extensive experience in the full range of court proceedings in state and federal court, Mr. Perley's practice also includes extensive counseling on matters including zoning, environmental review, land development, variances, legislative drafting, tax certiorari and eminent domain representing clients before town and village boards, planning boards, zoning boards of appeals and assessment boards of review.

Mr. Perley was the Town Attorney of Boston from 1986 – 2003. In 1991, he was a member of the Citizen's Reapportionment Advisory Committee for the Erie County Legislature, which redrew the legislative districts based on the 1990 census. Mr. Perley was formerly Trustee of Buffalo Seminary, and served as President of the Orchard Park Symphony Orchestra and of the Youth Orchestra Foundation of Buffalo.

Highly regarded by his peers and in the courts, in 2008, Mr. Perley was named one of the Top 10 lawyers in New York State (outside of New York City) by New York Super Lawyer's Magazine, which conducted a survey of all practicing attorneys in the state. He has also been named to the list of the Best Lawyers in America and the Business First

list of Legal Elite of WNY. Mr. Perley was presented with the Pro Bono Service Award by Hon. William Skretny of the U.S. District Court of the Western District of New York for his dedicated service to the federal court. Mr. Perley was also appointed to the Eighth Judicial District Committee on Character and Fitness for admission of applicants to the New York State Bar Association.

Mr. Perley is a former member of the Board of Directors of the Bar Association of Erie County, former President of the Western New York Trial Lawyers Association, and is the National Board Representative of the Buffalo Chapter of the American Board of Trial Advocates. He is a member of the Municipal and School Law Committee and the Committee on Eminent Domain and Tax Certiorari of the Erie County Bar Association, and of the Municipal Law and the Torts, Insurance and Compensation Law Sections of the New York State Bar Association.

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Stephanie Propos has a B.A. in American Studies from Brandeis University and a J.D. from New York Law School. Stephanie joined CNA in 2008 as a Claims Specialist in the Program Law group where she handled both Lawyers and Judges professional liability claims. She became a Claims Consultant in 2016 and continues to handle Lawyers claims for the dedicated NY and PA teams along with her other assigned States and Judges liability claims in CA and MI. Prior to joining CNA she was in private practice in New York. She has almost 20 years of litigation experience, which includes personal injury (Plaintiff and Defense) and general insurance defense. Stephanie is licensed to practice in New York.

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Roderick Quebral is a 1985 graduate of UB Law School. He was an Assistant District Attorney in Erie County from 1985-1992, including service in the Comprehensive Assault, Rape and Abuse Bureau, the Special Investigations/Prosecutions Bureau, and as an Assistant Bureau Chief in the Felony Trial Bureau. He joined the staff of the Attorney Grievance Committees of the Appellate Division, Fourth Department in 1992 as an Associate Counsel and is currently a Principal Counsel for the Eighth Judicial District Grievance Committee in Buffalo.

Mr. Quebral is a frequent lecturer on topics related to ethics and professional responsibility for continuing legal education programs sponsored by local bar associations in Western New York. He is a member of the National Organization of Bar Counsel, the New York State Association of Disciplinary Attorneys, and the St. Thomas More (Catholic Lawyers) Guild, for whom he served on the Board of Directors and as Treasurer from 1993 through 2008.

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For more than 35 years, Ms. Rice has concentrated her practice on the representation of attorneys and risk management for lawyers. Ms. Rice holds the AV® Peer Review Rating from Martindale-Hubbell, its highest rating for ethics and legal ability, has been designated a Super Lawyer annually since 2008 and was assigned a “superb” AVVO rating. In 2012, Long Island Business News named Ms. Rice as one of the 50 most influential women on Long Island.

Ms. Rice is a Past President of the 5,000 member Nassau County Bar Association, the largest suburban bar association in the country, and is presently Chair of NCBA’s Judiciary Committee. In 2014, Ms. Rice was awarded the NCBA President’s Award for service to the Association and in 2015, she was honored by the St. John’s Law School Alumni Nassau Chapter. In addition to having authored a column for the American Bar Association Law Practice Management Magazine, Ms. Rice is the co-Chair of the New York State Bar Association Law Practice Management Committee and an alternate member of the NYSBA Nominating Committee.

Ms. Rice also served as an ABA Presidential appointee to the ABA Standing Committee on Lawyer's Professional Liability from 2009 through 2012 and was Chair of the New York State Bar Association - Committee for Insurance Programs from 2008 to 2013. Ms. Rice is a member of the Professional Liability Underwriting Society; the Defense Association of New York and the Defense Research Institute.

In addition to being a New York State Bar Association Presidential appointee to the Task Force on Non-Lawyer Ownership and the Special Committee on Legal Specialization, Ms. Rice has served on the Torts, Insurance and Compensation Law Section. Her prior roles at the Nassau County Bar Association include President 2012-2013, President Elect 2011-2012, First Vice President 2010-2011, Second Vice President 2009-2010, Treasurer 2008-2009, Secretary 2007-2008, Director 2004-2007, Judiciary Committee (Chair 2006-2007) Vice-Chair (2005-2006), Strategic Planning Committee (Chair 2005-2006) (Vice-Chair 2003-2005), Nassau Lawyer/Publications Committee (Editor in Chief 2006-2007) (Co- Managing Editor 2005-2006). She is also a member of Nassau Suffolk Trial Lawyers and the Suffolk County Bar Association.

Ms. Rice has authored materials for numerous publications and newsletters including the New York Law Journal, BNA publications, the New York State Bar Journal and Nassau Lawyer, and has lectured for the Professional Liability Underwriting Society, the ABA Standing Committee on Lawyer's Professional Liability, PLI, the National Legal Malpractice and Risk Management Conference, the Nassau and Suffolk County Bar Associations, the New York State Bar Association, the New York City Bar and the American Conference Institute, as well as for various law firms, insurers, law schools and trade associations, at seminars covering such diverse topics as Risk Management and Loss Prevention for Attorneys, The Elements of and Defenses to a Legal Malpractice Action, Legal Malpractice Principles and Trial Strategy, The Anatomy of a Disciplinary Proceeding, What Damages are Recoverable and What are the Limitations?, What Makes Lawyers Happy?, Representing the Client with Greater Concerns, Ethical Issues with Email, Cyber-Security and Law Firms, Federal Statutes Affecting Attorneys, Preparing, Defending and Preventing Claims Stemming From Tax Shelter Advice, Social Media and Ethics, Whither Privity?, Defending Attorneys with Psychological Difficulties, Can the Jury Award That? Beyond Out of Pocket Damages in Professional Liability Cases, Avoiding Malpractice and Client Grievances, Protecting Your Practice, Top Ten Traps (resulting in malpractice claims and grievances), Disqualification of Legal Malpractice Experts, Identification and Resolution of Conflicts of Interest, Risk Management for Defense Attorneys, Ethics in the Wake of the New Rules of Professional Conduct; Law Practice Management under the New York Rules of Professional Conduct; Ethics in the Profession, Anatomy of a Legal Malpractice Action, Don't Make Malpractice Your Nightmare, Improving Communication Skills with Clients, Legal Malpractice Issues and Trends, Risks Presented by Law Firm Mergers, Risk Management Techniques for Real Estate Attorneys, Risk Management Techniques for Matrimonial Attorneys, Risk Management Techniques for Trust and Estate Attorneys, Starting Your Own Law Practice, Ethical Issues Confronting Claims Attorneys in Handling and Evaluating Claims and Attorney Liability under the Fair Debt Collection Practices Act.

From 1999 to 2003, Ms. Rice administered the Attorney Loss Prevention Hotline Service for the broker responsible for the NYSBA sponsored professional liability insurer.

Ms. Rice received her Juris Doctorate from St. John's University School of Law, Jamaica, New York in 1979 and a Bachelor of Arts degree from Fordham College at Fordham University in 1976. She was admitted to practice before the Courts of the State of New York in 1980 and is also admitted before the United States District Courts for the Southern and Eastern Districts of New York, and the United States Court of Appeals for the Second Circuit, as well as several other jurisdictions on a pro hac vice basis. From 1984 to 2000, Ms. Rice was a Governor-appointed member of the Council for the State University of New York Maritime College at Fort Schuyler.

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Michael S. Ross is the principal of the Law Offices of Michael S. Ross, where he concentrates his practice in attorney ethics. He is a former Assistant United States Attorney in the Criminal Division of the Southern District of New York and also served as an Assistant District Attorney in Kings County. Mr. Ross has been an Adjunct Professor at the Benjamin N. Cardozo School of Law for thirty-eight years, and has taught a variety of courses in Criminal and Civil Litigation; Appellate Advocacy; Judicial Administration; and Professional Responsibility. Mr. Ross currently teaches Litigation Ethics at Cardozo Law School during both the Fall and Spring semesters and simultaneously, for the last twelve years, he has taught Professional Responsibility at Brooklyn Law School during the Fall, Spring and Summer Semesters. He co-founded in 1983 Cardozo Law School's annual two-week Intensive Trial Advocacy Program and for more than three decades, has served in roles as the Executive Director, Team Leader or Instructor/Lecturer of the program.

Mr. Ross has lectured widely on ethics-related topics to organizations such as the American Bar Association ("A.B.A."), the Practicing Law Institute, the Appellate Divisions of the First, Second and Third Judicial Departments, the Association of the Bar of the City of New York, the New York State Judicial Institute, the National Institute of Trial Advocacy, the New York State Bar Association, the New York County Lawyers' Association, the New York State Trial Lawyers Association and the New York State Academy of Trial Lawyers.

Mr. Ross has served as a member of the New York State Bar Association's Committee on Professional Discipline; the New York State Bar Association's Task Force On Lawyer Advertising; the New York County Lawyers' Association's Committee on Professional Discipline; the New York State Bar Association's Special Committee on the Unlawful Practice of Law; the New York State Bar Association's Special Committee on Procedures for Judicial Discipline; and the New York State Bar Association's Committee on Mass Disasters. He previously served for a number of terms on the Association of the Bar of the City of New York's Committee on Professional Discipline.

Mr. Ross completed a five-year tenure as an appointed member of the New York State Continuing Legal Education Board, which, among other things, formulates CLE guidelines in the State. Mr. Ross has chaired the A.B.A.'s Grand Jury Committee and the City Bar Association's Committee on Criminal Advocacy. He previously served as the A.B.A. Criminal Justice Section's liaison to the A.B.A. Standing Committee on Ethics and Professional Responsibility and was an appointed member of the A.B.A.'s Special "Criminal Justice In Crisis Committee."

Among his writings, Mr. Ross has co-authored a chapter on "Client and Witness Perjury," for the A.B.A.'s Section of Litigation ethics training course book entitled Litigation Ethics: Course Materials For Continuing Legal Education.

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Brett A. Scher is a partner at Kaufman Dolowich & Voluck, LLP. His practice includes litigation in the fields of professional liability, insurance coverage disputes, commercial matters, and class action defense. Mr. Scher's practice addresses litigation on the trial and appellate levels throughout the United States in both state and federal courts. In the area of professional liability, his practice includes complex attorney malpractice claims arising from underlying commercial litigation, securities law, real estate, personal injury, corporate governance, entertainment law, and patent/trademark issues. He also represents several companies with respect to the defense of individual and class action claims under the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Telephone Consumer Protection Act and the Racketeer Influenced and Corrupt Organizations Act.

Mr. Scher also represents accountants, actuaries and insurance brokers/agents, and third party administrators on errors and omissions claims. He also focuses on claims involving real estate issues, including the defense of home appraisers, surveyors, home inspectors, real estate agents, lenders, building management companies, co-op and condo boards, and real estate brokers. His insurance coverage practice focuses on policy drafting and coverage services with respect to professional liability policies, technology policies, investment management policies and commercial general liability policies.

Mr. Scher has served as international coverage/monitoring counsel for two of the largest domestic insurers, supervising securities law class actions and professional negligence claims, for more than 10 years.

Education
Fordham University School of Law – J.D.
State University of New York, Albany – B.S.

Admissions
New York
U.S. District Court

-Eastern District of New York
-Southern District of New York
-Western District of New York
-Northern District of New York
U.S. Court of Appeals
-Second Circuit

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Lisa Shrewsberry is a partner in the firm's Connecticut and New York offices and practices in the firm's professional liability, employment practices liability and directors and officers liability areas. She has represented lawyers, accountants, actuaries, insurance agents, broker/dealers, registered representatives, architects and engineers in all phases of litigation and arbitration. In addition to serving as counsel of record in such professional liability matters, Ms. Shrewsberry has supervised defense counsel on a national basis in litigation and arbitration on behalf of directors and officers liability insurers, and life insurance carriers, life insurance agents, securities brokers/dealers and registered representatives, and their errors and omissions carriers. In insurance coverage matters, Ms. Shrewsberry's practice includes policy drafting and policy interpretation, through coverage and bad faith litigation.

Ms. Shrewsberry served as an Adjunct Professor of Law at New York Law School from 1994-1996, where she taught courses in legal research and analysis, legal writing, oral argument and drafting litigation documents.

Education
University of Connecticut School of Law, J.D., 1988
Central Connecticut State University, B.S., 1985, *cum laude*

Bar Admissions
Connecticut
New York State Bar Association

Court Admissions
U.S. District Court, District of Connecticut
U.S. Court of Appeals, Second Circuit
U.S. District Court, Eastern District of New York
U.S. District Court, Northern District of New York
U.S. District Court, Southern District of New York
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David S. Wilck represents professionals in the defense of claims involving malpractice, breach of fiduciary duty, defamation, fraud, conspiracy, ethical violations, and mismanagement.

A partner in Rivkin Radler's Professional Liability, Directors & Officers Liability, and Intellectual Property Practice Groups, David defends attorneys, accountants, directors and officers, insurance agents and brokers, real estate agents, debt collectors, and third party administrators.

With a Master of Laws degree (LL.M.) in intellectual property, David handles copyright, trademark, and unfair competition matters. He has represented retailers, restauranteurs, manufacturers, standarized test preparation companies, and software maintenance entities on claims arising under the Lanham Act (trademark infringement and unfair competition), trade dress, copyright infringement, antitrust, and theft of trade secrets.

Before joining Rivkin Radler, David worked as professional liability claims counsel for an international insurer, where he supervised defense and coverage litigation involving lawyers, accountants, architects, and engineers.

David is a frequent lecturer on risk management and professional liability issues. He has spoken at the New York State Bar Association's Risk Management Program on "Insurance Considerations" and he has participated in a panel discussion at the Seventh Annual E&O Insurance ExecuSummit – Professional Liability Series on "Fallout from Superstorm Sandy: Impact on the Insurance Marketplace and Insurance Agent Liability." David is a member of the American Bar Association's Legal Malpractice Committee and a member of the Professional Liability Underwriting Society ("PLUS"). He is also a member of the Professional Liability CLM Committee.

David was named one of the Top 40 Rising Stars in Business Under 40 by Long Island Business News for 2007.

In 2007, he was honored with The Humanitarian of the Year Award by Family Residences and Essential Enterprises, Inc. (“F.R.E.E.”), a Long Island charity for adults with disabilities.

Education

New York University School of Law, LLM.
Touro Law School, Juris Doctor, cum laude, Academic Excellence Award in Intellectual Property
Binghamton University, B.A.

Bar Admissions

New York
New Jersey

Court Admissions

United States District Courts of the Eastern, Southern and Western Districts of New York
United States Court of Appeals, Second Circuit
All State Courts of New York and New Jersey

Notes Pages


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