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LEGAL MALPRACTICE: A FRAMEWORK FOR ASSESSING POTENTIAL CLAIMS

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MLP -- Malpractice Claims, Insurance and Prevention

Legal malpractice suits are becoming more commonplace in the litigation landscape. This article will provide a framework for the practitioner to assess potential malpractice cases.

Who Can Sue?

The Florida Supreme Court set forth the general controlling law as to who may bring a legal malpractice action in *Angel, Cohen and Rogovin v. Oberon Investment, Inc.*, 512 So. 2d 192 (Fla. 1987). In *Angel*, the Supreme Court stated that Florida courts have uniformly limited attorneys' liability for negligence in the performance of their professional duties to clients with whom they share privity of contract. *Id.* at 194. However, privity is not required when an attorney makes a negligent misrepresentation to a nonclient, and it will not protect an attorney from direct fraudulent acts or statements.¹

The *Angel* court recognized that, in Florida, the privity requirement has been relaxed when it was the apparent intention of the client to benefit a third party. *Id.* The area of will drafting was cited as the most obvious example of this limited exception to the privity requirement.

The case of *Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner*, 586 So. 2d 1221 (Fla. 3d DCA 1991),² is an example of the so-called "will-drafting exception."³ The Third District Court of Appeal found that only where the testator's intent, as expressed in the will itself, not as shown by extrinsic evidence, is hindered by the attorney's negligence, does the frustrated beneficiary of the will have an action for legal malpractice against the testator's attorney. *Id.*

Espinosa cited the facts of *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. 4th DCA 1976), as an example for the privity exception, as follows:

"[W]here (1) the testator makes a will leaving all her property to her daughter and remarries thereafter, (2) hires a lawyer to make certain that her daughter remains the sole beneficiary under the will after her remarriage, and is negligently assured by the lawyer that no change was necessary to effect this intention, and (3) upon her death, her husband takes a statutory share of her estate as a pretermitted husband-it has been held that the daughter has a legal malpractice action against the testator's lawyer; this is so because the testamentary intent, as expressed in the will, to leave all her property to her daughter was frustrated due to the lawyer's negligent failure to draft a new will specifically excluding the testator's new husband and again leaving all her property to the daughter."

Espinosa, at 1223.

The court in *Espinosa* found that an attorney preparing a will has a duty not only to the testator-client, but also to the testator's intended beneficiaries, who may maintain a legal malpractice action against the attorney on theories of either tort (negligence) or contract (as third party beneficiaries). *Id.*

The third party intended beneficiary exception to the privity rule for bringing a legal malpractice action is not limited to will drafting.⁴ The case of *Rushing v. Bosse*, 652 So. 2d 869 (Fla. 4th DCA 1995), established that “privity between the child and attorney” is not required in a legal malpractice action against the attorney who institutes and proceeds with a private adoption proceeding. The *Rushing* court stated that it did not read *Angel* as “creating an exception to the privity requirement limited solely to the area of will drafting.” *Id.* at 584.

The third party beneficiary exception to the privity requirement is not unlimited, however. A final summary judgment was affirmed in *Brennan v. Ruffner*, 640 So. 2d 143 (Fla. 4th DCA 1994), which involved a lawsuit by a disgruntled minority shareholder of a closely held corporation against the attorney representing the corporation. The Fourth District Court of Appeal found that an attorney-client relationship did not exist between such shareholder and the corporate attorney, notwithstanding the fact that such attorney had drafted a shareholders' agreement which directly affected the shareholder's rights. In contrast to the *Brennan* ruling, *Greenberg v. Mahoney Adams & Criser, P.A.*, 614 So. 2d 604 (Fla. 1st DCA 1993), held that the mere assertion by the client that it was an intended third party beneficiary was sufficient to obtain a reversal of the lower court's decision dismissing a professional malpractice suit.

***39 Statute of Limitations**

Once it is determined that a person has a right to bring a legal malpractice action, the applicable statute of limitations must be analyzed. A lawsuit against an attorney for professional malpractice must be commenced within two years from the time that the cause of action is discovered or should have been discovered with exercise of due diligence.⁵ The difficult question is when the two-year period begins.⁶ In *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So. 2d 1323 (Fla. 1990), the Florida Supreme Court utilized the time period in which a cause of action for legal malpractice would begin to accrue in analyzing when a cause of action against accountants would commence. “A clear majority of the district courts have expressly held that a cause of action for legal malpractice does not accrue until the underlying legal proceeding has been completed on appellate review because, until that time one cannot determine if there was any actionable error by the attorney.” *Id.* at 1325. The court wanted to avoid the quandry which would require a party to file a malpractice proceeding against a professional, claiming negligence, while taking a totally inconsistent position during an appeal by alleging that the attorney was correct and a lower court's ruling was incorrect.

The *Peat* case held that the cause of action would not begin to accrue until the injured party knew or should have known of the “redressable harm or injury.” *Id.* at 1325. The matter of when the client knew or should have known of the attorney's negligence is a question of fact, not ordinarily capable of determination on summary judgment.⁷

The earlier case of *Sawyer v. Earle*, 541 So. 2d 1232 (Fla. 2d DCA 1989), was disapproved to the extent that it conflicted with *Peat*. In *Sawyer*, the Second District Court of Appeal held that the statute of limitations had been tolled, notwithstanding that the claimant was unable to “determine his exact amount or full extent of damages” at the time the statute would have expired. The difference between the two cases turns on the fact that in *Peat* the client maintained that its legal position was correct until after the U.S. Tax Court had ruled against such position, while in *Sawyer* the client believed his representation to be improper when he discharged his first lawyer well within the two-year period.

The clear message from these two cases is that the malpractice clock will start ticking for purposes of the statute of limitations when the client suspects or is informed that his or her attorney's actions were negligent. This message is confirmed in the case of *Edwards v. Ford*, 279 So. 2d 851 (Fla. 1973), which the *Peat* court found to be “clearly distinguishable.” *Peat*, 565 So. 2d at

1327. In *Edwards*, a claim was asserted that a contract was usurious and a member of the law firm which drafted the contract allegedly agreed to undertake corrective measures without charge sometime during 1963. The malpractice suit in 1968, which was filed in response to a suit by the law firm to recover its unpaid attorneys' fees, was unsuccessful as a result of the court's holding that the statute of limitations had expired. The *Edwards* court quoted at length from the case of *Downing v. Vaine*, 228 So. 2d 622 (Fla. 1st DCA 1969), in holding that the event which triggers the running of the statute of limitations is notice to or knowledge by the injured party that a cause of action has accrued in his or her favor, and not the date on which the negligent act which caused the damages was actually committed. *Edwards*, 279 So. 2d at 853.⁸ It is important to note that the damages incurred by the clients in *Edwards* were only "minimal" at the time that their cause of action accrued and had not fully matured. *Id.* Thus, it is readily apparent from a reading of these three cases that an attorney malpractice case needs to be considered as soon as a client is told about potentially negligent activity, suspects negligent activity, or takes any position, such as changing counsel, which would suggest knowledge of negligent activity. The only safe harbor would be to appeal an adverse decision, while maintaining the correctness of the attorney's actions which gave rise to the appeal until after the appeal is decided.

An otherwise time-barred action for legal malpractice may be resurrected as a counterclaim to an action by the attorney against the former client to collect attorneys' fees.⁹

A practical safety net, any time that there is a concern about the statute of *40 limitations arising, is to enter into a tolling agreement with the potentially culpable attorney, in which the parties agree that the statute of limitations will not commence until a date certain. Alternatively, as suggested in *Birnholz v. Blake*, 399 So. 2d 375 (Fla. 3d DCA 1981), the malpractice action can be stayed pending a resolution of the claim giving rise to the malpractice action.

Elements of a Legal Malpractice Action

A legal malpractice plaintiff is required to plead¹⁰ and prove: 1) the attorney's employment; 2) the attorney's neglect of a reasonable duty; and 3) that such negligence resulted in and was the proximate cause of loss to the plaintiff.¹¹ The naked legal conclusion that an attorney was negligent will not satisfy the pleading requirements for legal malpractice.¹²

The first element of the cause of action, that an attorney must be employed by the plaintiff-client, is addressed in *Ginsberg v. Chastain*, 501 So. 2d 27 (Fla. 3d DCA 1986). The issue before the court in *Ginsberg* was whether attorney Daniel Ginsberg's one-time representation of Fred Chastain in a real estate matter entitled Chastain to believe that Ginsberg was also representing him at a meeting between Chastain and Annmarie Ahlers, one of Ginsberg's long-time clients.

The Third District Court of Appeal held that the record was devoid of any evidence which would indicate that an attorney-client relationship existed for legal services between Chastain and Ginsberg relating to the aforementioned meeting. Chastain testified at trial that he never discussed with Ginsberg the subject of the meeting, he never asked Ginsberg to perform any services in connection with the drafting of the agreement, Ginsberg never billed him for any services in connection with the agreement, Chastain never requested a bill, and there was no fee agreement. Chastain thus failed to establish employment of the attorney and had no cause of action for legal malpractice.

What Is a Reasonable Duty?

One has a cause of action against an attorney who neglects to perform the services which he or she agrees to perform for the client, or which by implication the attorney agrees to perform when he or she accepts employment.¹³ However, an attorney's failure to accurately predict changes on unsettled points of law is not actionable. *Kaufman v. Stephen Cahen, P.A.*, 507 So. 2d 1152 (Fla. 3d DCA 1987), *rev. den.*, 518 So. 2d 1276 (Fla. 1987). A cause of action against the attorneys in *Kaufman* did not exist for their failure to file a wrongful death claim timely, since the law regarding the statute of limitations for such cause of action was changed by a Florida Supreme Court decision during the course of the representation.

However, an attorney has a duty to inform his or her clients of the attorney's awareness of a possible change in the law of a question which could have a materially adverse effect upon the clients. *Stake v. Harlan*, 529 So. 2d 1183 (Fla. 2d DCA 1988). In *Stake*, the attorney had actual knowledge of the certification of a question to the Florida Supreme Court, which was evidenced by his citation of the pending case in a letter he wrote to the client. *Id.* at 1184. The court held that the attorney breached his duty to make his clients aware of the implications of the certified question, so that the clients could make an informed decision as to whether to transact the subject real estate closing in the manner suggested by the attorney. *Id.* at 1185.

The result in *Kaufman* suggests that the attorney who is ignorant of legal trends which might affect the client's needs will be held to a lower standard than the knowledgeable attorney, such as the one in *Stake*, who will be held to a much higher standard. Rewarding an attorney for failure to know potential changes in the law seems to be a curious and unsupportable result.

Violation of the Rules of Professional Conduct is not negligence per se, although a violation may be used as some evidence of negligence. The rules do not create a legal duty on a lawyer.¹⁴ However, evidence that an attorney did not conduct himself or herself as reasonably as an attorney should respecting the Code of Professional Responsibility is evidence of a failure to use due care as an attorney.¹⁵

Proximate Cause of Loss

An attorney who drafts documents is not ipso facto a guarantor that the documents will be litigation-free or will accomplish everything that the client might want.¹⁶ The rationale is that if there were malpractice liability under those circumstances, an attorney would, in effect, insure his or her work; but since insurance coverage ordinarily calls for premium payment, attorneys' fees would inevitably increase substantially to provide for that type of insurance.¹⁷

In *Hatcher v. Roberts*, 478 So. 2d 1083 (Fla. 1st DCA 1985), *rev. den.*, 488 So. 2d 68 (Fla. 1986), a client-mortgagor brought a legal malpractice action against its attorney and law firm, contending that the lawyer negligently withdrew an affirmative defense of prepayment in a foreclosure proceeding.

The First District Court of Appeal found, as did the trial court, that under all the facts, circumstances, and law existing at the time of the foreclosure suit, the prepayment defense asserted and then withdrawn in the foreclosure proceeding could not possibly have succeeded, even with diligent preparation and litigation by Miller. *Id.* Therefore, since the attorney's acts were not the proximate cause of the client's alleged damages, no legal malpractice had occurred.

An attorney who gives improper or erroneous advice to a client who suffers damage as a result may be subject to a malpractice action for compensatory damages.¹⁸ However, such negligence, if it exists, and even if gross, does not warrant an award of punitive damages, absent the necessary allegations and proof of wantonness or reckless indifference.¹⁹ The fact that an attorney who allegedly gave bad advice had listed his or her name with a lawyer referral service as being proficient in that particular *41 field of law, by itself, does not rise to the required level of wantonness or reckless indifference required for punitive damages.²⁰

Conclusion

The decision to sue an attorney should not be made without extensive analysis of the facts and applicable law. Unlike other types of litigation in which clients often have a good idea as to whether they have a viable cause of action, only an expert in the substantive legal area in which the error allegedly occurred can determine if culpable negligence has been demonstrated. This article has purposefully not attempted to examine cases based upon substantive areas in which lawyers have been found to be negligent, since the goal was only to provide a basic framework for analyzing a potential legal malpractice claim. However, there is a plethora of cases in almost every substantive area describing lawyers' negligent acts and the number is steadily growing.

Footnotes

Note

1. Warren R. Trazenfeld is a graduate of the University of Florida School of Law, has been an attorney in Miami since 1981, and an adjunct professor at the University of Miami School of Law since 1986. He is a civil litigator with an emphasis on plaintiffs' legal malpractice and also practices real estate law. The assistance of Nancy D. Wiener with this article is gratefully acknowledged.

This column is submitted on behalf of the General Practice Section, Carla S. Matthews, chair, and David A. Donet, editor.

- 1 [Moss v. Zafiriz](#), 524 So. 2d 1010 (Fla. 1988); [Bongard v. Winter](#), 516 So. 2d 27 (Fla. 3d D.C.A. 1987), *rev. den.*, 525 So. 2d 881 (Fla. 1988).
- 2 Question of great public importance certified in an unpublished order answered and decision approved in [Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner](#), 612 So. 2d 1378 (Fla. 1993).
- 3 See also [Rosenstone v. Satchell](#), 560 So. 2d 1229 (Fla. 4th D.C.A. 1990).
- 4 See [Mann v. Cooke](#), 624 So. 2d 785, 786 (Fla. 1st D.C.A. 1993).
- 5 FLA. STAT. §95.11(4).
- 6 See [Robbins v. Hess](#), 659 So. 2d 424, 20 Fla. L. Weekly D1801, (Fla. 1st D.C.A. Aug. 10, 1995), [Martin County v. Indiantown Enterprises, Inc.](#), 658 So. 2d 1144, 20 Fla. L. Weekly D1775 (Fla. 4th D.C.A. Aug. 2, 1995).
- 7 [Burnside v. McCrary](#), 384 So. 2d 1292 (Fla. 3d D.C.A. 1980).
- 8 See [Zakak v. Broida & Napier, P.A.](#), 545 So. 2d 380 (Fla. 2d D.C.A. 1989); [Diaz v. Piquette](#), 496 So. 2d 239 (Fla. 3d D.C.A. 1986), *rev. den.*, 506 So. 2d 1042 (Fla. 1987); [Richards Enterprises, Inc. v. Swofford](#), 495 So. 2d 1210 (Fla. 5th D.C.A. 1986), *cause dism.*, 515 So. 2d 231 (Fla. 1987).
- 9 [Cherney v. Moody](#), 413 So. 2d 866 (Fla. 1st D.C.A. 1982); [Allie v. Tonata](#), 503 So. 2d 1237 (Fla. 1987).
- 10 An analysis of venue and jurisdiction in legal malpractice actions is beyond the scope of this article. See [Fleming and Weiss, P.C. v. First American Title Insurance Company, et al.](#), 580 So. 2d 646 (Fla. 3d D.C.A. 1993) (held insufficient minimum contact with Florida to sue a New York law firm in Florida). [Roberts v. Cason](#), 652 So. 2d 439 (Fla. 4th D.C.A. 1995) (venue was proper in Orange County, although the law firm had its only place of business in Lake County, because the allegedly botched real estate closing involved property located in Orange County); [Tucker v. Fianson](#), 484 So. 1370 (Fla. 3d D.C.A. 1986), *rev. den.*, 494 So. 2d 1153 (Fla. 1986) (all of the negligent representations were made in Broward County but because of the negative impact to the client's Dade County property, venue was proper in Dade County).
- 11 [Maillard v. Dowdell](#), 528 So. 2d 512, 514 (Fla. 3d D.C.A. 1988), *rev. denied*, 539 So. 2d 475 (Fla. 1988); [Weiner v. Moreno](#), 271 So. 2d 217, 219 (Fla. 3d D.C.A. 1973); [Chipman v. Chonin](#), 597 So. 2d 363 (Fla. 3d D.C.A. 1992).
- 12 [Rios v. McDermott, Will and Emery](#), 613 So. 2d 544 (Fla. 3d D.C.A. 1993).
- 13 [Dykema v. Godfrey](#), 467 So. 2d 824 (Fla. 1st D.C.A. 1985).
- 14 [Pressley v. Farley](#), 579 So. 2d 160 (Fla. 1st D.C.A. 1991), *cause dismissed*, 583 So. 2d 1036 (Fla. 1991).
- 15 [Gomez v. Hawkins Concrete Construction Co.](#), 623 F. Supp. 194 (D.C. Fla. 1985).
- 16 [Daytona Development Corp. v. McFarland](#), 505 So. 2d 464, 467 (Fla. 2d D.C.A. 1987).
- 17 *Id.*
- 18 [Solodky v. Wilson](#), 474 So. 2d 1231 (Fla. 5th D.C.A. 1985).

19 *Id.* at 1232.

20 *Id.*

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