1992

Legal Malpractice in Ohio

John C. Nemeth

Follow this and additional works at: https://engagedscholarship.csuohio.edu/clevstlrev

Part of the Legal Profession Commons, and the Torts Commons

How does access to this work benefit you? Let us know!

Recommended Citation

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.
LEGAL MALPRACTICE IN OHIO

JOHN C. NEMETH

I. INTRODUCTION .......................................................... 143

II. ELEMENTS OF A LEGAL MALPRACTICE CLAIM .................. 144
   A. Attorney-Client Relationship .................................... 144
      1. Intentional Acts ............................................... 148
         a. Fraud ..................................................... 148
         b. Malicious Prosecution .................................. 151
         c. Abuse of Process ........................................ 152
      2. Negligent Representation ..................................... 153
      3. Third Party Beneficiaries ................................... 155
   B. Breach of Duty .................................................. 157
   C. Damages Proximately Caused by Breach ......................... 162
      1. Success in the Underlying Legal Action ..................... 164
         a. Burden of Proof Where the Underlying Action
            was Voluntarily Settled ................................ 165
         b. Discovery Problems ...................................... 166
         c. Testimony of Trial Judge ............................... 166
         d. Bifurcation .............................................. 167
      2. Damages Proximately Related to Malpractice ................. 168
   D. Summary .................................................................. 169

III. STATUTE OF LIMITATIONS ........................................... 169

IV. FINAL THOUGHTS ....................................................... 174

I. INTRODUCTION

Within the last decade, Ohio courts have encountered a significant increase in the number of legal malpractice cases. Ohio, however, is by no means the exception. Almost every state is experiencing an explosion in legal malpractice litigation. Unfortunately, there is no real explanation for this phenomena. Perhaps it is the consequence of a society which is overly result-oriented. People feel that results can be controlled and that someone should be held accountable if there is a failure to produce the desired end. Claims of legal

1 B.A., Kent State University; J.D., Ohio State University. The author would like to thank Jeffrey S. Marcalus, J.D., Capital University, for his research and editorial effort.
malpractice tend to reflect this attitude. Clients dissatisfied with the results of a particular legal action seek relief against their attorney, judging his or her performance by hindsight. This may have a chilling effect on zealous representation if claims of legal malpractice continue to grow at their present rate.

This article will discuss the fundamentals of a legal malpractice case, specifically addressing two areas. The first involves the elements of a legal malpractice case. This discussion will expose two problems that continually appear in legal malpractice litigation: (1) expanding the liability of an attorney to third parties, and (2) determining whether the alleged malpractice was the proximate cause of the plaintiff’s injuries. The second area of discussion will focus on the time limitations imposed for bringing a legal malpractice action. Additionally, in order to better understand the current state of the law, a brief discussion illustrating the historical development of the applicable statute of limitations will be instructive.

II. ELEMENTS OF A LEGAL MALPRACTICE CLAIM

To succeed in a legal malpractice action in Ohio, the aggrieved party must satisfy three requirements. It must be established that: (1) an attorney-client relationship existed which gave rise to a duty; (2) there occurred a breach of that duty; and (3) damages were proximately caused by the breach. Because much of Ohio’s legal malpractice litigation has centered around proof of these three elements, a closer examination is warranted.

A. Attorney-Client Relationship

The most fundamental requirement of any legal malpractice action is establishing that an attorney-client relationship existed at the time the alleged malpractice occurred. This relationship is contractual in nature; therefore, usual principles of agency law govern its parameters. Although compensation is a significant component of the relationship, it is not an exclusive element necessary to a determination of whether an attorney-client relationship existed, nor is the payment of a fee a condition precedent to an attorney-client relationship.

In most situations, determining whether an attorney-client relationship existed is a question of fact. A formal written contract is not necessary to create an attorney-client relationship because it may be implied from the conduct of the parties. Under Ohio law, an attorney-client relationship is consensual in

---


3In re Estate of Clark, 229 N.E.2d 122 (Ohio C.P. 1967).


nature and can only arise when both the attorney and the client consent to its formation.6 A "client" within the context of an attorney-client relationship is generally defined as "one who employs and retains an attorney or counselor to manage or defend a suit or action to which he is a party, or to advise him about some legal matter."7

Many have argued that an attorney-client relationship may arise when an attorney advises a party about a legal matter even though representation is not undertaken or is subsequently declined. Moreover, when a prospective client approaches an attorney with the view toward retaining his services, an attorney-client relationship is created.8 Other jurisdictions have held that an attorney-client relationship exists where the putative client seeks advice and the attorney renders the same.9

In addition to the implied and expressed contractual relationships which provide a foundation for a malpractice action, a professional claim may also sound in tort. In essence, a cause of action based upon legal malpractice is a tort action for negligence. This claim is based upon a breach of the attorney's duties to his client. The fact that the attorney had no duty to render legal advice to the client is separate from the issue of duty where he undertakes to render advice that is likely to be relied upon.10

It has been argued that where a party is not adverse, gratuitous advice can require the same standard of care as if there were a formal retainer.11 The scope of this duty does not usually depend upon the manner in which the relationship is created, nor does the existence of duty depend upon payment of a fee.12 In


8 Taylor v. Sheldon, 173 N.E.2d 892 (Ohio 1961). In Taylor, the Supreme Court of Ohio held that: Where a person approaches an attorney with the view of retaining his services to act on the former's behalf, an attorney-client relationship is created, and communications made to such attorney during the preliminary conferences prior to actual acceptance or rejection by the attorney of the employment are privileged communications. Id. at 893.


12 Id. See also RESTATEMENT (SECOND) OF TORTS § 323 (1977) providing that: One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise
Togstad v. Vesely, Otto, Miller & Keefe,\textsuperscript{13} for example, the Supreme Court of Minnesota confirmed a $649,000.00 judgment for negligence for failing to warn the client about a statute of limitations problem. Even though the attorney had refused to represent the client, the court found sufficient evidence under both a tort and contract analysis, to support a finding that an attorney-client relationship existed. In so doing, the court noted that a negligence analysis should include a showing that:

\begin{quote}
[the attorney] rendered legal advice (not necessarily at someone's request), under circumstances which made it reasonably foreseeable to the attorney that if such advice was rendered negligently, the individual receiving advice might be injured thereby.\textsuperscript{14}
\end{quote}

Another example appears in Procanik by Procanik v. Cillo,\textsuperscript{15} where the plaintiffs had retained an attorney to investigate a potential medical malpractice action. The attorney consulted a second attorney, who specialized in medical malpractice, to see whether the specialist would be interested in accepting the case.\textsuperscript{16} After reviewing the file and the medical records, the specialist declined representation.\textsuperscript{17} The plaintiffs later brought suit against the second attorney, claiming that he negligently rendered legal advice.\textsuperscript{18} The issue before the court was whether an attorney must act in a professionally reasonable manner when declining representation of a potential client.\textsuperscript{19} The court held that when an attorney declines representation he need not give his reasons for doing so, however, if he voluntarily provides a reason it must be professionally reasonable under the circumstances.\textsuperscript{20}

Underlying the attorney-client relationship is the assumption of a duty owed by an attorney to the client.\textsuperscript{21} It has been the general rule in Ohio that attorneys

reasonable care to perform his undertaking, if (a) his failure to exercise such care increased the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

\textsuperscript{13}291 N.W.2d 686 (Minn. 1980).

\textsuperscript{14}Id. at 693.


\textsuperscript{16}Id. at 987

\textsuperscript{17}Id. at 988.

\textsuperscript{18}Id. at 990.

\textsuperscript{19}Id. at 993.

\textsuperscript{20}Cillo, 543 A.2d at 993.

\textsuperscript{21}The Ohio Code of Professional Responsibility expresses, in general terms, the standards of professional conduct expected of lawyers. It is from these expressions that the Disciplinary Rules are derived.
owe no duty to non-client third parties.\textsuperscript{22} This precept evolved from the traditional rule that a lawyer cannot be held liable to a plaintiff unless the plaintiff is in privity with the client.\textsuperscript{23} In recent years, however, several states have recognized exceptions to this privity requirement. In the often cited case of Lucas \textit{v. Hamm},\textsuperscript{24} California led the way in allowing deviation from this privity requirement.\textsuperscript{25} The rationale for this approach appears to be that one who renders legal advice under any set of facts is liable to those individuals whose reliance upon said advice is foreseeable.\textsuperscript{26} While the foreseeability test has been adopted by a number of jurisdictions, no Ohio case has yet to adopt the rule. In fact, this line of reasoning was recently rejected by the Tenth District Court of Appeals in the case of \textit{Columbus Consol. Agency, Inc. v. Wolfson}.

In \textit{Columbus Consol.}, plaintiffs, who were purchasers in an investment program, sued their attorney for rendering an erroneous opinion as to whether the program would involve the sale of a security under Ohio or federal securities law.\textsuperscript{28} The attorney had erroneously concluded that the transactions would not involve such a sale.\textsuperscript{29} The plaintiffs instituted a class action based upon two alternative legal theories: (1) That they were in privity with the attorney;\textsuperscript{30} and (2) that the attorney could be liable to them as third parties whose reliance was specifically foreseen.\textsuperscript{31} After rejecting the plaintiffs' first argument, the court addressed the "foreseeability" issue:

\begin{quote}
[The plaintiff-appellants argue in their second assignment of error that the trial court erred in failing to consider both (1) their argument regarding liability to third parties whose reliance is specifically foreseen, and (2) their argument regarding potential liability to individual purchasers under the Ohio securities statutes. Appellants support these arguments by citing the Ohio securities statutes and \textit{Haddon View Investment Co. v. Coopers & Lybrand} (citation omitted), where the Supreme Court held that accountants may be held liable by a third party for professional negligence when the third party is a member of a limited class whose reliance on the accountant's
\end{quote}

\textsuperscript{22} Elam \textit{v. Hyatt Legal Services}, 541 N.E.2d 616 (Ohio 1989).


\textsuperscript{25} It appears that a majority of states have adopted this approach.

\textsuperscript{26} Lucas, 364 P.2d at 687.

\textsuperscript{27} 591 N.E.2d 385 (Ohio Ct. App. 1990).

\textsuperscript{28} \textit{Id.} at 386.

\textsuperscript{29} \textit{Id.}

\textsuperscript{30} \textit{Id.} at 386.

\textsuperscript{31} \textit{Id.} at 388.
representation is specifically foreseen. As discussed previously, however, in Scholler, . . . the court set forth a specific rule of law governing when a third party can maintain an action against an attorney. Pursuant to this holding in Scholler, the potential class members in the instant case cannot maintain an action against the attorney-appellees. We therefore do not reach appellants' argument that is based upon the Haddon View rationale, which applies to accountants and not attorneys. Nor do we reach appellants' argument that there may be potential liability to individual purchasers under the Ohio securities statutes since the purchasers in this matter have no standing to bring such an action. Accordingly, appellants' second assignment of error is not well taken and is overruled.\textsuperscript{32}

Currently, most states recognize three main exceptions to this general rule that an attorney is not liable to non-client third parties: (1) intentional acts, (2) negligent misrepresentation, and (3) third party beneficiaries. The extent to which these exceptions are recognized in Ohio warrants a closer examination.

1. Intentional Acts

Ohio courts recognize that an attorney can be liable to a third party, absent privity, if the attorney, in representing his client, commits an act of fraud, maliciously prosecutes, abuses process, or does anything to intentionally harm a third person.\textsuperscript{33} An action based on an intentional act has advantages and disadvantages. The most significant advantage, common to all actions for an intentional act, is that privity between the attorney and the aggrieved party is not required.\textsuperscript{34} This is because the nature of the action sounds in tort. One disadvantage is the ultimate collectability of the final judgment. Most malpractice insurance polices contain exclusionary language for fraudulent acts.\textsuperscript{35}

\textit{a. Fraud}

Fraud is defined as the "concealment or misrepresentation of a fact or set of facts material to the transaction between the parties, the falsity of which is known to the defendant (or if not actually known, should have been known),

\textsuperscript{32}Columbus Consolidated, 591 N.E.2d at 388.

\textsuperscript{33}Scholler v. Scholler, 462 N.E.2d 158 (Ohio 1984).

\textsuperscript{34}Id. at 163.

\textsuperscript{35}See generally David J. Meiselman, \textit{Attorney Malpractice: Law and Procedure} § 21:6, at 327-28 (1980)(discussing cases determining whether such exclusionary language is enforceable by the courts). "This policy does not apply to any judgment or final adjudication based upon or arising out of any dishonest, \textit{deliberately fraudulent}, criminal, malicious or deliberate wrongful acts or omissions committed by the insured . . ." (emphasis added). Id.
by which falsity the defendant intends to mislead the plaintiff and in reliance on which the plaintiff acts to his detriment."\(^{36}\)

There are several advantages to bringing an action for fraud, as opposed to malpractice. First, as previously noted, an action for fraud sounds in tort, not in contract; thus, privity is not a requirement.\(^{37}\) Furthermore, the plaintiff benefits from a four-year statute of limitations period.\(^{38}\) Finally, the time when the statute of limitations begins to toll is more advantageous to the plaintiff in a fraud claim because "[a] cause of action for fraud does not accrue until the fraud and the wrongdoer [is] actually discovered."\(^{39}\)

An action for fraud, however, has its disadvantages as well. Initially, courts will examine the factual bases of the complaint in order to determine the "gist" of the lawsuit.\(^{40}\) If the complaint involves legal malpractice, the court will invoke the one-year period of limitations, irrespective of the allegations set forth in the complaint.\(^{41}\) Therefore, in order for an action brought after the one year limitation to be successful, the complaint must focus upon the attorney's fraudulent acts. A good illustration of this is DiPaolo v. DeVicor,\(^{42}\) which involved the administration of a decedent's estate. In DiPaolo, the widow and her five children filed a legal malpractice claim against officials of her husband's company, and two attorneys, for excluding the company from the estate's assets.\(^{43}\) The attorneys were also employed by the executrix as her counsel during the administration. Apparently, the attorneys, at the direction of the president of the company, told the plaintiffs that they had no legal or

---

\(^{36}\) Hibbett v. City of Cincinnati, 446 N.E.2d 832, 836 (Ohio Ct. App. 1982).

\(^{37}\) See supra note 34 and accompanying text.

\(^{38}\) Ohio Rev. Code Ann. § 2305.09(C) (Baldwin 1989).

\(^{39}\) See infra Part III, discussing when the statute of limitations begins to toll in a legal malpractice case.

\(^{40}\) Hibbett, 446 N.E.2d at 835.

\(^{41}\) See, e.g., id. at 835-36 (Ohio Ct. App. 1982) (rejecting plaintiff's classification of legal malpractice claims as claims of negligence, breach of contract and fraud, and, thereby, striking down plaintiff's attempt to invoke the longer statute of limitations periods of O.R.C. § 2305.07 and § 2305.09(C) & (D)).

\(^{42}\) 555 N.E.2d 969 (Ohio Ct. App. 1988).

\(^{43}\) Id. at 971.
equitable interest in the business. In response to the complaint, the defendant-attorneys filed a motion to dismiss which was ultimately granted.

On appeal, the court held that absent privity between the third parties and the executrix, the defendants were immune from liability while serving as attorneys for the executrix, unless the attorneys acted maliciously. The court found that the alleged fraud arose from statements made during the course of defendants' representation. The court went on to note that "such representation constitutes a fundamental aspect of the attorney-client relationship." Hence, the existence of the attorney-client relationship gives rise to a presumption that the attorney acted in good faith.

In DiPaolo, the court noted that on the face of the complaint, none of the plaintiffs except for the widow had formed an attorney-client relationship with defendant-lawyers. Therefore, no cause of action accrued to third parties unless they were in privity with her or the defendants acted maliciously. The court then discussed the legal malpractice claims and concluded that they were correctly dismissed as being time barred. The court noted that the plaintiff clearly discovered some, albeit not all, of the details of the alleged malpractice and resultant injury during the administration of the estate.

In an action for fraud, the burden of rebutting the presumption that the attorney acted in good faith lies with the plaintiff. The plaintiff must specifically allege that the defendant's actions were for his own personal gain. For pleading purposes, Ohio Civil Rule 9(B) requires that a cause of action for fraud must be pled with particularity. Perhaps this deficiency led the DiPaolo

44 Id.
45 Id. at 972.
46 Id. at 975.
47 DiPaolo, 555 N.E.2d at 975.
48 Id.
49 Id.
50 Id.
51 Id.
52 DiPaolo, 555 N.E.2d at 975.
53 Id.
54 Id.
55 Id. at 976.
56 To meet the particularity requirement the plaintiff must: (1) specify the statements claimed to be false; (2) state, in the complaint, the time and place where the statements were made; and (3) identify the defendant claimed to have made the statement. See Kordi v. Minot, 531 N.E.2d 318 (Ohio Ct. App. 1987).
court to conclude that, absent the allegations of personal gain, it was impossible to make such inferences. Therefore, the court of appeals properly concluded that the action was one in malpractice, not fraud, and was properly dismissed as barred by the statute of limitations.57

The foregoing discussion illustrates why, in Ohio, it is extremely difficult for a third party to succeed against an attorney in an action for fraud. First, the applicable statute of limitations is determined from the complaint and not from the form of the pleading. Second, the plaintiff has the burden of proving that the attorney did not act in good faith. Usually, this burden will require a showing that the attorney’s actions were for his own personal gain. If either one of these burdens is not satisfied, the court will likely determine that the case is one properly based on malpractice and therefore is not subject to the four-year statute of limitations.

b. Malicious Prosecution

An action by a third party for malicious prosecution presents some unique problems. In general, such an action requires the plaintiff to establish that:

A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if

(a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and

(b) the proceedings have terminated in favor of the accused.58

In Ohio, an action for malicious prosecution has been extended to civil actions insofar as the plaintiff establishes that some interference with the plaintiff’s person or property has resulted from the attorney’s actions.59 Because an attorney is an agent acting on behalf of his client, he cannot be liable to a third party unless he acts beyond the scope of his authority.60 Courts continue to recognize that an attorney must be afforded some immunity from suits by third persons so that he may properly represent his clients.61 As a result, suits for malicious prosecution are not favored by courts because they serve as a restraint upon the right to resort to courts for lawful redress.62

57 DiPaolo, 555 N.E.2d at 976.
62 Wojcynski, 464 N.E.2d at 614.
Furthermore, the Code of Professional Responsibility imposes upon an attorney an obligation to the public and to his profession to act honestly and in good faith in all of the activities he undertakes. 63

An attorney, however, cannot always justify his actions merely by showing that he followed his client's instructions. In Board of Education v. Marting, 64 the court held that the question of whether an attorney should be held accountable based upon his capacity as an attorney in a previous action is a jury question. 65 The court reasoned that the attorney is in a position to know whether the client is motivated by malice and also knows whether there is no cause for prosecution. 66 Furthermore, the attorney is in the best possible position to minimize error. 67

c. Abuse of Process

Many attorneys confuse abuse of process with malicious prosecution. Perhaps this is so because both torts have very similar elements. For this discussion, a basic understanding of their differences is all that is necessary. The significant difference between abuse of process and malicious prosecution is the point at which malice is manifested. 68 In abuse of process, the malice is injected after process is initiated. 69 Thus, abuse of process connotes that the process was properly initiated but lacked proper purpose. Abuse of process is a proper situation for disciplinary action by the local bar. 70 In fact, Ohio Civil Rule 11 was adopted primarily for the purpose of preventing abuses of the legal system by making sanctions mandatory if the attorney is found guilty of an abuse of process. 71

Third party actions for intentional acts remain a viable form of redress for a plaintiff. An action based on an intentional act relieves the plaintiff of the privity requirement necessary for maintaining a malpractice action. 72

---

63 W.D.G. Inc., 5 Ohio Op. 3d at 400.
64 185 N.E.2d 597 (Ohio C.P. 1962).
65 Id. at 600.
66 Id.
67 Id.
69 Id.
However, these avenues do have their own separate and distinct complications, which remove some of their appeal. Although privity is not a requirement, principles of agency law often preclude the plaintiff from recovering in a case based on an intentional act.\(^7\)

2. Negligent Misrepresentation

Like intentional acts, an action for negligent misrepresentation sounds in tort rather than contract. Therefore, privity is not an essential element to a successful action. Those jurisdictions which recognize a cause of action for negligent misrepresentation apply it in a case where:

One who, in the course of his business, profession or employment, ... supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.\(^7\)

Whether an attorney can be liable to a third party for negligent misrepresentation varies from jurisdiction to jurisdiction. Generally, in the absence of privity, courts have been reluctant to hold an attorney liable to a third party for negligent misrepresentation.\(^7\)

The legitimacy of a cause of action for negligent misrepresentation by a third party can be difficult. In order to appreciate the underlying rationale rejecting a third party's action, a closer examination of the elements is warranted.

As set forth by one Maryland court, to be successful on a negligent misrepresentation claim, the plaintiff has the burden of proving five essential elements:

1. The defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
2. the defendant intends that this statement will be acted upon by the plaintiff;
3. the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
4. the plaintiff justifiably takes action in reliance on the statement; and

\(^7\) See, e.g., Finley v. Schuett, 455 N.E.2d 1324 (Ohio Ct. App. 1982).


(5) the plaintiff suffers damages proximately caused by the defendant’s negligence.\(^76\)

Immediately, we can identify several problems a court might encounter when contemplating whether to extend the negligent misrepresentation theory to cases involving third parties. The most obvious problem with the negligent misrepresentation theory is that the plaintiff must show that the attorney owed him a duty.\(^77\)

The attorney-client relationship imposes a myriad of fiduciary obligations upon the attorney. The agency law maxim that no servant can serve two masters suggests that an attorney cannot effectively represent his client while owing a corresponding duty to a third party. In fact, the Code of Professional Responsibility addresses this problem when it states:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.\(^78\)

In considering an adverse party as a third party, courts maintain the position that "an attorney, in representing his client, deals at arm's length with adverse parties and consequently is not liable to such adverse parties for his actions."\(^79\)

The concern many courts have is that an attorney would not devote his entire energies to his client if he were continually preoccupied with the possibility of a claim for negligence by anyone who has dealt with his client.\(^80\)

Fortunately, Ohio has yet to hold an attorney liable to a third party based on a theory of negligent misrepresentation. However, one case has come somewhat close. In Scholler v. Scholler,\(^81\) the plaintiff-wife sought to set aside a

\(^76\) Flaherty v. Weinberg, 492 A.2d 618, 627-28 (Md. 1985).

\(^77\) In determining whether an attorney owes a duty to a third party not in privity, courts have adopted a "balancing test" whereby the court weighs: (1) the extent to which the transaction between the lawyer and the second party was intended to affect the third party; (2) the foreseeability of harm to the third party; (3) the degree of certainty that the third party did in fact suffer harm; (4) the closeness of the connection between the conduct of the attorney and the injury; (5) the moral blame attributable to the lawyer's conduct; and (6) the policy of preventing future harm. Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901 (Cal. Ct. App. 1976).

\(^78\) As adopted by the Ohio Supreme Court set forth in Ohio REV. CODE ANN. § EC 5-2 (Anderson 1983)(emphasis added).

\(^79\) Bell, 613 S.W.2d at 338.

\(^80\) Id. See also Flaherty, 492 A.2d at 626; Green Spring Farms, 401 N.W.2d at 826; Page v. Frazier, 445 N.E.2d 148, 153 (Mass. 1983).

\(^81\) 462 N.E.2d 158 (Ohio 1984).
divorce decree because she subsequently discovered that her husband failed to disclose all of his assets. Although the divorce decree was not set aside, she was successful in getting the child support increased. The plaintiff-wife then filed the present action, individually and on behalf of her minor son, in part alleging that her former attorney negligently failed to make complete discovery of her husband’s financial information. Plaintiff further claimed that her minor son was entitled to recover for the attorney’s malpractice. On appeal, the Supreme Court of Ohio held in part that the son was not in privity with his mother or the attorney who represented her and could, therefore, not recover for the attorney’s malpractice. Although this result might seem unfair, the court noted that the son’s interests were protected by the domestic relations judge and the probate court.

An action for negligent misrepresentation raises similar issues and concerns to those which arise in a case based on an intentional act. The existing agency relationship between an attorney and client introduces a wide variety of problems that plaintiffs must overcome unless they are in privity with the attorney.

3. Third Party Beneficiaries

The third exception to the rule requiring privity of contract between an aggrieved party and an attorney is the third party beneficiary theory. This theory is frequently advanced by beneficiaries of a will prepared by an attorney. This issue was first presented to the Supreme Court of Ohio in Simon v. Zipperstein. In Zipperstein, the attorney prepared a will and an antenuptial agreement for the plaintiff’s father. When preparing these documents, the attorney neglected to interrelate them. When the client-testator died, a declaratory action ensued wherein the court allowed the second wife to collect

---

82 Id. at 160.
83 Id.
84 Id. at 163.
85 Id.
86 Scholler, 462 N.E.2d at 164. The Court stated that "an attorney who represents a spouse in the negotiation of a separation agreement does not simultaneously, automatically represent the interests of a minor child of the marriage." Id.
87 Id. at 163-64.
88 512 N.E.2d 636 (Ohio 1987).
89 Id. at 636-37.
90 For example: The antenuptial agreement provided for a limit upon inheritance from the estate by his present wife, but did not refer to the will nor did the will refer to the antenuptial agreement. Id. at 637.
under both instruments. The decedent's daughter then brought a malpractice action against the drafting attorney.

In its opinion, the court restated the general rule that absent fraud, collusion, or malice an attorney may not be liable in a malpractice action where privity is lacking. This rule applies whether the aggrieved party is a beneficiary or a purported beneficiary. The court's rationale is that by having such a rule, attorneys can direct their attention to their client's needs and not the needs of some remote party not in privity with the client. Moreover, "[t]o allow indiscriminate third-party actions against attorneys of necessity would create a conflict of interest at all times, so that the attorney might well be reluctant to offer proper representation to his client in fear of some third-party action against the attorney himself." In conclusion, the court found that privity was lacking since Simon, as a potential beneficiary, did not have a vested interest in the estate.

Attorney immunity from liability to will beneficiaries is not absolute. All that can be concluded from Zipperstein is that between a potential beneficiary whose interest is not vested, and the attorney for the decedent, no privity exists and the beneficiary is barred from bringing a legal malpractice claim.

The Zipperstein court left open the question of privity when the beneficiary's interest in the estate is vested. This question, however, was resolved in Elam v. Hyatt Legal Services. In Elam, an attorney was retained to assist in the administration of an estate. The decedent's will left a life estate in a parcel of real property to her husband with the remainder to other beneficiaries. However, the lawyer drafted a deed which excluded the remaindermen's interest and gave a fee simple to the husband. The remaindermen brought suit against the attorney seeking damages for the attorney's ignoring the interest of the remainderman when transferring the decedent's real estate.

91 Id.
92 Id.
93 Zipperstein, 512 N.E.2d at 638.
94 Id.
95 Id.
96 Id. (quoting W.D.G., Inc. v. Mutual Mfg. & Supply Co., 5 Ohio Op. 3d 397, 399-400 (Franklin Cty. 1976)).
97 Zipperstein, 512 N.E.2d at 638.
98 541 N.E.2d 616 (Ohio 1989).
99 Id. at 617.
100 Id.
101 Id.
102 Id. at 617. Both lower courts held that there was no privity between the
The sole issue on appeal was whether the remaindermen could maintain a cause of action against the attorney.\textsuperscript{103} In reversing the lower court's decision, the supreme court held that the remaindermen were in privity with the executor of the estate.\textsuperscript{104}

The \textit{Elam} court made clear that they did not intend to overrule their holding in \textit{Zipperstein}. First, the court noted that the fiduciary of an estate owes a duty to serve as a representative of the entire estate.\textsuperscript{105} Next, the court distinguished the present case from \textit{Zipperstein}: In \textit{Elam}, the remaindermen's interest was vested upon the death of the decedent; whereas, in \textit{Zipperstein}, the beneficiaries' interest was not vested.\textsuperscript{106} Consequently, \textit{Elam} held that "[a] beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance."\textsuperscript{107}

At first blush, it appears that \textit{Elam} is not going to cause any major shifts in Ohio law. Privity is still needed to maintain a cause of action for legal malpractice. The distinction between \textit{Elam} and \textit{Zipperstein} is the vested status of the beneficiaries. Furthermore, \textit{Elam} was recently interpreted by a Federal District Court in \textit{Firestone v. Galbreath}.\textsuperscript{108} Judge Graham, writing for the majority, observed that \textit{Elam} involved postmortem services by the attorney to the executor.\textsuperscript{109} At that time, the beneficiaries were already vested.

In light of \textit{Zipperstein}, \textit{Elam}, and \textit{Firestone}, if the beneficiary is not vested at the time the alleged malpractice occurred, no privity will exist. Therefore, the beneficiary will lack standing to maintain a legal malpractice action.

\textbf{B. Breach of Duty}

The second element of a successful malpractice action requires a showing that the representation fell below the standard of skill and care required by the profession.\textsuperscript{110} Defining the appropriate standard of care is problematic and usually a source of considerable litigation. Unlike the issues of proximate cause

---

\textsuperscript{103} \textit{Elam}, 541 N.E.2d at 618.

\textsuperscript{104} \textit{Id}.

\textsuperscript{105} \textit{Id}.

\textsuperscript{106} \textit{Id}.

\textsuperscript{107} \textit{Id}.

\textsuperscript{108} 747 F. Supp. 1556 (S.D. Ohio 1990) (rejecting the application of \textit{Elam} to the present action).

\textsuperscript{109} \textit{Id}. at 1572.

\textsuperscript{110} \textit{See supra} note 2 and accompanying text.
and damages, the question of whether there is a legal duty is one of law for the courts to determine.\textsuperscript{111} If the court finds that no legal duty exists, the case can be dismissed because there can be no negligence or contract liability.\textsuperscript{112}

Although a claim for legal malpractice sounds in tort, the presence of an attorney-client relationship and the scope of that relationship are contractual.\textsuperscript{113} The legal duty owed by an attorney is defined by the contract. In order to have a valid contractual relationship, the attorney and client must have a "meeting of the minds" regarding the scope of their relationship.\textsuperscript{114} Because the relationship is created by consent of the parties, it cannot be assumed nor forced upon an attorney who has the option to accept or decline the representation.\textsuperscript{115}

This point is illustrated in the case of \textit{Jamison v. Norman}.\textsuperscript{116} In \textit{Jamison}, the defendant was retained to represent the plaintiff in a personal injury action which resulted from an accident in the course of his employment.\textsuperscript{117} The plaintiff never sought the attorney's advice on a workers' compensation claim, which plaintiff himself initiated.\textsuperscript{118} The plaintiff then brought a malpractice claim against the attorney for failure to advise of the workers' compensation matter.\textsuperscript{119} The court found no duty on the part of the attorney to advise the plaintiff because the plaintiff initiated the workers' compensation claim without seeking the attorney's counsel. Therefore, the workers' compensation claim fell outside the attorney's contract of employment.\textsuperscript{120} Although the issue has not been specifically addressed by the Ohio appellate courts, representation letters or agreements between attorneys and their clients are critical for this reason. The trend will probably be to hold the lawyer liable because he is in the better position to define for the client the scope of his representation.


\textsuperscript{112} \textit{Id.} at 435. The plaintiff alleged that the defendant, who represented the plaintiff's former spouse, was negligent in handling a dissolution proceeding. The court found that there had never been an attorney-client relationship in the dissolution proceeding. \textit{Id.}


\textsuperscript{114} Noroski v. Fallet, 442 N.E.2d 1302 (Ohio 1982).

\textsuperscript{115} \textit{See MALLEN & SMITH, supra} note 11, at § 8.2.

\textsuperscript{116} \textit{771 S.W.2d} 408 (Tenn. 1989).

\textsuperscript{117} \textit{Id.} at 409.

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.} at 410.
Established case law indicates that the client's expectations with respect to the representation are controlling.\textsuperscript{121} However, it does not appear sufficient to allege that an attorney-client relationship existed with respect to some matters. The burden is to establish that the relationship existed with respect to the particular act or omission upon which the malpractice is based.\textsuperscript{122} Attorneys are neither responsible for ferreting out all of their client's needs nor for reviewing every legal aspect of the client's transactions.\textsuperscript{123}

Finally, in addressing the issue of duty, one must keep in mind that the plaintiff has to establish the applicable standard of care to be applied. The standard for an attorney is the same as that of a physician: "An attorney is required to exercise the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession similarly situated."\textsuperscript{124} If an attorney fails to meet these requirements he will be liable for negligence.\textsuperscript{125} This burden is required to avoid liability which is based on a disgruntled client's version of what occurred or what the client believes should have occurred.\textsuperscript{126} A brief review of Ohio cases illustrates that the prevailing view is that expert testimony is required for determining professional standards of performance.

Expert testimony is necessary to establish the standard of knowledge and skill that is ordinarily possessed by members of the legal profession who are similarly situated.\textsuperscript{127} If the plaintiff fails to introduce expert testimony, or the expert testimony fails to establish the standard, the defendant-attorney is entitled to a directed verdict.\textsuperscript{128}

Expert testimony can be crucial in the early stages of a malpractice action.\textsuperscript{129} Many of the unsuccessful malpractice claims have failed because the plaintiff

\textsuperscript{121} See Westinghouse Electric Corp. v. Kerr-McGee Corp, 580 F.2d 1311, 1319 (7th Cir. 1978), cert. denied, 439 U.S. 955 (1978).


\textsuperscript{123} See MALLEN & SMITH, supra note 11, at § 19.5.


\textsuperscript{125} Id.

\textsuperscript{126} Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966).


\textsuperscript{129} See Haller v. Close, No. 90-AP-853 (10th Dist. Feb. 5, 1991)(unreported). Defendants submitted affidavits of their own opinions as to the appropriate
did not produce any expert testimony. The rationale for requiring expert testimony lies in the fact that without the expert testimony a jury would be left to speculate as to the appropriate standard of care. Of course, no rule would be complete without some exceptions. In Ohio, there are two exceptions to the expert testimony requirement. Expert evidence is not necessary: (1) when the breach is within the ordinary knowledge and experience of a layman; or (2) if the breach is so obvious that it may be determined by the court as a matter of law.

In McInnis v. Hyatt Legal Clinics, the court found expert testimony was not necessary because the claimed breach of professional duty was within the understanding of the jury. In this case, McInnis retained the defendant to represent him in a divorce proceeding. McInnis asked his attorney to make sure that information regarding the divorce would not be published in the local newspapers. After giving McInnis written assurance that notice of the proceeding would not appear in the local papers, notice was published and McInnis sued claiming legal malpractice. The basis of McInnis' claim was that his attorney breached his professional duties by failing to use best efforts to insure that McInnis' request was honored. The court noted that the Code of Professional Responsibility placed upon an attorney a duty to 'remember that the decision whether to forego legally available objectives or methods standard of care. Haller failed to present any expert testimony on the standard of care issue. As a result, the court concluded that reasonable minds could only conclude that there was no breach of duty. Id.

See Minnick v. Callahan, 24 Ohio Op. 3d 104 (Ohio Ct. App. 1980)(defendant attorney was entitled to a directed verdict since plaintiff failed to introduce expert testimony to establish the required standard of care).

Id. at 106. See also, Northwestern Life Ins. Co. v. Rogers, 573 N.E.2d 159 (Ohio Ct. App. 1989)(expert testimony is required so that the trier of fact does not have to speculate on the standard of care, particularly in a complex case involving real estate transactions which are normally not within the understanding of the layman).

Haller, No. 90-AP-853 at 6.

461 N.E.2d 1295 (Ohio 1984).

Id. at 1297.

Id. at 1296.

Id.

Id.

McInnis, 461 N.E.2d at 1296.

Model Code of Professional Responsibility EC 7-8.
because of nonlegal factors is ultimately for the client and not for himself.”\textsuperscript{140} Here the attorney’s breach was so obvious that laymen on the jury could conclude, without the benefit of expert testimony, that the attorney’s actions fell below the requisite standard of care.\textsuperscript{141} The \textit{McInnis} decision demonstrates that a breach of the Code of Professional Responsibility may preclude the need for expert testimony.

At least one plaintiff was unsuccessful in attempting to prove that a breach was so obvious that it could be determined by a lay person. In \textit{Northwestern Life Ins. Co. v. Rogers},\textsuperscript{142} the plaintiff attempted to persuade the court to adopt a malpractice \textit{per se} standard, upon a showing of a violation of the conflict of interest prohibitions contained in the Code of Professional Responsibility.\textsuperscript{143} Instead of introducing expert evidence on the standard of care issue, the plaintiff attached an article about legal ethics and the Code of Professional Responsibility.\textsuperscript{144} In response, the court stated "that there can be instances where noncompliance with the Code of Professional Responsibility does not result in malpractice."\textsuperscript{145} The court concluded that expert evidence was required in this case because of the complex nature of the Code of Professional Responsibility.\textsuperscript{146}

We can conclude from the current state of the law that, for the most part, you should retain an expert witness if you represent a plaintiff in a legal malpractice action. Likewise, if you are defending the action, you will need to retain an expert, and should attach their affidavit if you file a motion for summary judgment. Generally, the only time that expert testimony will not be required is where the breach is painfully obvious, such as failing to bring an action within the prescribed statute of limitations period.

Critical to the evaluation of the legal malpractice case is an understanding of what the particular standard of care is in any given factual situation. Since both sides will retain experts to testify on this issue, many problems may arise. Often, when there is a dispute as to whether the defendant-attorney was negligent, experts reach not only opposite conclusions but also use different standards.\textsuperscript{147} These problems can be confronted earlier in the case with a motion in limine if the trial court is inclined to face the issue as a legal question,

\textsuperscript{140}\textit{McInnis}, 461 N.E.2d at 1296-97 (quoting \textsc{Model Code of Professional Responsibility} EC 7-8).

\textsuperscript{141} \textit{Id.} at 1237.

\textsuperscript{142} 573 N.E.2d 159 (Ohio Ct. App. 1989).

\textsuperscript{143} \textit{Id.} at 162.

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.} at 163.

\textsuperscript{146} \textit{Id.} at 163-64.

\textsuperscript{147} \textit{See, e.g., Waldman v. Levine}, 544 A.2d 683 (D.C. 1988).
precluding the expert from testifying before the jury on the issue. Unfortunately, there are no reported Ohio cases on point, but other jurisdictions have addressed the problem where an element of the cause of action depends upon a pure question of law. Questions of duty generally involve a legal conclusion which may not be the proper subject for expert testimony.

Clearly no attorney is expected to be infallible, nor an insurer of results, unless he or she agreed to achieve a specific result. If the area of the law is doubtful or debatable, the attorney is not responsible for incorrectly predicting the outcome of subsequent case law. This rule is extremely important because holding an attorney liable for failing to accurately predict when and how the law would change would place a tremendous burden on attorneys. Attorneys would become less willing to take cases which involved an undefined point of law or one in which its present state places an undue hardship on certain classes of individuals. Our system of jurisprudence would suffer if an attorney could not challenge the constitutionality of a law without the threat of liability to his client.

The attorney has the responsibility of rendering fair and reasonable professional services which are comparable to those rendered by other attorneys practicing under similar circumstances. Unlike standard negligence cases, the standard being applied varies with the circumstances of each case. Ohio courts have left unanswered the question of whether the particular standard of care should be different if the defendant attorney holds himself out as a specialist in a particular area of law. At this time, the locality standard has not been applied in Ohio. Thus, it appears all practitioners state-wide are held to the same uniform standard of care whether the venue of the malpractice action is rural or urban.

C. Damages Proximately Caused by Breach

The third element of a legal malpractice claim is damage proximately caused by the breach. An attorney is not liable to a client for neglect of duty if the claimed negligence did not proximately cause the plaintiff’s injury. The theory behind a damage award is to put the former client in a position he would have been in had the malpractice not occurred. Thus, like in any negligence

---


action, the plaintiff must prove that the defendant-attorney was the proximate cause of the plaintiff's damages.\textsuperscript{153}

This last element is the most difficult for a plaintiff to establish. The existence of damages depends on two factors: first, whether the underlying legal action would have been successful had the case been handled competently;\textsuperscript{154} and second, that the damages are attributable to the malpracticing attorney.\textsuperscript{155} Perhaps this is why some courts prefer to separate the question of proximate cause into two separate elements.\textsuperscript{156} When such an approach is utilized the plaintiff will have to show that: (1) the attorney's alleged misconduct caused the plaintiff's injury; and, (2) that the damages which the plaintiff sustained were the proximate result of the attorney's alleged misconduct.\textsuperscript{157} Due to the complex legal issues involved in establishing proximate cause, the two prongs will be examined separately in an attempt to illustrate the problems associated with each.\textsuperscript{158}

Initially, it must be noted that the alleged negligence of an attorney is never the proximate cause of the plaintiff's injury when a malpractice action is not ripe for adjudication.\textsuperscript{159} Stated another way, unless the attorney's wrongful conduct deprived the client of something to which he was otherwise entitled, a malpractice action cannot be maintained. For example, in Petruzzi v. Casey,\textsuperscript{160} the Franklin County Court of Appeals held that a legal malpractice action cannot be maintained if the plaintiff had other remedies available to her.\textsuperscript{161} The plaintiff, confined to a wheelchair, was a passenger aboard a cruise ship.\textsuperscript{162} Special arrangements were made by the ship's employees to help her get ashore; specifically, the crew members arranged to carry her down a steep flight of stairs in order to load her onto a tender.\textsuperscript{163} While she was being carried down

\textsuperscript{154}Alfonso v. McIntyre, 387 So.2d 1348 (La. Ct. App. 1980).
\textsuperscript{156}See Jablonski, 453 N.E.2d 1296.
\textsuperscript{157}Id. Ultimately, the amount of damages focuses on what the client would have recovered had the underlying case been handled competently.
\textsuperscript{158}A brief review of legal malpractice cases in Ohio illustrates that the courts are frequently exposed to some of the more esoteric questions that arise in a legal malpractice case when addressing the issues of proximate cause and consequential damages.
\textsuperscript{160}Id.
\textsuperscript{161}Id.
\textsuperscript{162}Id. at 1633.
\textsuperscript{163}Id. at 1633-34.
the stairs, one of the crewmen lost his grip and Petruzzi fell and suffered injuries.\textsuperscript{164} When she returned home, she contacted defendant to handle her personal injury case.\textsuperscript{165} After advising her that he did not handle personal injury matters, he referred her to a second attorney.\textsuperscript{166}

Upon reviewing the merits of the case, the second attorney discovered that the ticket issued to Petruzzi contained a provision which imposed a one-year statute of limitations for any personal injury actions against the cruise line and a notice provision requiring the complainant to notify the cruise line of any claims within six months of the date of the occurrence.\textsuperscript{167} After the second attorney refused to pursue her claim, Petruzzi filed a malpractice action against the first attorney.\textsuperscript{168}

In her complaint, Petruzzi claimed that Casey’s alleged negligence precluded her from filing suit against the cruise line.\textsuperscript{169} In response, Casey argued that the limitations did not bar an action against the crewmen or an action against the cruise line in either Federal Admarlty Court or in the state courts of Florida.\textsuperscript{170} The court found that since these other avenues of legal recourse were available, the plaintiff was not precluded from pursuing her personal injury claim for damages.\textsuperscript{171} Therefore, her legal malpractice action against Casey was premature.\textsuperscript{172}

1. Success in the Underlying Legal Action

In order for a plaintiff to succeed in a legal malpractice action, it must be shown that the plaintiff possessed a valid claim or defense. The procedural tool which is utilized by the courts for demonstrating legal malpractice at the trial level has been coined in the phrase a "suit within a suit".\textsuperscript{173} Under Ohio law, the issue of proximate cause in a legal malpractice action is not satisfied if the plaintiff cannot show that he would have successfully prosecuted or defended

\textsuperscript{164}Petruzzi, No. 89-AP-1508 at 1634.
\textsuperscript{165}Id.
\textsuperscript{166}Id.
\textsuperscript{167}Id.
\textsuperscript{168}Id.
\textsuperscript{169}Petruzzi, No. 89-AP-1508 at 1637.
\textsuperscript{170}Id.
\textsuperscript{171}Id.
\textsuperscript{172}Id. Another interesting case where an attorney avoided liability because the client had another option available is Mitchell v. Transamerica Ins. Co., 551 S.W.2d 586 (Ky. Ct. App. 1977).
\textsuperscript{173}Petruzzi, No. 89-AP-1508 at 1637.
the underlying suit absent the alleged malpractice.\(^{174}\) Proof that the underlying suit would have been successful raises interesting problems particularly concerning burdens of proof, discovery, testimony of the trial judges and bifurcation of the suit within a suit.

\textit{a. Burden of Proof Where the Underlying Action was Voluntarily Settled}

Although proving the "suit within a suit" appears to place a substantial burden on the plaintiff, often it works to the defendant’s disadvantage. Initially, the "suit within a suit" requirement places the burden of proof on the plaintiff.\(^{175}\) This burden is appropriate, especially in legal malpractice cases where the plaintiff was unsuccessful in the underlying action. However, this burden is relaxed and, on occasion, appears to shift to the defendant when the underlying action is voluntarily settled by the plaintiff.\(^{176}\) This recurring situation is the source of great frustration for the defendant in a legal malpractice action. In this scenario, a plaintiff no longer must prove the success of the underlying case, and in fact, it is the opposite conclusion that a plaintiff desires. Thus, the burden shifts to the defendant who must show that, but for the voluntary settlement, the plaintiff would have been successful in the underlying action.

Since the underlying case was never litigated, there is simply no way to know whether the defendant’s representation fell below the expected standard, unless his negligence was so obvious that a settlement was in the best interest of the plaintiff. This problem is compounded when the defendant was not the attorney in the underlying action. This situation usually occurs in third-party beneficiary cases where the defendant’s alleged negligence precluded the third-party from receiving some benefit to which she was entitled.\(^{177}\)

While the trend seems to support the position that voluntary settlement of the underlying action should not preclude the plaintiff from bringing a legal

---

\(^{174}\) Here, again, expert testimony is necessary. For example, in Lemke v. Rudd, No. 10883, 1989 Mont. App. LEXIS 1312 (2d Dist. Apr. 12, 1989), the plaintiff testified that she instructed her attorney to seek a new trial with a jury. However, the attorney decided to have a judge decide the case. Although the court found that a failure to abide by specific instructions may be sufficient to establish a breach of duty without expert testimony, the court affirmed the verdict because the plaintiff did not introduce any expert testimony on the issue of proximate cause. \textit{id.}


\(^{177}\) \textit{See, e.g.}, Pelham v. Griesemer, 440 N.E.2d 96 (Ill. 1982).
malpractice claim, this position should only be followed when the defendant attorney's alleged malpractice was the cause in fact of settling the underlying action. In such a case, there should be sufficient evidence to support a jury finding that the plaintiff was damaged by the attorney's negligence in prematurely settling the underlying case and that the settlement would have been greater absent said negligence. Any view to the contrary will inhibit judicial economy by discouraging attorneys from promoting out-of-court settlements. The issue of forced settlements has not been specifically addressed in Ohio; however, other jurisdictions have held that an attorney may be found liable for negligently causing a client to settle a claim for an amount less than what he could have legitimately anticipated receiving if not for the lawyer's negligence.

b. Discovery Problems

Proving the "suit within a suit" imposes additional burdens on the defendant. Initial discovery in malpractice cases provides the plaintiff with depositions, statements, and exhibits from the underlying case, not to mention the arguments and inferences, with the benefit of hindsight, to show a jury how the case would have been won if the attorney properly prosecuted it. On the other hand, the defendant's attorney often has to rely on witnesses and former parties who no longer want to be involved in the dispute between the plaintiff and his former attorney. These facts frequently appear in domestic relations, personal injury, or commercial and consumer litigation.

c. Testimony of Trial Judge

Many negligence claims involve an underlying action which has often gone to trial. For example, an attorney may be criticized for failing to present certain forms of testimony at trial or for failing to raise a particular defense. As a result, the testimony of the trial court judge or the opposing attorney from the underlying action may be relevant. The case law is not clear on whether the judge who presided over the original trial may testify in a subsequent malpractice action. While Canon 2(b) of the Code of Judicial Conduct prevents a judge from lending the prestige of his office "to advance the private interests of others," Canon 2 does not afford a trial court judge a privilege against testifying in response to an official summons. Therefore, it is possible to

---


182 Id.
argue that the trial judge can testify when subpoenaed. This would allow him to offer an opinion on how an attorney handled a particular matter. This was the scenario in Woodruff v. Tomlin,183 where a trial judge was allowed to testify concerning the competency of attorneys who had appeared before him in trial proceedings.184

There is perhaps one reason for precluding testimony of a trial court judge. Ohio Rule of Evidence 404A, provides for the inadmissibility of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice."185 It may be argued that this provision of the Ohio Rules of Evidence may be employed to preclude admission into evidence of the testimony of the judge who presided in the underlying matter, particularly where the judge is being called to testify to a matter that might otherwise be the subject of independent expert testimony.

Once a jury is satisfied that the attorney was negligent, few cases are lost for failure to also prove proximate cause. To ameliorate the harshness of proving the "suit within a suit," some other states have shifted the burden of proof to the attorney, or at least the burden of going forward with evidence to prove the former client could not have succeeded on the original claim.186

d. Bifurcation

Often courts bifurcate the "suit within a suit" and allow it to proceed first.187 The benefits of bifurcation vary from case to case and involve a mixture of strategy considerations. For example, assume that the lawyer is accused of negligence in the handling of a plaintiff's personal injury case. If the case is bifurcated, and the question of whether the lawyer's conduct fell below the applicable standard of care is tried first, the evidence relating to the severity of the plaintiff's medical injuries are irrelevant. The trial court and jury can focus on the issue of the lawyer's conduct without their attention being diverted by concerns relating to the question of the plaintiff's injury and damages. If such a case is not bifurcated, the trier of fact will hear the evidence relating to both liability and damages at the same time. Under those circumstance it may be more difficult for the trier of fact to separate the two issues.

Other advantages to bifurcation are judicial economy and the saving of expenses by the parties. If the court bifurcates the case and tries the issue of liability first, a subsequent trial for damages may prove unnecessary.

183 593 F.2d 33 (6th Cir. 1979).
184 Id. at 42.
185 OHIO R. EVID. 404A.
Bifurcation also has the practical effect of stimulating settlement. If a lawyer loses on the liability issue, a damages settlement becomes more likely.

2. Damages Proximately Related to Malpractice

In addition to success in the underlying case, a plaintiff cannot recover if he could not have recovered in the original action.\(^{188}\) Obviously, the attorney’s negligence would not be the "but for" cause of the plaintiff’s inability to recover if the statute of limitations had run. Hence, the solvency of the defendant in the underlying action can become an issue for the plaintiff as well as the other elements of the legal malpractice action.

Assuming that the plaintiff can prove that any award in the underlying action would have been collectable, the question becomes what is the proper measure of damages? Unfortunately, the courts are split as to whether the plaintiff is entitled to recover more from the attorney than he could have recovered in the underlying action. Some jurisdictions hold that the amount of damages should be reduced by the amount of the underlying contingency fee;\(^{189}\) while others have come to an opposite conclusion.\(^{190}\)

Ohio courts have not yet decided the precise issue. However, one court has demonstrated a willingness to hold the measure of damages equal to the value of the lost claim.\(^ {191}\) Typically, American jurisprudence has opposed the recovery of attorney’s fees in a tort action.\(^ {192}\) However, the foreseeability rationale has been applied by non-Ohio courts. In other jurisdictions, courts have concluded that all of the damages which are foreseeable are recoverable, including legal fees.\(^ {193}\)


D. Summary

A claim of legal malpractice in Ohio is not ripe unless the plaintiff has exhausted all other remedies. Once a legal malpractice case is ripe the plaintiff has the burden of proving the amount and collectability of the lost claim even if negligence and proximate cause are established. If the original claim could not have been recovered, then the negligent attorney was not the "but for" cause of the plaintiff's injury. Although the measure of recoverable damages varies from case to case, the plaintiff has the burden of presenting sufficient evidence from which damages can be ascertained. Once that amount can be ascertained, it arguably may be reduced by the amount of the underlying contingency fee because the attorney was not entitled to the award without having the attorney's contingency fee deducted. Finally, any damages that are remote or speculative cannot be recovered.194

III. STATUTE OF LIMITATIONS

The statute of limitations for bringing a malpractice action is one year.195 This statute does not expressly include claims of legal malpractice; however, "at the time this statute was enacted, the common meaning and legal definition of the term, 'malpractice,' was limited to the professional misconduct of members of the medical profession and attorneys."196 Consequently, Ohio courts have held that this one-year limitation applies to actions against an attorney for malpractice.197 Cases which have construed this legislative mandate illustrate some of the unusual questions which have developed in legal malpractice cases.

In the beginning, the Supreme Court of Ohio adopted the "termination rule" for determining when the statute of limitations begins to run in a malpractice case.198 The "termination rule" has its origin in medical malpractice cases.199 The rule states that "[a] cause of action for malpractice against an attorney accrues, at the latest when the [attorney]-client relationship finally

194 However, even if all the damages are not ascertainable then the existence of those which are so identifiable gives rise to a cause of action as the precise amount need not be shown with mathematical certainty. See Zimmie v. Calfee, Halter & Griswold, 538 N.E.2d 398 (Ohio 1989).

195 OHIO REV. CODE ANN. § 2305.11(A) (Baldwin 1989).


199 Id. at 773.
terminates." This approach can lead to harsh results, especially in the case where the injury is one which requires a long period of development before it is discoverable.

The termination rule was superseded by the Ohio Supreme Court in Skidmore & Hall v. Rottman. In a rather brief opinion, the Skidmore court adopted the "discovery rule" for determining when the statute of limitations begins to run. Like the termination rule, the discovery rule was adopted from the medical malpractice line of cases. Pursuant to Skidmore, a "[clause of action... accruing and the statute of limitations commences to run when the client discovers, or in the exercise of reasonable care and diligence should have discovered, the resulting injury." The "discovery rule" eases the unconscionable result to the innocent victim who, by exercising even the highest degree of care, could not have discovered the malpractice within one year of its occurrence.

The decision in Skidmore left a number of questions unanswered. Specifically, Skidmore did not address the situation where the professional relationship continued after the client discovered the alleged malpractice. This issue was raised in Omni-Food & Fashion, Inc. v. Smith. In Omni-Food, the plaintiff owned a food supply and discount business. The plaintiff employed defendant to assist in the incorporation of his business. In part, this involved making sure that the registration of certain shares of stock complied with the applicable securities laws. Apparently, the attorney failed to make sure that the stock was registered, as evidenced by the class action suit which was brought by certificate holders who sold 1,251 shares of unregistered stock. The defendant was retained to defend the lawsuit. Unfortunately, an answer was not timely filed and a default judgment for $7.5 million was entered against the plaintiff. The attorney then advised his client to file bankruptcy, believing that once the debt was discharged plaintiff could resume its business. Unfortunately, the adverse publicity destroyed their plans.

---

200 Id.
201 450 N.E.2d 684 (Ohio 1983).
202 Id. at 685. See also Oliver v. Kaiser Community Health Found., 449 N.E.2d 438 (Ohio 1983)(policy considerations).
203 450 N.E.2d at 684.
204 528 N.E.2d 941 (Ohio 1988).
205 Id. at 942.
206 Id.
207 Id.
208 Id.
209 Omni-Food, 528 N.E.2d at 942.
In a subsequent malpractice suit against the attorney, the plaintiffs claimed $10 million in damages. The defendant responded by filing a motion for summary judgment asserting, inter alia, that the plaintiff's action was barred by R.C. 2305.11(A), because plaintiff knew that when an answer was not filed, a malpractice citing had been committed. The motion, citing Skidmore, was granted and affirmed on appeal.

The issue presented in Omni-Food was by no means novel. In fact, the court entertained the same issue in a similar case which modified the accrual date of the statute of limitations in a medical malpractice case. Being consistent in its practice of following the medical malpractice cases, the Omni-Food court once again modified the accrual date of the statute of limitations. Under Omni-Food, a cause of action for legal malpractice accrues when the client either discovers or, through the exercise of reasonable diligence, should have discovered the resulting injury, or when the attorney-client relationship for that particular transaction terminates, whichever occurs later. The court, applying this newly adopted standard, held that the termination of the attorney-client relationship may have occurred at a later date; therefore, the plaintiffs could maintain the legal malpractice action against the lawyer who incorporated them.

The termination rule encourages the parties to resolve their dispute without litigation and motivates the attorney to mitigate the client's damages. By doing so, mutual confidence, which is essential to the attorney-client relationship, is fostered. Also, the rule discourages an unscrupulous attorney from concealing his malpractice until the claim is barred by the statute of limitations. Under the new standard, the court must determine when a legal malpractice action accrues under both the termination rule and the discovery rule. Then the court must compare the two to determine which date is later. It is from this later date that the limitations period will be calculated. This approach is good because it "is one that fairly and flexibly applies either the termination rule or the discovery rule, depending on the facts of the particular case."

---

210 Id.
211 Id.
212 Id.
213 See Fry singer v. Leech, 512 N.E.2d 337 (Ohio 1987).
214 Omni-Food, 528 N.E.2d at 944.
215 Id. at 945.
216 Id. at 944.
217 Id.
218 Id.
219 Omni-Food, 528 N.E.2d at 944.
The inquiry that courts must now make in light of *Omni-Food* is not always easy. For example, in *Zimmie v. Calfee, Halter & Griswold*, the court had to determine whether the statute of limitations in a legal malpractice action begins to run even if damages were uncertain. In *Zimmie*, the plaintiff retained the defendant's services to prepare an antenuptial agreement to control, inter alia, the disposition of property in the event of divorce. Fourteen years later *Zimmie* was sued for a divorce. Unfortunately, the trial court held that the antenuptial agreement was invalid. *Zimmie* unsuccessfully appealed the case all the way to the Ohio Supreme Court. The attorney terminated his relationship with *Zimmie* when he realized there was a problem with the antenuptial agreement. He was no longer the attorney of record when the matter was being appealed. Therefore, the attorney-client relationship had terminated long beyond the one year time period under the termination rule. *Zimmie* filed a malpractice action against the attorney who drafted the antenuptial agreement. The defendant responded by filing a motion for summary judgment asserting that *Zimmie* was time-barred by R.C. 2305.11(A). *Zimmie* argued that the complaint was timely filed because it was filed within one year of the Supreme Court's decision invalidating the antenuptial agreement. The trial court rejected *Zimmie*'s argument because he knew that the agreement was invalid more than one year before the legal malpractice action was filed. Moreover, *Zimmie* knew on the day of the wedding that defendant had failed to prepare his schedule of assets. Also, the court considered the two occasions when the trial court and appellate court

---

221 *Id.* at 399.
222 *Id.*
223 *Id.* The court found that *Zimmie* had not fully disclosed his financial situation to his wife before she signed the agreement, and that the agreement was not voluntarily executed. *Id.*
224 *Zimmie*, *538 N.E.2d* at 399.
225 *Id.*
226 *Id.*
227 *Id.* at 401.
228 *Id.* at 399.
229 *Zimmie*, *538 N.E.2d* at 400.
230 *Id.*
231 *Id.*
232 *Id.*
invalidated the antenuptial agreement well before the one-year period for the filing of the complaint had ended.\textsuperscript{233} The Ohio Supreme Court held that Zimmie was put on notice of his need to pursue further remedies against the attorney who drafted the agreement when the antenuptial agreement was held invalid by the trial court.\textsuperscript{234} The court was not persuaded by the fact that Zimmie's damages were uncertain. All that was required to begin tolling the statute under the discovery rule was the occurrence of some cognizable event. In this case the cognizable event was that some damage had occurred, the extent of which was irrelevant.

Based on \textit{Omni-Food} and \textit{Zimmie}, the statute of limitations begins to run when there is a cognizable event, or when the attorney-client relationship terminates, whichever occurs later. The problems that may arise as a result of the "cognizable event test" are eloquently expressed by Justices Sweeney and Brown in the \textit{Zimmie} dissent. They argued that using the "cognizable event" standard in cases such as \textit{Zimmie} is unfair and inappropriate since the basis of the malpractice action can be reversed on appeal.\textsuperscript{235} In addition, the standard encourages litigation and discourages attorneys from settling their case.\textsuperscript{236} The majority's response to this criticism appears to be a denial of the problem because a plaintiff can file the legal malpractice action and keep it in abeyance while pursuing appellate relief.\textsuperscript{237}

Unfortunately, the majority in \textit{Zimmie} missed the mark. Fairness compels a finding that a legal malpractice action should not accrue until the appellate process is exhausted. Several important policy considerations would be fulfilled under this approach. First, if the aggrieved party is successful on appeal, there is either no basis for a legal malpractice case or its value is minimized and defined. Thus needless litigation will be prevented. Second, if the aggrieved party is unsuccessful on appeal, the malpracticing attorney will be more likely to resolve the dispute outside of court through settlement negotiations. Third, the knowledge and resources of the attorney will be readily available to assist the plaintiff in favorably resolving the matter before an adversarial relationship develops. Finally, if the alleged malpractice involves an intricate matter, such as a complex federal tax issue, a tribunal which is most competent to resolve the issue will be called upon to do so.\textsuperscript{238}

\textsuperscript{233} \textit{Id.} at 400.

\textsuperscript{234} 538 N.E.2d at 402.

\textsuperscript{235} \textit{Id.} at 403.

\textsuperscript{236} \textit{Id.} at 403-04.

\textsuperscript{237} \textit{Id.} at 402.

\textsuperscript{238} For example: Suppose a taxpayer sought tax advice from an attorney. Subsequently, the I.R.S. disallowed the particular benefit that the taxpayer was advised he would get. Not requiring the aggrieved taxpayer to appeal to the tax court before filing his legal malpractice claim would necessarily require a court of general jurisdiction to resolve questions of federal tax which could be
Presently, the "cognizable event" standard is a troubling precedent for someone litigating a legal malpractice case because the plaintiff is not forced to exhaust his remedies in the underlying action before he may file a malpractice claim. It is difficult to foresee whether the court will review this question again in the future. Hopefully it will, and when it does, the cognizable event standard should be modified to include a requirement that the appellate process be exhausted before the legal malpractice claim may be filed. Only then will the public policy considerations be advanced while maintaining fairness to the parties involved.

IV. FINAL THOUGHTS

Although the principal function of this article has been to focus on the more significant issues in the anatomy of a legal malpractice case, we have also visited the repeating problems and emerging dilemmas for which there are no significant decisions to answer our inquiries. There are certainly many other equally important considerations when either prosecuting or defending a legal malpractice lawsuit and one of these ancillary topics is legal malpractice insurance coverage. Although time does not permit adequate discussion of the nuances of all malpractice insurance problems in this article, suffice it to say that pitfalls await the practitioner with the more contemporary and less protective coverage known as the "claims made" policy which limits the risk of the insurer to only those claims made prior to or during the coverage period. Often the insurer may look to the application to see whether or not the insured accurately set forth all potential errors, omissions or personal injury which may result in a claim against them. If, indeed, it appears from the insurer's review of the claim file that its insured was on prior notice of this potential claim at the time of the application, then coverage may be in jeopardy. This can be the basis of a denial of coverage from the basic policy language as well as exclusionary provisions within the policy such as those exclusions where negligent acts complained of occurred prior to coverage even though the consequences of the negligence was not realized by the plaintiff until during the coverage period.

Finally, some parting thoughts are worth mentioning that do not pertain specifically to the "nuts and bolts" of a legal malpractice lawsuit or legal malpractice claims, in general, in Ohio but certainly can help us avoid those situations. I have taken the liberty of listing them in my "to do" list as ten principal steps to take to avoid legal malpractice claims.

1. Do return all telephone calls timely and keep your client advised of the progress of his/her case.

2. Do diary all important dates and devise a practical system of office monitoring of these dates or purchase the appropriate software package that can be integrated with your law office systems.

resolved in the taxpayer's favor in tax court. Justice and fairness dictate that this policy should not prevail in legal malpractice cases.
3. Do actually listen to the client. During conferences, be it by phone or in person, show concern, interest, understanding and respect and retain your notes in the file whenever possible.

4. Do represent your client zealously but avoid emotional attachment which might impair your ability to render objective and independent advice.

5. Do refer a case to a specialist when indicated as well as maintaining continuing education courses in your own field of practice.

6. Do maintain detailed records and documents to support your fee, including a written itemization describing the services rendered contemporaneously with the date and the time expended on the client matter.

7. Do discuss fees fully and freely at the initial conference using written retainers whenever possible and confirming, in writing, settlement offers, demands and important oral communications that need to be memorialized in writing.

8. Do use certified mail when rejecting a case, advising the individual that they are free to seek other legal counsel and when you believe the statute of limitations will expire. Where statute of limitation problems may be involved, advise the client immediately in a written letter of rejection as to the earliest date by which you estimate the statute will expire.

9. Do periodically review the Code of Professional Responsibility.

10. Do maintain professional liability insurance and report claims and all potential claims in a timely fashion.

In conclusion, the principals of jurisprudence, whether they pertain specifically to legal malpractice or tort law, have been imbedded in our society for centuries; however, with changing conditions in our world today, more and more people are holding lawyers accountable and to a higher standard. Perhaps this is because of higher expectations as we saw occur within the medical malpractice crisis several years ago; nevertheless it is important that lawyers, as practitioners, understand the environment in which they practice as they implement the essential elements of a legal malpractice case from either the plaintiff or defendant perspective.