LEGAL MALPRACTICE 2019:

Legal Malpractice Causes of Action,

Litigation Strategy and Ethics

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Table of Contents

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Never in the history of our judicial system has the concept of seeking redress from one's attorney for real or perceived grievances been as common place. Prior to 1970, there were few reported decisions discussing an attorney's liability for "legal malpractice." From 1970 forward, reported decisions on cases involving the theory of "legal malpractice" or "attorney malpractice" ballooned geometrically with 407 reported decisions in the 70s, 2,663 in the 80s, 6,668 in the 90s, well over 10,000 reported decisions in the first decade of this century, and 9,171 reported decisions since 2010. That's reported decisions – not just filed claims against attorneys.

The theories under which lawyers are sued and the defenses to these claims are constantly evolving. Not all of the news is good. In fact, much of it is bad. Some is just plain ugly. However, the bottom line is that a good percentage of all legal malpractice cases are dismissed on motion.

This article is intended to review the elements of a legal malpractice action as well as some of the available defenses. It is hoped that the issues discussed assist in not just exploring the topic at hand but also in providing some thought as to how the exposure may be avoided in the first place.

I. ELEMENTS

Legal malpractice is defined as the failure by an attorney to "exercise that degree of skill commonly exercised by an ordinary member of the legal community."[1] In order to prevail on a cause of action for legal malpractice, a plaintiff must show that (1) defendant owes plaintiff a duty, (2) defendant breached that duty, and (3) actual damages were proximately caused by the breach.[2]

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1 *Conklin v. Owen*, 72 A.D.3d 1006, 900 N.Y.S.2d 118 (2nd Dep't 2010); *Estate of Nevelson v. Carro, Spanbock, Kaster, & Cuiffo*, 259 A.D.2d 282, 284, 686 N.Y.S.2d 404 (1st Dep't 1999).

2 *Global Business Institute v. Rivkin Radler LLP*, 101 A.D.3d 651, 958 N.Y.S.2d (1st Dep't 2012); *Kotzian v. McCarthy*, 36 A.D.3d 863, 827 N.Y.S.2d 875 (2nd Dep't 2007); *Simmons v. Edelstein*, 32 A.D.3d 464, 820 N.Y.S.2d 614 (2nd Dep't 2006); *Hatfield v. Herz*, 109 F.Supp2d 174, 179 (S.D.NY 2000).

The elements of negligence and proximate cause are established with proof that the attorney failed to exercise "the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession"[3] and that, 'but for' the attorney's failure to exercise due care, the plaintiff would have prevailed in the underlying action or would not have incurred damages as a result of the attorney's conduct.[4] An attorney may not undertake a representation tat he or she is unqualified to handle without associating with experienced counsel.[5] To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence."[6] The failure to allege that "but for" the attorney's conduct, the client would not have sustained damages warrants a dismissal of the complaint.[7]

Since legal malpractice is the failure of an attorney to use due care in the representation of a client, it is well settled in New York that a cause of action for fraud, breach of contract, negligent misrepresentation or breach of fiduciary duty complaining of the same conduct and alleging the same damages as a legal malpractice claim will be dismissed as duplicative.[8]

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3 *Dombrowski v. Bulson,* 19 N.Y.3d 347 (2012);.*Darby & Darby, P.C. v. V.S.I. International, Inc*., 95 N.Y.2d 308, 716 N.Y.S.2d 378 (2000).

4 *Waggoner v. Caruso,* 14 N.Y.3d 874, 903 N.Y.S.2d 333 (2010); *AmBase Corp. v. Davis Polk & Wardwell,* 8 N.Y.3d 428, 834 N.Y.S.2d 705 (2007); *Blank v. Harry Katz, P.C.,* 3 A.D.3d 512, 770 N.Y.S.2d 742 (2nd Dep't 2004); *Caires v. Siben & Siben,* 2 A.D.3d 383, 384, 767 N.Y.S.2d 785 (2nd Dep't 2003); *see, Natale v. Jeffrey Samel & Assocs.,* 308 A.D.2d 568, 764 N.Y.S.2d 883 (2nd Dep't 2003), *lv denied* 2 NY3d 701, 778 N.Y.S.2d 460 (2004); *Magnacoustics, Inc. v Ostrolenk, Faber, Gerb & Soffern,* 303 A.D.2d 561, 755 N.Y.S.2d 726 (2nd Dep't 2003), *lv denied* 100 N.Y.2d 511, 766 N.Y.S.2d 165 (2004); *Iannarone v. Gramer,* 256 A.D.2d 443, 682 N.Y.S.2d 84 (2nd Dep't 1998).

5 NY Rules of Professional Conduct ("RPC") 1.1:

> (a)A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

See also Wo Yee Hing Realty Corp. v. Stern, 99 A.D.3d 58, 949 N.Y.S.2d 50 (1st Dep't 2012) (Attorney is obligated to know the law relating to the matter for which he is representing a client and it is the attorney's duty, if he lacks knowledge of the statutes, to inform himself; like any artisan, by undertaking the work, the attorney represents that he is capable of performing it in a skillful manner. However, where negligent representation fails to be the proximate cause of damage, plaintiff cannot recover); *Fielding v. Kupferman,* 65 A.D.3d 437, 440, 885 N.Y.S.2d 24 (1st Dep't 2009)c.

6 *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 442 (2007).

7 *Waggoner v. Caruso,* 14 N.Y.3d 874, 903 N.Y.S.2d 333 (2010).

8 *Sun Graphics Corp. v. Levy, Davis & Maher, LLP*, 94 A.D.3d 669, 943 N.Y.S.2d 464 (1st Dep't 2012) (causes of action for breach of contract, breach of fiduciary duty, and negligent misrepresentation are redundant of the legal malpractice claim, since they arise from the same allegations and seek identical relief"); *Gaskin v. Harris,* 98 A.D.3d

A. Standard of Care

In order to prove a legal malpractice claim, a plaintiff must demonstrate that the attorney "failed to exercise that degree of skill commonly exercised by an ordinary member of the

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941, 950 N.Y.S.2d 751 (2nd Dep't 2012) (breach of contract claim duplicative of legal malpractice cause of action) *Waggoner v. Caruso,* 14 N.Y.3d 874, 903 N.Y.S.2d 333 (2010) (Duplicative breach of fiduciary duty claim dismissed notwithstanding failure to plead legal malpractice action); *Tsafatinos v. Lee David Auerbach, P.C.,*80 A.D.3d 749, 915 N.Y.S.2d 500 (2nd Dep't 2011) (Breach of fiduciary duty and breach of contract claims alleging same damages as time-barred legal malpractice claim dismissed); *Leon Petroleum, Inc. v. Carl S. Levine & Associates, P.C.*, 80 A.D.3d 573, 914 N.Y.S.2d 661 (2nd Dep't 2011) (duplicative breach of contract and breach of fiduciary duty claims dismissed), *Turner v. Irving Finkelstein & Meirowitz, LLP*, 61 A.D.3d 849, 879 N.Y.S.2d 145 (2nd Dep't 2009) (To the extent complaint can be construed to assert claims of breach of contract, negligence, or fraud, those causes of action were duplicative of legal malpractice cause of action); *Maoiliniv. McAdams & Fallon, P.C.,* 61 A.D.3d 644, 877 N.Y.S.2d 368 (2nd Dep't 2009) (Breach of contract claim duplicative of deficient legal malpractice claim): *Carl v. Cohen*, 55 A.D.3d 478, 868 N.Y.S.2d 7 (1st Dep't 2008) (fraud claim duplicative of legal malpractice claim); *Ideal Steel Supply Corp. v. Beil,*55 A.D.3d 544, 865 N.Y.S.2d 299 (2nd Dep't 2008) (breach of contract claim duplicative of legal malpractice allegations); *Rivas v. Raymond Schwartzberg & Assoc., PLLC,* 52 A.D.3d 401, 861 N.Y.S.2d 313, 2008 (1st Dep't 2008) (breach of contract action duplicative of legal malpractice claim); *Amodeo v. Kolodny, P.C.,* 35 A.D.3d 773, 828 N.Y.S.2d 446 (2nd Dep't 2006) (breach of contract claim duplicative of legal malpractice claim); *AmBase Corp. v. Davis Polk & Wardwell,* 30 A.D.3d 171, 816 N.Y.S.2d 438 (1st Dep't 2006) *aff'd* 8 N.Y.3d 428, 834 N.Y.S.2d 705 (2007) (breach of fiduciary duty claim duplicative of legal malpractice claim); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.,* 10 A.D.3d 267, 780 N.Y.S.2d 593(1st Dep't. 2004) (breach of fiduciary duty claim duplicative of legal malpractice claim)*; Ferdinand v. Crecca & Blair*, 5 A.D.3d 538, 774 N.Y.S.2d 714 (2nd Dep't 2004) (breach of contract claim duplicative of legal malpractice); *Miszko v. Leeds & Morelli*, 3 A.D.3d 726, 769 N.Y.S.2d 923 (3rd Dep't 2004) (breach of contract claim as plead is dismissed as redundant); *Proskauer Rose, LLP v. Asia Electronics Holding Co.,* 2 A.D.3d 196, 767 N.Y.S.2d 771 (1st Dep't 2003) (breach of fiduciary duty claim duplicative of legal malpractice claim); *Murray Hill Investments, Inc. v. Parker Chapin Flattau & Klimpl, LLP,* 305 A.D.2d 228, 759 N.Y.S.2d 463 (1st Dep't 2003) (breach of fiduciary duty and fraud claims dismissed as duplicative of legal malpractice claims); *Lory v. Parsoff*, 296 A.D.2d 535, 745 N.Y.S.2d 218 (2nd Dep't 2002) (dismissing claims which were duplicative of malpractice claims); *Sage Realty Corporation v. Proskauer Rose LLP*, 251 A.D.2d 35, 675 N.Y.S.2d 14 (1st Dep't 1998) (breach of contract claim is a redundant pleading of the malpractice claim); *Best v. Law Firm of Queller & Fisher*, 278 A.D.2d 441, 718 N.Y.S.2d 397 (2nd Dep't 2000), *cert. den. sub nom. Best v. Sears, Roebuck & Co.,* 534 U.S. 1080, 122 S.Ct. 812, 151 L.Ed.2d 696 (2002) (fraud, breach of contract and indemnity claims duplicative of legal malpractice claim); *Waggoner v. Caruso,* 2008 WL 4274491 (N.Y.Sup.) affirmed by Appellate Division and Court of Appeals (fraud and breach of fiduciary duty claims dismissed as duplicative of legal malpractice claims – court rejected contention that claim for punitive damages due to fraud alleged separate and distinct damages: "Plaintiffs' argument would render the law on duplicativeness meaningless, because malpractice plaintiffs could always simply circumvent the requirement that the claims be independent by asking for punitive damages as part of their fraud claim."); *Tal v. Leber,* 2008 WL 4274490 (N.Y.Sup.) (breach of contract and fraud claims predicated upon same facts as legal malpractice dismissed). *But see, Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP,* 56 A.D.3d 1, 865 N.Y.S.2d 14 (1st Dep't 2008) (Breach of fiduciary duty claim predicated upon firm's alleged actions in helping competing company set not duplicative of legal malpractice claims related to firm's handling of claims as company's counsel); *Morgan, Lewis & Bockius LLP v. IBuyDigital.com, Inc.,*14 Misc.3d 1224(A), 2007 WL 258305 (N.Y. Sup 2007)(Although legal malpractice, breach of fiduciary duty, breach of standard to use due care and partial breach of contract claim dismissed as duplicative, engagement letter specifying named attorney would lead IPO states sufficient breach of contract claim on motion to dismiss); *Becker v. Julien, Blitz & Schlesinger, P.C.*, 66 A.D.2d 674, 411 N.Y.S.2d 17 (1st Dep't 1978). *Contrast, Bixby v. Summerville,*62 A.D.3d 1137, 880 N.Y.S.2d 205 (3rd Dep't 2009), ("Additionally, given that defendant regularly paid the firm for more than a year after the retainer agreement (permitting the law firm to staff the representation appropriately) was executed, while Stiglmeier continued to represent him, we agree with Supreme Court that, by his conduct, defendant waived any objection to the firm's assignment of Stiglmeier to his case.")

legal community."[9] The issue is not whether the attorney could have come up with a better plan or performed differently, but whether the attorney departed from the requisite standard of care.[10]

The New York Pattern Jury Instruction, a source all attorneys should consult on a regular basis no matter what the nature of the claim, presents this summary of standard of care:

> An attorney who undertakes to represent a client impliedly represents that (he, she) possesses a reasonable degree of skill, that (he, she) is familiar with the rules regulating practice in actions of the type which (he, she) undertakes to bring or defend and with such principles of law in relation to such actions as are well settled in the practice of law, and that (he, she) will exercise reasonable care. Reasonable care means that degree of skill commonly used by an ordinary member of the legal profession. However, an attorney is not a guarantor of the result of the case. Moreover, if an attorney points out to the client the nature of the risks involved in a certain course of procedure and the client elects to follow that course, the attorney is not responsible for the consequences.[11]

In most legal malpractice actions, the plaintiff must introduce expert testimony in order to establish the standard of care in the legal profession and to testify as to whether the defendant's acts or omissions negligently deviated from that standard and whether such negligence was the proximate cause of any damages to plaintiff.[12] Plaintiff's failure to meet the burden of presenting expert testimony on professional standard of care warrants a dismissal of plaintiff's claim.[13] Conclusory opinions by experts are insufficient.[14] The failure to produce competent expert testimony as to the elements of the underlying case will also result in dismissal of the malpractice claim.[15]

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9 *Zeitlin v. Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman, Franzblau & Falkin,* 209 A.D.2d 510, 619 N.Y.S.2d 289 (2nd Dep't 1994); *Caires v. Siben & Siben,* 2 A.D.3d 383, 384, 767 N.Y.S.2d 785 (2nd Dep't 2003).

10 *Estate of Nevelson v. Carro, Spanbock, Kaster, & Cuiffo, supra; Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP,* 301 A.D.2d 63, 750 N.Y.S.2d 277 (1st Dep't 2002).

11 NY PJI 2:152.

12 *See, Green v. Payne, Wood and Littlejohn,* 197 A.D.2d 664, 602 N.Y.S.2d 883 (2nd Dep't 1993); *Canavan v. Steenburg*, 170 A.D.2d 858, 566 N.Y.S.2d 960 (3rd Dep't 1991); *Fidler v. Sullivan,* 93 A.D.2d 964, 463 N.Y.S.2d 279, 280 (3rd Dep't 1983).

13 *Orchard Motorcycle Distributors, Inc. v. Morrison Cohen Singer & Weinstein, LLP*,49 A.D.3d 294, 853 N.Y.S.2d 320 (1st Dep't 2008); *Merlin BioMed Asset Management, LLC v. Wolf Block Schorr & Solis-Cohen, LLP ,* 23 A.D.3d 243, 803 N.Y.S.2d 552 (1st Dep't 2005); *Active Operations Corp. v. Lampert,* 115 A.D.2d 452, 495 N.Y.S.2d 689, 690 (2nd Dep't 1985).

14 *Brady v. Bisogno & Meyerson,* 32 A.D.3d 410, 819 N.Y.S.2d 558 (2nd Dep't 2006).

15 *Joseph DelGreco & Co., Inc. v. DLA Piper L.L.P,* 899 F. Supp. 2d 268 (S.D.N.Y. 2012); *Yousian v. Eisenberg, Margolis, Friedman & Moses*, 34 A.D.3d 228, 822 N.Y.S.2d 710 (1st Dep't 2006).

The rare exceptions to this rule are when "the ordinary experience of the fact-finder provides sufficient basis for judging the adequacy of the professional service, or the attorney's conduct falls below any standard of due care."[16]

The expert may not opine on what constitutes legal malpractice, as that is the province of the court. In rejecting the affidavit of plaintiff's counsel as support for the claimed malpractice, the Appellate Division held in *Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*:

> We do not rely on an attorney's affidavits to tell us what constitutes malpractice. Moreover, the affidavit offered here raises an additional concern. It is tinged with the sense that since the affiant would have done things differently, therefore the attorney being challenged was incompetent. Such a contest of strategies is easily reduced to a malpractice standard that impermissibly compares the defendant-attorney's choice of strategies with the afterthoughts later offered by plaintiff's now-favored attorney, for whom bias is a necessary concern, rather than measuring counsel's performance against the much more objective standard of the profession's commonly prevailing practices.[17]

In addition, the testimony of a disbarred attorney may not be used to establish either the standard of care or defendant attorney's departure from the acceptable standard.[18]

Proof of the violation of a Rule of Professional Conduct alone will not sustain a cause of action for legal malpractice.[19] The newly enacted New York Rules of Professional Conduct include express language that states that the rules of conduct were not intended to create a civil

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16 *Greene,* 602 N.Y.S.2d at 885; *O'Shea v. Brennan*, 2004 WL 1118109 at *3-4 (S.D.N.Y 2004); *Momah v. Massena Memorial Hosp.,* 2000 WL 306774 (N.D.N.Y. 2000); *Logalbo v. Plishkin, Rubano & Baum,* 558 N.Y.S.2d 185 (2nd Dep't 1990); *S & D Petroleum Co., Inc. v. Tamsett,* 144 A.D.2d 849, 534 N.Y.S.2d 800, 802 (3rd Dep't 1988); but see *Suppiah v. Kalish*, 76 A.D.3d 829, 907 N.Y.S.2d 199 (1st Dep't 2010) *mot. for lv to app. granted* 1/11/2011 NYLJ 26, (col. 5) ("As this is a motion for summary judgment, the burden rests on the moving party-here, defendant-to establish through expert opinion that he did *not* perform below the ordinary reasonable skill and care possessed by an average member of the legal community . . . Also, defendant was required, on this motion, to establish through an expert's affidavit that even if he did commit malpractice, his actions were not the proximate cause of plaintiff's loss . . . By failing to submit the affidavit of an expert, defendant never shifted the burden to plaintiff." *Note*, although leave to appeal to the Court of Appeals was granted, the case was resolved beforethe further appeal was heard)

17 750 N.Y.S.2d at 282.

18 *Kranis v. Scott*, 178 F.Supp.2d 330, 334 (E.D.N.Y. 2002).

19 *Guiles v. Simser*, 35 A.D.3d 1054, 826 N.Y.S.2d 484 (3rd Dep't 2006) (claim that attorney had sexual relationship with client during the course of matrimonial representation insufficient to sustain legal malpractice action).

action in favor of a litigant.[20] The long-standing decisional law in New York is in accord with the intent of the drafters.[21] In *Tilton v. Trezza*,[22] the court held that introduction of the Code provisions into evidence and reference to the Code sections by plaintiff's expert would not be permitted and the jury would not be charged that Code violations may be used as evidence of malpractice.

A conflict of interest, even if a violation of the Rules of Professional Conduct or its predecessor Code of Professional Responsibility, does not by itself support a legal malpractice cause of action.[23] In *Mills v. Pappas,*[24] the Appellate Division rejected plaintiff-executrix' claim that her former attorneys' representation in a proceeding against her in the same forum, arising out of the same estate, constituted malpractice, holding:

> To the extent that the alleged malpractice is based upon a claimed conflict of interest resulting from the [law] firm proceeding in Surrogate Court against plaintiff, any such conflict is at most a violation of defendants' ethical responsibilities, an insufficient basis for imposing liability in favor of a former client.[25]

Similarly, in *Brainard v. Brown*,[26] the Appellate Division held:

> Finally, the assertion that defendant, by dint of his representation simultaneously of both plaintiff and the excavating concern, breached the duty of loyalty imposed by Canon 5 of the Code of Professional Responsibility and that this gives rise to a cause of action for breach

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20 A complete copy of New York Rules of Professional Conduct, effective April 1, 2009, ["RPC"], issued by the Appellate Divisions, together with the Preamble, Scope and Comments authored by NYSBA are available at nysba.org in a .pdf format which may be downloaded and kept for easy reference. The Scope of the RPC carries over the concept from the prior Code of Professional Liability Code provides: "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."

21 *Shapiro v. McNeill*, 92 N.Y.2d 91, 677 N.Y.S.2d 48 (1998); *Sumo Container Sta. v. Evans, Orr, Pacelli, Norton & Laffan,* 278 A.D.2d 169, 170, 719 N.Y.S.2d 223 (1st Dep't 2000).

22 12 Misc.3d 1152(A), 819 N.Y.S.2d 213 (N.Y. Sup. 2006)

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23 *Schafrann v. N.V. Famka, Inc.,* 14 A.D.3d 363, 787 N.Y.S.2d 315(1st Dep't 2005); *Joyce v. JJF Associates, LLC*, 8 A.D.3d 190, 781 N.Y.S.2d 62 (1st Dep't 2004).

24 *Mills v. Pappas,* 174 A.D.2d 780, 782, 570 N.Y.S.2d 726 (3rd Dep't 1991), *appeal dismissed* 78 N.Y.2d 1121, 578 N.Y.S.2d 874 (1991), *cert. denied* 504 U.S. 971, 112 S.Ct. 2957, 119 L.Ed.2d 579 (1992).

25 570 N.Y.S.2d at 728.

26 91 A.D.2d 287, 458 N.Y.S.2d 735 (3rd Dep't 1983); *See, also, Brown v. Samalin & Bock, P.C.*, 155 A.D.2d 407, 547 N.Y.S.2d 80 (2nd Dep't 1989) ("However, even if the procurement of the release constituted a violation of the Code of Professional Responsibility, as plaintiff claims, it did not, in itself, generate a cause of action which might support an award of punitive damages"); *Weintraub v. Phillips, Nizer, Benjamin, Krim & Ballon*, 172 A.D.2d 254, 568 N.Y.S.2d 84, 85 (1st Dep't 1991).

> of contract, is not well founded. A purported violation of a disciplinary rule does not, in itself, generate a cause of action . . .

While not supporting a cause of action, some of the conduct constituting a violation of a disciplinary rule may also constitute evidence of malpractice.[27] With the added obligations imposed upon attorneys in the new Rules of Professional Conduct, there is a real concern that the standard of the attorney's expected duty to the client with respect to such issues as obtaining the informed consent of the client and communication with the client has risen.

Notwithstanding the express language of the Rules of Professional Conduct and the former Code of Professional Responsibility Preamble and Scope and significant case precedent, in *Tabner v. Drake*,[28] the court held that, at a minimum, a question of fact existed as to whether the attorneys "breached the standards regarding conflicts of interest caused by simultaneous representation as set forth in Code of Professional Responsibility DR 5-105(c)" since the borrower client alleged that the law firm never expressly disclosed its representation of the lender. In addition, where plaintiff wife alleged that defendant attorney engaged in an impermissible dual representation of plaintiff wife passenger and husband driver without informing plaintiff of the risks and resulting in the claim that plaintiff wife lost the ability to recover against owner of vehicle, the court found that a question of fact precluded summary judgment by defendant attorney.[29]

Courts and jurors do not "like" cases where it is alleged an attorney put his or her personal interests over that of a client or where it is claimed that an attorney favored the interests of one client over another. For that reason, it is critical that attorneys rigorously employ the proper procedures for identifying, analyzing and resolving conflicts of interest.[30]

B. Privity

Across the country the "citadel of privity"[31] continues to erode and an increase in claims asserted against attorneys by non-clients is evident. New York remains one of the few states which honors the traditional concept that there must be privity, *i.e.,* a direct attorney-client relationship, in order to state a claim for legal malpractice against an attorney. "The well-established rule in New York with respect to attorney malpractice is that absent fraud, collusion,

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27 *The William Kaufman Organization, Ltd. v. Graham & James*, 269 A.D.2d 171, 703 N.Y.S.2d 439 (1st Dep't 2000); *Swift v. Choe*, 242 A.D.2d 188, 674 N.Y.S.2d 17 (1st Dep't 1998); (a release obtained in violation of a disciplinary rule should not serve to shield a lawyer from liability before the facts and circumstances surrounding the execution of the document are fully examined).

28 9 A.D.3d 606, 780 N.Y.S.2d 85 (3rd Dep't 2004).

29 *LaRusso v. Katz*, 30 A.D.3d 240, 818 N.Y.S.2d 17 (1st Dep't 2006); *see also, Tavarez v. Hill*, 23 Misc.3d 377, 870 N.Y.S.2d 774 (N.Y. Sup. 2009) (court sua sponte stayed defendant's motion for summary judgment on the basis of plaintiffs' attorney's inherent conflict in representing interests of passengers and driver).

30 *See* p. 51, *infra.*

31 *Ultramares v. Touche*, 255 N.Y. 170, 174 N.E. 441(1931).

malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence."[32]

An attorney-client relationship exists when there is an explicit undertaking by the attorney to perform a specific legal task. Although required by court rule, the absence of a written engagement letter is not always determinative[33] – the court looks to the actions of the parties.[34] However, the unilateral belief of an individual is insufficient to establish the existence of an attorney-client relationship.[35]

In the 1992 decision in *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*,[36] the New York Court of Appeals carved out a narrow exception to the privity requirement, finding a basis for liability on the theory of negligent misrepresentation where a third party has a relationship with defendant attorney that is "so close as to approach that of privity." In order to fall within this narrow exception, a litigant must prove "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance."[37]

Notwithstanding the *Prudential* exception, until very recently there were relatively few cases against attorneys in which the claim had been successfully made that the relationship between plaintiff and defendant attorney was "so close as to approach that of privity."[38] Even where

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32 *Council Commerce Corp. v. Schwartz, Sachs & Kamhi,* 144 A.D.2d 422, 534 N.Y.S.2d 1 (2nd Dep't 1988).

33 *Gardner v. Jacon*, 148 A.D.2d 794, 538 N.Y.S.2d 377 (3rd Dep't 1989). However, when plaintiff alleged the existence of a written agreement in opposition to defendants' summary judgment motion but failed to produce a copy on the motion or in response to prior discovery orders, defendants' summary judgment motion will be granted. *Smith v. Cohen*, 24 A.D.3d 183, 806 N.Y.S.2d 29 (1st Dep't 2005).

34 *Wei Cheng Chang v. Pi*, 288 A.D.2d 378, 733 N.Y.S.2d 471 (2nd Dep't 2001).

35 *Carlos v. Lovett & Gould*, 29 A.D.3d 847, 815 N.Y.S.2d 695 (2nd Dep't 2006); *Volpe v. Canfield*, 237 A.D.2d 282, 654 N.Y.S.2d 150 (2nd Dep't 1997) *lv. den*. 90 N.Y.2d 802, 660 N.Y.S.2d 712 (1997); *Jane St. Co. v. Rosenberg & Estis*, 192 A.D.2d 451, 597 N.Y.S.2d 17 (1st Dep't 1993); *but see Bloom v. Hensel*,59 A.D.3d 1026, 872 N.Y.S.2d 776 (4th Dep't 2009) (Plaintiff raised question of fact as to whether attorney-client relationship existed at time of alleged malpractice despite lack of fee-sharing relationship between moving attorney and attorney of record in underlying personal injury action); *Shanley v. Welch*, 31 A.D.3d 1127, 818 N.Y.S.2d 878 (4th Dep't 2006)(court found question of fact existed with respect to existence of attorney client relationship despite concession that defendant attorney did not negotiate separation agreement and despite fact that agreement specified plaintiff had been advised to retain counsel and decided to proceed without representation).

36 80 N.Y.2d 377, 382, 590 N.Y.S.2d 831, 833 (1992).

37 *Id.*, 80 N.Y.2d at 384.

38 *See, State of California Public Employees' Retirement System v. Shearman & Sterling*, 95 N.Y.2d 427, 718 N.Y.S.2d 256, 741 N.E.2d 101 (2000) (relationship demonstrated between assignee and law firm was not "so close as to approach that of privity"); *Bluntt v. O'Connor*, 291 A.D.2d 106, 737 N.Y.S.2d 471 (4th Dep't. 2002) (relationship between law guardian and mother of ward insufficient); *Busino v. Meachem,* 270 A.D.2d 606, 704 N.Y.S.2d 690 (3rd Dep't. 2000) (minority shareholder's relationship to law firm representing corporation insufficient); *Tajan v. Pavia &*

the plaintiff alleges negligent misrepresentation based upon statements contained in an opinion letter, the courts have dismissed claims where the opinion letter contained precisely the information called for in the parties' sale agreement and did not contain a misrepresentation.[39]

The extent to which direct privity remains a necessary element of any legal malpractice claim was recently addressed by the First Department in *Federal Ins. Co. v. North American Specialty Co.*[40] In *Federal Ins. Co.*, plaintiff excess carrier asserted a legal malpractice claim against defendant law firm retained by the primary carrier to represent its insured in a suit alleging that a worker sustained serious personal injuries as a result of a violation of Labor Law §§ 240(1) and 241(6). The excess carrier maintained that it paid $1,000,000 more than it should have towards the settlement of the underlying claim as a result of defendant law firm's failure to raise the prohibition against anti-subrogation as a basis for dismissal of the cross-claim seeking contractual indemnification against the insured. In reversing the trial court and dismissing the legal malpractice claim, the Appellate Division held (i) the allegation that defendant law firm owed a duty to defend in the absence of the allegation of an attorney-client relationship is insufficient to sustain a legal malpractice action; (ii) defendant law firms duty ran only to its client, the insured; (iii) the cause of action seeking damages for the excess carrier individually and not as the subrogee of its insured's rights, Federal could not recover on the theory of equitable subrogation; (iv) the excess insurer did not plead facts sufficient to establish a relationship "so close as to touch the bounds of privity" under *Prudential* which applies only to negligent misrepresentation cases; and (v) the excess carrier could not recover on the theory of equitable subrogation because the insured did not sustain any damage as a result of the alleged malpractice in failing to raise the prohibition against anti-subrogation in response to the cross-claim for contractual indemnification. In reaching this decision, the First Department held:

> Strict adherence to the rule prohibiting legal malpractice claims by non-clients serves an important policy consideration. An attorney's paramount duty is to protect zealously the interests of his or her client, and if that duty is breached and the breach proximately causes injury, the attorney may be subject to a malpractice claim, but only by his or her client. While, concededly, third parties may be interested in the actions by another's attorney and even benefit therefrom, that circumstance does not give rise to a duty on the part of the attorney to the third party. Were it otherwise, the attorney would be faced with the constant burden of weighing all the competing interests attendant upon such diverse obligations to the

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Harcourt, 257 A.D.2d 299, 693 N.Y.S.2d 544 (1st Dep't 1999) (plaintiff failed to establish relationship so close as to approach privity with estate's law firm that wrote opinion letter on validity of artwork).

39 *Mega Group, Inc. v. Pechenik & Curro, P.C.,* 32 A.D.3d 584, 819 N.Y.S.2d 796 (3rd Dep't 2006).

40 47 A.D.3d 52, 847 N.Y.S.2d 7 (1st Dep't 2007).

potential detriment of his or her client, to whom he owes undivided fidelity.[41]

In contrast, in 2004 the same court held that an excess liability insurer that was potentially liable for indemnification in a wrongful death action against an insured site owner brought by the estate of a contractor's employee could, as the insured's equitable subrogee, assert a breach of fiduciary duty claim against the insured's law firm based upon the law firm's failure to commence a third-party contractual indemnification action against the contractor/employer.[42] In addition to relying upon the doctrine of equitable subrogation, the *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.* court specifically held that the excess insurer stated a professional liability cause of action under the "so close as to approach privity" test since it alleged that (i) the attorney was aware that his services were to be used for a specific purpose; (ii) the excess insurer relied upon those services; and (iii) the attorney engaged in some conduct evincing an understanding of the excess insurer's reliance. As a result, the First Department reinstated the excess carrier's complaint against defendant law firm even though the complaint did not assert the existence of a negligent misrepresentation. Notwithstanding this decision, the *Federal Ins. Co*. decision appears to indicate that the courts do not intend to utilize the *Allianz* decision to expand the application of the *Prudential* test.

However, in *Benedict v. Whitman Breed Abbott & Morgan*,[43] the Appellate Division affirmed the trial court's denial of the defendant attorneys' motion to dismiss, holding that a partner in a partnership represented by the defendant law firm had standing to maintain claims for legal malpractice where it was alleged that another equal partner participated in some wrongdoing with the law firm.

At the present time in New York, the attorney for the decedent is not liable to either the beneficiary or the estate itself.[44] The "will drafting" cases decided in New York since the *Prudential* "so close as to approach privity" test was established confirm that the *Prudential* holding will not be applied to extend the scope of an attorney's liability to will beneficiaries. In *Conti v. Polizzotto*,[45] the Appellate Division rejected plaintiff will beneficiary's claim that the payment of the

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41 *Id*., at *5. *But see, Kumar v. American Transit Ins. Co.,* 49 A.D.3d 1353, 854 N.Y.S.2d 274 (4th Dep't 2008) (third party action against insured's attorneys by primary carrier permitted under the theory of equitable subrogation notwithstanding insurer's failure to pay sum on behalf of insured).

42 13 A.D.3d 172, 787 N.Y.S.2d 15 (1st Dep't 2004).

43 282 A.D.2d 416, 722 N.Y.S.2d 586 (2d Dep't. 2001).

44 *See*, *Spivey v. Pulley*, 138 A.D.2d 563, 526 N.Y.S.2d 145 (2nd Dept. 1988) (legal malpractice action brought against decedent's attorney on behalf of the estate of the decedent dismissed on the grounds that there existed no privity between the estate and the attorney and "that the decedent's estate possesses no cause of action against the defendant in its own right"); *see also, Deeb v. Johnson*, 170 A.D.2d 865, 566 N.Y.S.2d 688 (3rd Dept. 1991) ("the courts of this State have not departed from the privity requirement in will-drafting cases, whether brought by intended beneficiaries or the estate itself").

45 243 A.D.2d 672, 663 N.Y.S.2d 293 (2nd Dep't 1997).

fees for services rendered by defendant attorney to the decedent was sufficient to establish the existence of privity and held:

> Plaintiffs' status as beneficiaries of that will, and their mere claim that they instructed the defendants to draft the instrument in accordance with the decedent's expressed intentions, fail to suggest the existence between the parties of the type of relationship necessary to sustain this action.

In *Goldfarb v. Schwartz*[46] and *Rovello v. Klein*,[47] the Second Department confirmed that the plaintiff will beneficiaries may not maintain a claim against the attorney retained to represent the estate. In *Matter of Pascale*,[48] the court recognized the test set forth in *Prudential* but nevertheless held that "[t]he privity requirement would be rendered meaningless if it could be circumvented by the simple device of having a fiduciary appointed for the estate of the deceased client who would then commence the proceeding against the attorney on behalf of all, or some, of the beneficiaries of the estate." Similarly, an attorney retained by the trustor to create a trust is not in privity with the trust beneficiaries.[49]

In 2010, the Court of Appeals did carve out an exception to the strict privity rule involve estate planning activities. However the decision in *Estate of Schneider v. Finmann*[50] makes it abundantly clear that while the personal representative of an estate may maintain a legal malpractice action against an attorney for negligent estate planning services rendered to the decedent that increased estate tax liability, New York continues to prohibit suits by beneficiaries – even intended beneficiaries - against the decedent's counsel. Although the Estate of Schneider decision was trumpeted as presenting significantly more exposure to trust and estate attorneys, in reality it only leveled the playing field and allowed the estate of a former client to sue an attorney for errors that caused increased tax liability to the estate. Furthermore, the Estate of Schneider decision plainly held that the exception would be construed narrowly and subsequent attempts to expand liability to beneficiaries has been rejected.[51]

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46 26 A.D.3d 462, 811 N.Y.S.2d 414 (2nd Dep't 2006).

47 304 A.D.2d 638, 757 N.Y.S.2d 496 (2nd Dep't 2003) *lv. to app. den.* 100 N.Y.2d 509, 798 N.E.2d 347, 766 N.Y.S.2d 163 (2003).

48 168 Misc.2d. 891, 644 N.Y.S.2d 887 (Surr. Ct., Bx. Cty. 1996).

49 *Fredriksen v. Fredriksen*, 30 A.D.3d 370, 817 N.Y.S.2d 320 (2nd Dep't 2006).

50 15 N.Y.3d 306, 907 N.Y.S.2d 109 (2010).

51 *Leff v. Fulbright & Jaworski, LLP,* 78 A.D.3d 531, 911 N.Y.S.2d 320 (1st Dep't 2010) (Although lawfirm represented wife in her own estate planning, wife could not recover for advice rendered to late husband in his estate planning since there was no prvity and plaintiff could not establish that there was a relationship so close as to approach the functional equivalent of privity since there was no evidence that law firms' advice to husband was aimed at affecting plaintiff's conduct or inducing her to act).

Notwithstanding the continued requirement of privity by the New York courts in suits filed by beneficiaries, it is noted that across the country there has been a substantial eroding of the strict privity requirement in these types of cases.[52]

May a plaintiff maintain a cause of action against trial counsel retained by the attorney of record notwithstanding the absence of privity between trial counsel and plaintiff? One treatise answers this question in the negative:

> When the nature of the relationship of the attorney to the plaintiff is that of an 'of counsel' or 'trial counsel' relationship to the attorney of record, neither the plaintiff nor the 'of counsel' attorney has any direct right of action against the other, as there is no privity.[53]

In *Hirsch v. Weisman*,[54] the court found that there was no privity of contract between the plaintiffs and an attorney who was of counsel to the attorney they retained holding:

> Here, there was no contractual relationship between plaintiffs and the Bondy defendants. Plaintiffs were in privity only with Weisman, their retained counsel. At best, the Bondy defendants had an "of counsel" relationship with plaintiffs. Historically, such a relationship has been held not to provide a basis for recovery by the retained trial counsel directly from the client (*Levy v. Jacobs,* 3 Misc.2d 994, 148 N.Y.S.2d 507), even where the client may ultimately have benefited from the services performed (*Kiser v. Bailey,* 92 Misc.2d 435, 400 N.Y.S.2d 312; *Grennan v. Well Built Sales,* 35 Misc.2d 905, 907, 231 N.Y.S.2d 625). The lack of privity runs both ways, and without showing knowledge of the contractual agreement between [the attorney of record] and [trial counsel], plaintiffs cannot be considered third-party beneficiaries of that arrangement.[55]

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52 *Harrigfeld v. Hancock*, 90 P.3d 884 (Id. 2004); *Borissoff v. Taylor & Faust,* 33 Cal.4th 523, 93 P.3d 337 (Sup. Ct. CA 2004); *Caba v. Barker*, 93 P.3d 74, 193 Or.App. 798 (Ct. App. 2004); *Stanley L. and Carolyn M. Watkins Trust v. Lacosta,* 92 P.3d 620 (Mont. 2004); *Sorkowitz v. Lakritz, Wissburn & Associates*, 261 Mich.App. 642, 683 N.W.2d 210 (2004); *Lucas v. Hamm,* 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685 (1961) (multi-factor balancing approach); *Pelham v. Griesheimer,* 92 Ill.2d 13, 64 Ill.Dec. 544, 440 N.E.2d 96, 99-100 (1982) (third party beneficiary analysis). *Trask v. Butler,* 123 Wash.2d 835, 872 P.2d 1080 (1994) (combination of multi-factor balancing test and the third party liability test).

53 15 N.Y. Practice, N.Y. Law of Torts, §13.32 (2001).

54 189 A.D.2d 643, 592 N.Y.S.2d 337 (1st Dept. 1993), *appeal dismissed,* 81 N.Y.2d 1067, 601 N.Y.S.2d 584 (1993).

55 592 N.Y.S.2d at 338.

Similarly, in *Vogel v. Lyman*, [56] the court dismissed legal malpractice claims asserted by plaintiff against an associate working for the attorney holding that since the associate did not commence employment with the attorney of record until after the attorney was retained, there was no privity between plaintiff and the associate.[57]

In New York, an attorney may limit the scope of the engagement by careful drafting of an engagement letter.[58]

C. Proximate Cause – the 'But For' Burden of Proof

In New York, a plaintiff must prove that 'but for' the negligence of the attorney, plaintiff would have recovered or would not have sustained damage in the underlying case.[59] A complaint failing to allege a prima facie case of legal malpractice must be dismissed.[60] The courts note that the burden is a "heavy one"[61] and requirement presents a "high bar to attorney malpractice liability."[62]

To establish the elements of proximate cause and actual damages, where the injury is the value of the claim lost, the client must meet the "case within a case" requirement, demonstrating that 'but for' the attorney's conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages. [63] If a litigant is unable to prove the elements

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56 246 A.D.2d 422, 668 N.Y.S.2d 162 (1st Dep't 1998).

57 668 N.Y.S.2d at 163.

58 *Weissman v. Kessler*, 78 A.D.3d 465, 912 N.Y.S.2d 25 (1st Dep't 2010).(retainer agreement's express waiver relieved attorney from any liability for events occurring in client's underlying divorce matter prior to attorney's engagement); *Turner v. Irving Finkelstein & Meirowitz, LLP*, 61 A.D.3d 849, 879 N.Y.S.2d 145 (2nd Dep't 2009) (Retainer agreement clearly stated that law firm's representation of client in workers' compensation action was limited to proceedings before Workers' Compensation Board, and thus firm could not be liable for legal malpractice relating to its alleged failure to advise client of "other legal remedies" relating to workplace incident after client was denied full Board review); *See, also,* RPC § 1.2(c) (A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and /or opposing counsel).

59 *Leder v. Spiegel*, 9 N.Y.3d 836, 840 N.Y.S.2d 888 (2007); *Am-Base Corp. v. Davis Polk & Wardwell,* 8 N.Y.3d 428, 434, 834 N.Y.S.2d 705 (2007).

60 *Leder, supra*, 9 N.Y.3d at 837.

61 *Nazario v. Fortunato & Fortunato, PLLC,* 32 A.D.3d 692, 822 N.Y.S.2d 236 (1st Dep't 2006).

62 *See Littman Krooks Roth & Ball, P.C. v. New Jersey Sports Productions, Inc.*, No. 00 Civ. 9419, 2001 WL 963949, at *3 (S.D.N.Y., Aug. 22, 2001).

63 *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.,* 10 A.D.3d 267, 780 N.Y.S.2d 593 (1st Dep't 2004); *Davis v. Klein,* 88 N.Y.2d 1008, 1009 (1996); *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo, supra* at 284, 686 N.Y.S.2d 404; *Reibman v. Senie*, 302 A.D.2d 190, 756 N.Y.S.2d 164 (1st Dep't. 2003); *Zarin v. Reid & Priest*, 184 A.D.2d 285, 386, 585 N.Y.S.2d 379 (1st Dep't. 1992); *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180, 710 N.Y.S.2d 578 (1st Dep't. 2000).

of the underlying claim, they cannot prevail on a summary judgment motion against the attorney[64] or successfully defend a summary judgment motion by the attorney.[65] As a result, even where the court has previously found that defendant attorney failed to preserve an objection to a jury charge in an underlying medical malpractice case, a subsequent legal malpractice case will be dismissed where plaintiff did not set forth the requisite factual allegations demonstrating that "but for" the failure alleged, there would have been a more favorable outcome in the underlying proceeding.[66] Even where an attorney was admittedly negligent, plaintiff may not recover unless plaintiff proves that 'but for' the negligent advice, plaintiff would not have been suffered damage.[67] As a result, even where the court found an attorney was negligent in a Section 1031 like-kind exchange by allowing the funds from the sale of the relinquished property to be paid directly to the client instead of an intermediary, the client's failure to designate replacement property and the ability to fund acquisition warrants dismissal of the complaint.[68]

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64 *Rodriguez v. Killerlane,* 44 A.D.3d 420, 843 N.Y.S.2d 69 (1st Dep't 2007). In reversing the trial court's award of summary judgment against attorney who failed to move for a default judgment against defendant within one year, the Appellate Division held:

> "[T]he effect of [defendant's] oversight [to move for entry of a default judgment within one year of the default] was, as best, ethereal--that which impressed Judge Cardozo as merely 'negligence in the air'--and cannot overcome the lack of merit in the underlying action.... [T]he 'but for' rule ... continues to control [in this CPLR 3215(c) context].... Any evaluation of the potential stability of a default judgment, had one been entered herein, would require impermissible speculation." *Tanel v. Kreitzer & Vogelman*, 293 A.D.2d 420 (1st Dep't 2002) (internal citations omitted). The only proof of the owners' liability presented by plaintiff was defendant's initial assessment of the merits and value of plaintiff's case against the owners, expressions of optimism that are insufficient to establish the merits of the underlying action.

See also, Jampolskaya v. Victor Gomelsky, P.C., 36 A.D.3d 761, 828 N.Y.S.2d 527 (2nd Dep't 2007).

65 *Oberkich v. Charles G. Eichinge*r, P.C., 35 A.D.3d 558, 827 N.Y.S.2d 192 (2nd Dep't 2006)(notwithstanding the fact that failure to obtain default within four years was malpractice, law firm entitled to summary judgment where plaintiff doe not allege delay in obtaining default made judgment unenforceable); *Gumbs v. Friedman & Simon,* 35 A.D.3d 362, 828 N.Y.S.2d 103 (2nd Dep't 2006) (plaintiff's inability to demonstrate City created condition by improper snow removal efforts warrant dismissal of malpractice claim despite failure to timely commence claim against City); *Nazario v. Fortunato & Fortunato, PLLC*, 32 A.D.3d 692, 822 N.Y.S.2d 236 (1st Dep't 2006) (failure to counter defendant attorney's demonstration that plaintiff did not sustain "serious injury" in underlying motor vehicle accident warrants dismissal of malpractice claim); *Billis v. Dinkes & Schwitzer*, 30 A.D.3d 260, 817 N.Y.S.2d 257 (1st Dep't 2006).

66 *Ellsworth v. Foley*, 24 A.D.3d 1239, 805 N.Y.S.2d 899 (4th Dep't 2005); *see also, Tortura v. Sullivan, Papain, Block, McGrath & Cannavo, P.C.*, 21 A.D.3d 1082, 803 N.Y.S.2d 571 (2nd Dep't 2005).

67 "[T]he failure to demonstrate proximate cause requires dismissal of a legal malpractice action regardless of whether the attorney was negligent" *Markowitz v. Kurzman Eisenberg Corbin Lever & Goodman, LLP,* 82 AD3d 719, 719 (2nd Dep't 2011); *G & M Realty, L.P. v. Masyr*, 96 A.D.3d 689, 948 N.Y.S.2d 256

68 *Wo Yee Hing Realty Corp. v. Stern*, 99 A.D.3d 58, 949 N.Y.S.2d 50 (1st Dep't 2012).

Referring again to the Pattern Jury Instructions, the need to be able to demonstrate a right to prevail in the underlying action is summarized as follows:

> Even though you find that defendant was negligent in failing to bring an action against T.P. on plaintiff's behalf, plaintiff may not recover in this action unless you further find that plaintiff would have been successful in an action against T.P. had one been brought. In order to decide the latter question, you must, in effect, decide a lawsuit within a lawsuit. Therefore, in order for the plaintiff to succeed, you would have to decide that on the evidence presented in this case plaintiff would have been successful in (his, her) action against T.P. had one been brought. If you find that on the evidence plaintiff would not have been successful, then you will find for defendant on this issue.
>
> In such an action *[insert rules that would govern burden of proof and substantive law in the action against T.P.]*.[69]

In *Weil, Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc*.,[70] the First Department rejected defendant's effort to assert a breach of fiduciary duty counterclaim in an effort to avoid the strict 'but for' causation:

> We take this occasion to note that the court erred in holding that the 'but for' standard of causation, applicable to a legal malpractice claim, does not apply to the claim for breach of fiduciary duty. Instead, it applied the less rigorous "substantial factor" causative standard. We have never differentiated between the standard of causation requested for a claim of legal malpractice and one for breach of fiduciary duty in the context of attorney liability. The claims are co-extensive.

As the *Weil, Gotshal* decision makes evident, the 'but for' requirement has been strictly adhered to by the appellate courts.[71]

However, in *Barnett v. Schwartz*,[72] the Second Department affirmed the trial courts refusal to charge the jury that plaintiff was required to prove that 'but for' defendant attorney's

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69 NY PJI 2:252.

70 10 A.D.3d 267, 780 N.Y.S.2d 593 (1st Dep't. 2004).

71 *See,e.g., Pistilli v. Gandin*, 10 A.D.3d 353, 780 N.Y.S.2d 293 (2d Dep't. 2004); *Lyons v. Gandin, Schotsky, Rappaport, Glass & Greene, LLP*, 8 A.D.3d 347, 777 N.Y.S.2d 912 (2d Dep't. 2004); *Iocovello v. Weingrad & Weingrad*, LLP, 4 A.D.3d 208, 772 N.Y.S.2d 53 (1st Dep't. 2004); *Ferdinand v. Crecca & Blair*, 5 A.D.3d 538, 774 N.Y.S.2d 714 (2d Dep't. 2004), *lv. to app. den.*, 3 N.Y.2d 609 (2004).

72 47 A.D.3d 197, 848 N.Y.S.2d 663 (2nd Dep't 2007).

alleged malpractice, plaintiff would not have sustained the damages alleged. The cases following *Barnett* do not support any lessening in the burden of proof required to prevail on a legal malpractice claim.[73]

In cases where a successor counsel had sufficient time to protect a party's rights, the outgoing counsel could not be liable for malpractice.[74] Any alleged negligence by an outgoing attorney cannot be the proximate cause of any of plaintiffs' alleged damages. As a result, a litigant cannot sustain the 'but for' burden against an attorney based upon the negligent failure to timely sue where successor counsel had the opportunity to bring suit in a timely fashion[75] or a statutory opportunity afforded successor counsel to revive a dismissed claim despite expiration of the Statute of Limitations [76]

A partner is ordinarily individually liable for the tortious conduct of another member or employee of the firm only if such conduct occurred while that partner was a member of the firm.[77] As a result, where the negligence occurs after the withdrawal of a partner from a law firm, the individual partner will be dismissed.[78]

D. Damages

In order to state a claim for legal malpractice, a plaintiff must have sustained "actual and ascertainable damages."[79] In the absence of actual damages sustained by plaintiff, a legal

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73 *See Joseph DelGreco & Co., Inc. v. DLA Piper L.L.P,* 899 F. Supp. 2d 268 (S.D.N.Y. 2012) (declining to follow the language of *Barnett)*; *But see, Smartix Intern. Corp. v. Garrubbo, Romankow & Capese, P.C.*, 2009 WL 857467 (S.D.N.Y.). Citing *Barnett*, the Southern District held: "With respect to causation, the possibility that the sanctions hearing also resulted from the failure of attorneys who are not defendants in this case to attend the court-ordered mediation does not preclude the possibility of establishing proximate cause, because it is not necessary to demonstrate sole causation in order to demonstrate proximate or but-for causation."

74 *Somma v. Dansker & Aspromonte Associates*, 44 A.D.3d 376, 843 N.Y.S.2d 577 (1st Dep't 2007); *Ramcharan v. Pariser,* 20 A.D.3d 556 (2nd Dep't 2005); *Perks v. Lauto & Garabedian,* 306 A.D.2d 261 (2nd Dep't 2003); *Albin v. Pearson,* 289 A.D.2d 272 (2nd Dep't 2001); *Richardson v. Lindenbaum & Young*, 2007 WL 316354 (N.Y. Sup. 2007); *DiBenedetto v. Hadziyianis*, 13 Misc.3d 1231(A), 2006 WL 3069284 (N.Y. Sup. 2006); 13 Misc.3d 1232(A), 2006 WL 3113181 (N.Y. Sup. 2006). The converse of this principle is similarly true. Where the malpractice occurred before successor counsel was retained, a legal malpractice claim against successor counsel will be dismissed. *Rivas v. Raymond Schwartzberg & Assoc., PLLC*, 52 A.D.3d 401, 861 N.Y.S.2d 313, 2008 (1st Dep't 2008).

75 *Artese v. Pollack*, 2 Misc.3d 1008; 784 N.Y.S.2d 918 (Sup. Ct. Nass. Co. 2004); *Golden v. Cascione, Chechanover & Purcigliotti,* 286 A.D.2d 281, 729 N.Y.S.2d 140 (1st Dep't 2001); *Greenwich v. Markoff,* 234 A.D.2d 112, 650 N.Y.S.2d 704 (1st Dep't 1996); *Shertov v. Capoccia,* 161 A.D.2d 871, 555 N.Y.S.2d 918 (3rd Dep't 1990).

76 *Kozmol v. Rothenberg,* 241 A.D.2d 484, 660 N.Y.S.2d 63 (2d Dept, 1997).

77 *See* Partnership Law § § 24, 26[a][1]; *Green v. Conciatori,* 26 AD3d 410, 411, 809 N.Y.S.2d 559 (2nd Dep't 2006); *Watkins v. Fromm,* 108 A.D.2d 233, 241-242, 488 N.Y.S.2d 768 (2nd Dep't 1985); *Gorton v. Fellner,* 88 A.D.2d 742, 451 N.Y.S.2d 873 (3rd Dep't 1982).

78 *Wright v. Shapiro*, 37 A.D.3d 1181, 830 N.Y.S.2d 627 (4th Dep't 2007).

79 *Ehlinger v. Ruberti, Girvin & Ferlazzo,* 304 A.D.2d 925, 926, 758 N.Y.S.2d 195 (3rd Dep't 2003), quoting

malpractice claim must be dismissed.[80] "Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a *prima facie* case of legal malpractice."[81] Where defendant attorney is able to demonstrate that his efforts on plaintiff's behalf resulted in an increase in the value of plaintiff's asset, as well as a savings in excess of the damages allegedly caused by the attorney's representation, the legal malpractice complaint will be dismissed.[82]

1. Punitive Damages

As with any other tort, in order to recover punitive damages in the context of a legal malpractice case, plaintiff must allege facts demonstrating that defendants' conduct "was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply criminal indifference to civil obligations."[83] The failure to plead and, ultimately, prove this level of conduct warrants a dismissal of any claim for punitive damages.[84]

On a related front, New York courts hold that in a legal malpractice suit, "it would be 'illogical' to hold the law firm liable for causing the loss of a claim for punitive damages which are meant to punish the wrongdoer and deter future similar conduct."[85] Since punitive damages against an attorney will not punish or deter the underlying wrongdoer, it is not a recoverable item of damages in a legal malpractice suit.

Businо v. Meachem, 270 A.D.2d 606, 609, 704 N.Y.S.2d 690 (3rd Dep't 2000); *Brooklyn Law School v. Great Northern Insurance Co.,* 283 A.D.2d 383, 723 N.Y.S.2d 861 (2nd Dep't 2001).

80 *Miszko v. Leeds & Morelli*, 3 A.D.3d 726, 769 N.Y.S.2d 923 (3rd Dep't 2004).

81 *Giambrone v. Bank of New York,* 253 A.D.2d 786, 677 N.Y.S.2d 608 (2nd Dep't 1998); *Plymouth Organization, Inc. v. Silverman, Collura & Chernis, P.C.,* 21 A.D.3d 464, 799 N.Y.S.2d 813 (2nd Dep't 2005); *Albanese v. Hametz,* 4 A.D.3d 379, 771 N.Y.S.2d 393 (2nd Dep't 2004).

82 *Vlahakis v. Mendelson & Associates*, 54 A.D.3d 670, 863 N.Y.S.2d 479 (2nd Dep't 2008).

83 *Long v. Cellino & Barnes, P.C.*, 59 A.D.3d 1062, 873 N.Y.S.2d 805 (4th Dep't 2009); *Williams v. Coppola*, 23 A.D.2d 1012, 804 N.Y.S.2d 172 (4th Dep't 2005); *Zarin v. Reid & Priest,* 184 A.D.2d 385, 388, 585 N.Y.S.2d 379 (1st Dep't 1992); *Rucker v. Sayegh*, 35 A.D.3d 706, 824 N.Y.S.2d 913 (2nd Dep't 2006)(motion to amend pleading to assert punitive damage claim against attorney denied).

84 *Robinson v. Way*, 57 A.D.3d 872, 871 N.Y.S.2d 233 (2nd Dep't 2008) (jury award of $100,000 punitive damages against attorney defendant reversed in light of absence of evidence demonstrating that the defendants' "conduct was so outrageous as to evince a high degree of moral turpitude ... showing such wanton dishonesty as to imply a criminal indifference to civil obligations"; *Rosenkrantz v. Steinberg,* 13 A.D.3d 88, 786 N.Y.S.2d 35 (1st Dep't 2004); *Kaiser v. VanHouten*, 12 A.D.3d 1012, 785 N.Y.S.2d 569 (3rd Dep't 2004).

85 *Summerville v. Lipsig,* 270 A.D.2d 213, 704 N.Y.S.2d 598 (1st Dep't. 2000) citing *Cappetta v. Lippman*, 913 F.Supp.302, 306 (S.D.N.Y. 1996); *Braun v. Rosenblum*, 25 A.D.3d 696, 811 N.Y.S.2d 683 (2nd Dep't 2006).

2. Collectibility

In New York, the plaintiff must have been able to collect the underlying judgment against the original tort-feasor before there can be recovery against an attorney in a subsequent legal malpractice action as a result of the loss of the underlying claim.[86]

One might argue that there is an open issue as to whose burden it is to plead and prove that the underlying judgment would or would not have been collectible against the original tort-feasor. At present, the law in three of the four Appellate Departments is that the plaintiff must plead and, ultimately, prove that the underlying judgment would have been collectible against the original tort-feasor.[87] As a result, the overwhelming body of law in New York presently holds that the collectibility of any damage award is an element of a legal malpractice case which must be proven by the plaintiff.

However, in 2004, the First Department in *Lindenman v. Kreitzer*,[88] departed from a long line of established cases and held that, in the context of a legal malpractice suit, it is the defendant attorney's burden to prove that the plaintiff would not be able to collect an award in the underlying case. The decision went so far as to suggest that the time period over which collectibility should be determined is something short of the ten year initial period in which a New York judgment is viable and "should be one that effects a fair balance between the rights of, and burdens on, both the client and the attorney who negligently conducts litigation on the client's behalf." In the 2005 decision in *Jedlicka v. Field*,[89] the Second Department refused to follow the First Department's lead.

Given the split in the Departments, it is possible that the issue will come before the Court of Appeals. In the interim, in the First Department at least, the affirmative defense should be raised in the answer and discovery should be geared towards the possibility that uncollectibility may be part of the defendant attorney's burden of proof.

3. Non-Pecuniary Damages

In New York, non-pecuniary damages are not recoverable in a legal malpractice case.[90] As a result, damages for "loss of liberty,"[91] personal injury or emotional distress flowing

86 *Williams v. Kublick*, 41 A.D.3d 1193, 837 N.Y.S.2d 803 (4th Dep't 2007) ("A necessary element of a cause of action for legal malpractice is the collectibility of the damages in the underlying action.").

87 *See, Jedlicka v. Field*, 14 A.D.3d 596, 787 N.Y.S.2d 888 (2nd Dep't 2005); *McKenna v. Forsyth & Forsyth*, 280 A.D.2d 79, 720 N.Y.S.2d 654 (4th Dep't. 2001), *lv. to app. den.* 96 N.Y.2d 720, 733 N.Y.S.2d 372 (2001); *Chiaffi v. Wexler, Bergerman & Crucet*, 116 A.D.2d 614, 615, 497 N.Y.S.2d 703 (2d Dep't. 1986); *Schweizer v. Mulvehill*, 93 F.Supp.2d 376, 396 (S.D.N.Y. 2000); *Reynolds v. Picciano*, 29 A.D.2d 1012, 289 N.Y.S.2d 436 (3d Dep't. 1968).

88 7 A.D.3d 30, 775 N.Y.S.2d 4 (1st Dep't. 2004).

89 14 A.D.3d 596, 787 N.Y.S.2d 888 (2nd Dep't 2005).

90 *Dombrowski v. Bulson,* 19 N.Y.3d 347 (2012).

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from the claimed malpractice of an attorney are not permitted.[92] Efforts to couch such a cause of action by alleging intentional infliction of emotional harm are equally unsuccessful.[93]

4. Attorney Fees

Absent the existence of a statute authorizing an award of attorney's fees in the event of a successful recovery, attorney fees may not be recovered as an item of damages.[94]

While the attorney fees incurred in the prosecution of a legal malpractice claim are not recoverable as damages, a claim may be asserted for the recovery of attorneys' fees as damages in a legal malpractice claim if the fees were reasonably incurred in retaining alternate counsel to perform services for which a defendant attorney was originally retained and paid or to make a reasonable attempt to cure the error caused by the attorney's negligent conduct.[95]

5. Damages Based Upon Allegedly Erroneous Tax Advice

In the context of a malpractice case, where plaintiff alleges tax advice was negligently rendered, the failure of the IRS to disallow is a defense since, in the absence of a disallowance, no damage has been sustained.[96] Clearly, the taxes owed by plaintiff are not a recoverable item of damages.[97] Furthermore, interest imposed by the taxing authority as a result of taxes not timely paid is not an item of damages in a suit against counsel since the interest represents the benefit plaintiff had of using the tax money during the period of time the taxes were not paid.[98]

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92 *Kaiser v. VanHouten*, 12 A.D.3d 1012, 785 N.Y.S.2d 569 (3rd Dep't 2004); *Guiles v. Simser*, 35 A.D.3d 1054, 826 N.Y.S.2d 484 (3rd Dep't 2006); *Salichis v. Tortorelli*, 2004 WL 602784 *4 (S.D.N.Y. 2004); *Epifano v. Schwartz*, 279 A.D.2d 501, 719 N.Y.S.2d 268 (2d Dep't 2001); *Kaiser v. Van Houten*, 2003 WL 22137465 (N.Y. Sup. 2003); *Risman v. Leader,* 256 A.D.2d 1245, 683 N.Y.S.2d 462 (4th Dep't 1998); *Dirito v. Stanley*, 203 A.D.2d 903, 611 N.Y.S.2d 65 (4th Dep't 1994); *Green v. Leibowitz*, 118 A.D.2d 756, 500 N.Y.S.2d 146 (2d Dep't 1986).

93 *Id.*

94 *Hunt v. Sharp*, 85 N.Y.2d 883, 626 N.Y.S.2d 57 (1995) "Under the 'American rule,' to which this State adheres (*see, e.g., Chapel v. Mitchell,* 84 N.Y.2d 345, 618 N.Y.S.2d 626, 642 N.E.2d 1082), the prevailing litigant ordinarily cannot collect its reasonable attorneys' fees from its unsuccessful opponents."

95 *Lory v. Parsoff*, 296 A.D.2d 535, 745 N.Y.S.2d 218 (2nd Dep't 2002); *Affiliated Credit Adjustors v. Carlucci & Legum*, 139 A.D.2d 611, 527 N.Y.S.2d 426 (2nd Dep't 1988). This premise is based upon the exception to the general rule that attorney fees are not recoverable as set forth in *Shindler v. Lamb*, 25 Misc.2d 810, 812, 211 N.Y.S.2d 762, aff'd 10 A.D.2d 826, 200 N.Y.S.2d 346 (1st Dep't 1960), aff'd 9 N.Y.2d 621, 210 N.Y.S.2d 226 (1961). The *Shindler* exception states as follows: "If, through the wrongful act of his present adversary, a person is involved in earlier litigation with a third person in bringing or defending an action to protect his interests, he is entitled to recover the reasonable value of attorneys' fees and other expenses thereby suffered or incurred. . ."

96 *Zwecker v. Kuhlberg*, 209 A.D.2d 514, 618 N.Y.S.2d 840 (2nd Dep't 1994).

97 *Shalam v. KPMG, LLP*, 43 A.D.3d 752, 843 N.Y.S.2d 17 (1st Dep't 2007).

98 *Nevelson v. Carro, Spanbock, Kaster & Cuiffo,* 259 A.D.2d 282, 686 N.Y.S.2d 404 (1st Dep't 1999); *Alpert v. Shea, Gould, Climenko & Casey*, 160 A.D.2d 67, 559 N.Y.S.2d 312, 315 (1st Dep't 1990). *But see, Jamie Towers*

II. DEFENSES

In addition to the strict elements of a legal malpractice case which must be proven before recovery is allowed, the defenses to a legal malpractice action also provide several bases for dismissal.

A. Statute of Limitations

In New York, the statute of limitations for a claim asserted against an attorney is three years "regardless of whether the underlying theory is based in contract or tort."[99] Earlier efforts by the judiciary to enlarge the period to six years based upon a contract theory[100] were soundly rebuffed by the Legislature in the *Justification* which accompanied passage of the 1996 amendment to the CPLR which characterized the judicial expansion of the limitations period as "abrogating and circumventing the original legislative intent."

Notwithstanding the clear legislative intent that the claim against a non-medical professional be subject to a three year period of limitations, following the 1996 amendment there was some speculation that the courts would revert to the six year contract limitations period where the plaintiff alleged an attorney had contracted for and did not provide a "specific result." In fact, in its decision in *Chase Scientific Research, Inc. v. NIA Group, Inc.,*[101] the court acknowledged that

> [The 1996 amendment] was intended not only to remediate the *Sears* line of cases but also to reduce potential liability of insurers and corresponding malpractice premiums, and to restore a reasonable symmetry to the period in which all professionals would remain exposed to a malpractice suit.

Despite this acknowledgment that the court had over-stepped its bounds in expanding the period of limitations, the *Chase Scientific* court continued to recognize that a malpractice claim could "theoretically also rest on breach of contract to obtain a particular bargained-for result."[102]

Housing Co., Inc. v. William B. Lucas, Inc., 296 A.D.2d 359, 745 N.Y.S.2d 532 (1st Dep't 2002).

99 N.Y. Civ. Proc & R. § 214(6).

100 In *Santulli v. Englert, Reilly & McHugh, P.C.*, 78 N.Y.2d 700, 579 N.Y.S.2d 324 (1992), the court held:

> A cause of action for breach of contract may be based upon a promise to exercise due care in performing the services required by the contract.
>
> . . .
>
> Turning then to the legal malpractice cause of action, we reject, as did the Appellate Division, defendant's argument that the three-year Statute of Limitations provided in CPLR 214(6) applies . . .

101 96 N.Y.2d 20, 27 (2001).

102 96 N.Y.2d at 25.

In *R. M. Kliment v. McKinsey & Co*.,[103] however, the court held that even where an express breach of a contractual provision, bargained-for by the parties, is alleged, the claim will be subject to a three year period of limitations.

In *Kliment*, petitioner architect sought a permanent stay of McKinsey's demand for arbitration which alleged, four years after the completion of construction, that Kliment breached the parties' agreement by failing to provide a fire protection system. The agreement provided that Kliment was to comply with "all laws, codes, ordinances and other requirements applicable to the Project (including, without limitation, the relevant building code, the requirements of the local board of fire underwriters or similar body, and any permits for the work) . . ."

The trial court denied Kliment's motion to stay arbitration holding that the underlying breach of contract claim was subject to a six year period of limitations. The Appellate Division reversed on the basis of the fact that CPLR 214(6) provided for a three year period of limitations whether the claim was for contract or tort. The Court of Appeals affirmed stating

> Allowing this claim to proceed would accomplish the precise result the Legislature sought to prevent--allowing what is essentially a malpractice claim to be couched in breach of contract terms in order to benefit from the six-year statute of limitations. McKinsey's claim is fundamentally a claim that K & H failed to perform services in a professional, non-negligent manner by neglecting to comply with the relevant building codes as promised in the agreement. As a result, the claim is barred by CPLR 214(6).[104]

In light of the language of this decision, it seems clear that "where the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or where acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years if the case comes within the purview of CPLR Section 214(6), regardless of whether the theory is based in tort or in a breach of contract,"[105] notwithstanding the fact that the specific result may have been bargained for by the parties.[106]

As noted above, an effort to predicate a fraud claim against an attorney in an attempt to avoid application of the three year statute of limitations will also fail.[107]

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103 3 N.Y.3d 538, 788 N.Y.S.2d 648 (2004).

104 *Id.*

105 Revised Assembly Mem. in Support, Bill Jacket, L 1996, ch 623.

106 *But see, O'Shea v. Brennan*, 2004 WL 1118109 *3 (S.D.N.Y 2004), "Moreover, under New York law, when no express promise was made in a retainer agreement to obtain a specific result, a breach of contract claim is a redundant pleading of a legal malpractice claim."

107 *See*, fn. 5, *supra; but see, Mitschele v. Schulz*, 36 A.D.3d 249, 826 N.Y.S.2d 14 (1st Dep't 2006).

1. Accrual

The statute of limitations in a legal malpractice action accrues on the date of negligence, not the date the client discovers the attorney's negligence.[108] The client's ignorance of either the attorney's negligence or the damage caused is irrelevant.[109] It is noted that in *McCoy v. Feinman*, the Court of Appeals expressly noted ". . . if there is injustice in the operation of CPLR 214(6), the Legislature has not seen fit to ameliorate the statute's effects by enacting a date of discovery rule."[110] Thus far, the legislature has not taken up the court's challenge. As a result, to this date "A malpractice cause of action sounds in tort and, therefore, absent fraud, accrues when an injury occurs, even if the aggrieved party is then ignorant of the wrong or injury."[111] However, it is noted that the legal malpractice period of limitations in many jurisdictions outside of New York is extended by the application of a discovery rule which delays the accrual of the claim.

Taking a somewhat contrary position, however, in *Britt v. Legal Aid Society*,[112] the Court of Appeals held that since a client convicted of a crime must prove that he or she is innocent before a legal malpractice case may be commenced against the attorney, the claim against the attorney does not accrue until the conviction is vacated and the decision is made not to re-prosecute.

On a motion to dismiss, the attorney has the initial burden of making a *prima facie* case that the three year limitations period has expired. The burden then shifts to the former client to show that an exception to the statute of limitations applies.[113]

2. Continuous Representation

Because a malpractice action accrues at the time of negligence, the doctrine of "continuous representation" operates to toll the period of limitations while the attorney continues to

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108 *Shumsky v. Eisenstein,* 96 N.Y.2d 164, 726 N.Y.S.2d 365 (2001); *St. Stephens Baptist Church, Inc. v. Salzman*, 37 A.D.3d 589, 830 N.Y.S.2d 248 (2nd Dep't 2007); *Amodeo v. Kolodny, P.C.,* 35 A.D.3d 773, 828 N.Y.S.2d 446 (2nd Dep't 2006); *Barbieri v. Shayne, Dachs, Stanisi, Corker & Sauer,* 304 A.D.2d 512, 757 N.Y.S.2d 583 (2nd Dep't 2003).

109 *McCoy v. Feinman,* 99 N.Y.2d 295, 301, 305, 755 N.Y.S.2d 693 (2002).

110 *Id.*, 755 N.Y.S.2d at 697, fn.2.

111 *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 620 N.Y.S.2d 318 (1994).

112 95 N.Y.2d 443, 718 N.Y.S.2d 264 (2000).

113 *Alicanti v. Bianco,* 2 A.D.3d 373, 374, 767 N.Y.S.2d 815 (2d Dep't. 2003), *lv. denied* 3 N.Y.3d 602, 782 N.Y.S.2d 405 (2004).

represent the client for the same matter. The doctrine does not delay the period on which the legal malpractice accrues and, as was stated by the Court of Appeals in *Glamm v. Allen*:[114]

> . . . its application is limited to situations in which the attorney who allegedly was responsible for the malpractice continues to represent the client in that case. When that relationship ends, for whatever reason, the purpose for applying the continuous representation rule no longer exists.[115]

Although codified by statute in the medical malpractice field, the doctrine of continuous representation was first applied based upon decisional law to toll the period of limitations in a legal malpractice action in the case *Siegel v. Kranis*.[116] The Court of Appeals, however, first expressed the rationale of the application of the doctrine to attorneys in *Greene v. Greene*:[117]

> In a broader sense the rule recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered.

Where, however, there has been a disruption in the confidence ordinarily placed in an attorney by a client, the continuous representation doctrine does not toll the period of limitations,[118] notwithstanding the fact that a formal substitution of counsel has not been effected.[119]

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114 57 N.Y.2d 87, 453 N.Y.S.2d 674, 678 (1982).

115 *See, also*, *Frischhut v. Laverne, Sortino, Hanks & Lustig*, 230 A.D.2d 890, 646 N.Y.S.2d 869 (2nd Dep't 1996). An exception to this rule may be found where a law firm continued to represent a plaintiff in the same manner following the departure of an employed attorney. In that case, the continuous representation of the law firm is imputed to the employed attorney notwithstanding the termination of the attorney-client relationship between the employed attorney and the client. *Pollicino v. Roemer & Featherstonhaugh*, 260 A.D.2d 52, 699 N.Y.S.2d 238 (3d Dept. 1999). Although the Court of Appeals seemed to have implicitly held to the contrary in *Gotay v. Breidbart*, 12 N.Y.3d 894, 884 N.Y.S.2d 677 (2009) , there are several cases which appear to hold that the negligence of a departed attorney will be imputed to his former firm in order to toll the period of limitations against the former law firm. *The New Kayak Pool Corporation v. Kavinoky Cook, LLP*, 74 A.D.3d 1852, 902 N.Y.S.2d 497(4th Dep't 2010); *Waggoner v. Caruso*, 68 A.D.3d 1, 886 N.Y.S.2d 368 (1st Dep't 2009) *affirmed on other grounds* 14 N.Y.3d 874, 903 N.Y.S.2d 333 (2010); *HNH Intl., Ltd. v. Pryor Cashman Sherman & Flynn LLP,* 63 A.D.3d 534, 535, 881 N.Y.S.2d 86 (1st Dep't 2009).

116 29 A.D.2d 47, 288 N.Y.S.2d 831 (2d Dep't 1968).

117 56 N.Y.2d 80, 94, 451 N.Y.S.2d 46, 50 (1982).

118 *Goicoechea v. Law Office of Stephen Kihl*, 234 A.D.2d 507, 651 N.Y.S.2d 198 (2d Dept. 1996); *Shivers v. Siegel,* 11 A.D.3d 447, 782 N.Y.S.2d 752 (2nd Dep't 2004).

119 *Daniels v. Lebit,* 299 A.D.2d 310, 749 N.Y.S.2d 149 (2nd Dep't 2002); *Piliero v. Adler & Stavros*, 282 A.D.2d 511, 723 N.Y.S.2d 91 (2d Dept. 2000); *Aaron v. Roemer, Wallens and Mineaux, LLP*, 272 A.D.2d 252, 707 N.Y.S.2d 711 (3rd Dep't 2000), app. den. 96 N.Y.2d 730, 722 N.Y.S.2d 796 (2001).

There was concern that the legislature's re-affirmance of the three year limitations period in 1996 would lead to a spate of continuous representation decisions which stretched the bounds of the original doctrine. This, however, has not proved to be the case. The courts have addressed the issue with restraint in several decisions that comport with the original requirements that the continuing relationship must be for the same matter[120] and terminates at the time the attorney-client relationship ends. [121]

The continuous representation doctrine does not apply to toll the period of limitations indefinitely where the client was unaware of the need for any further legal services in connection with the retained matter.[122] However, where the attorney and client "both explicitly anticipate continued representation" and the clients are "left with the reasonable impression that defendant (attorney) was, in fact, actively addressing their legal needs," the period of limitations will be tolled.[123]

In *McCoy v. Feinman,*[124] the wife's attorney failed to assert a claim for pre-retirement death benefits and no such provision was included in the stipulation settling the action for divorce. When the former husband died prior to retirement, the former wife was denied any share in the death benefit. The Court of Appeals found that the cause of action accrued on the day of the stipulation or, at the latest, the date on which the judgment incorporating the stipulation was filed saying, "we find no reason that plaintiff's damages were not then sufficiently calculable to permit plaintiff to obtain prompt judicial redress."[125]

In *CLP Leasing Co., LP v. Nessen*,[126] plaintiff relied upon an entry in the invoices

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120 *Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoeble & Conway, LLP*, 52 A.D.3d 566, 860 N.Y.S.2d 182 (2nd Dep't 2008) (representation of plaintiff in matters unrelated to owners' sale of property to Town insufficient to establish continuous representation); *Maurice W. Pomfrey & Assocaites, Ltd. v. Hancock & Estabrook, LLP*, 50 A.D.3d 1531, 862 N.Y.S.2d 217 (4th Dep't 2008) (representation of employer in matters other than subject employment agreement does not toll period of limitations for legal malpractice claim arising out of drafting of employment agreement); *Chicago Title Ins. Co. v. Mazula*, 47 A.D.3d 999, 849 N.Y.S.2d 333 (3rd Dep't 2008) (attorney's alleged continuous representation of estate did not toll limitations period on surviving spouse's malpractice claim for preparing faulty deeds conveying tenancy in the entirety property where attorney represented surviving spouse in her individual capacity in conveying her interests in faulty original deed and in faulty corrective deed and performed no more work for her in regard to conveyances); *Lai v. Gartlan*, 28 A.D.3d 263, 811 N.Y.S.2d 917 (1st Dep't 2006) ("The documentation plaintiffs submitted showed only the continuation of a general professional relationship, and not an ongoing representation concerning the specific matters from which their claim rose . . .")

121 *Marlett v. Hennessy*, 32 A.D.3d 1293, 823 N.Y.S.2d 325 (4th Dep't 2006).

122 *Ashmead v. Groper,* 251 A.D.2d 716, 673 N.Y.S.2d 779 (3rd Dep't 1998); *Melendez v. Bernstein*, 29 A.D.3d 872, 815 N.Y.S.2d 792 (2nd Dep't 2006).

123 *Shumsky, supra*, 726 N.Y.S.2d at 370.

124 99 N.Y.2d 295, 755 N.Y.S.2d 693, 785 N.E.2d 714 (2002).

125 *Id,* 755 N.Y.S.2d 693.

126 12 A.D.3d 226, 784 N.Y.S.2d 535 (1st Dep't 2004).

rendered by defendant attorneys to support its claim that the doctrine of continuous representation applied to toll the period of limitations. The First Department rejected plaintiff's claim holding that the documentation "submitted showed only the continuation of a general professional relationship, and not an ongoing representation concerning the specific matters from which their claims arose" since the "insurance matter reflected in defendants' billing statements was unrelated to the litigation conduct that they criticized."

To take advantage of the continuous representation toll, the acts of representation forming the basis of the claim must be specifically plead in the complaint.[127] Plaintiff's allegations of legal representation amounting to the attorney acting as corporate counsel from 1993 through 2003 on a myriad of matters is insufficient to toll the period of limitations with respect to the 1993 drafting of an employment agreement.[128]

B. Plaintiff's Conduct

1. Culpable conduct

The conduct of a plaintiff-client may result in a reduction or even a complete bar of a legal malpractice claim.[129] If the client's conduct was such that the plaintiff-client cannot demonstrate that 'but for' the attorneys conduct, the damage would not have occurred, then the legal malpractice case will be dismissed.[130] While an attorney has the responsibility to investigate and prepare every phase of a client's case, an attorney is not liable for not knowing facts that the client failed to tell him or her.[131] The client's conduct can also operate to reduce the attorney's liability. As a result, a plaintiff's motion for summary judgment against an attorney has been denied when there is a question of fact as to whether the plaintiff's own negligence contributed to the defect in the notice of claim.[132]

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127 *Zaref v. Berk & Michaels*, 192 A.D.2d 346, 596 N.Y.S.2d 773, 774 (1st Dep't 1993).

128 *Byron Chemical Corp. v. Groman, Tisman & Ross, P.C.*, 61 A.D.3d 909, 877 N.Y.S.2d 457 (2nd Dep't 2009) ("Accepting the facts alleged in the plaintiff's complaint as true, there was a nine-year lapse between the defendants' representation as to the employment agreements. The continuous representation doctrine does not contemplate such intermittent representation").

129 *Cicorelli v. Capobianco*, 89 A.D.2d 842, 453 N.Y.S.2d 21 (2nd Dep't 1982) *affd* 59 N.Y.2d 626, 463 N.Y.S.2d 195. *But see, Northrup v. Thorsen,* 46 A.D.3d 780, 848 N.Y.S.2d 304 (2nd Dep't 2007) (Client's attempt to persuade attorney to correct his error in settling personal injury action through binding arbitration without first obtaining the consent of client's workers' compensation carrier constituted a reasonable effort on client's part to mitigate her damages, and therefore attorney's inaction in rectifying his error could not be attributed to any culpable conduct on the client's part, in client's legal malpractice action).

130 *DiPlacidi v. Walsh*, 243 A.D.2d 335, 664 N.Y.S.2d 537 (1st Dep't 1997).

131 *Green v. Conciatori*, 26 A.D.3d 410, 809 N.Y.S.2d 559 (2nd Dep't 2006).

132 *Cappadonna v. Simon, Sarver, Friedman & Rosenberg,* 233 A.D.2d 118, 649 N.Y.S.2d 777 (1st Dep't 1996).

Where the allegations asserted by the plaintiff-client are flatly contradicted by a document signed by the plaintiff, the courts regularly dismiss claims on the basis that the client is bound to read and know what he or she signed.[133] The sole exception to this well-settled doctrine is where the client alleges that he had previously read and executed the document and was advised by counsel that the new document now being signed was identical to the document previously read and executed.[134] As a result, a legal malpractice action that is predicated upon a claim that the plaintiff client was unaware of the existence of a conflict[135] or the terms of a settlement agreement[136] will be

In addition, the conduct of plaintiff's agents, including counsel, may be imputed to the plaintiff client under common agency principles and thereby reduce plaintiff's recovery.[137] In a recent case, the third party defendant law firms argued that the affirmative defense of the culpable conduct of plaintiff and its agents precluded a third party action seeking contribution against several law firms that had represented plaintiff.[138] Although the trial court accepted the third party defendant law firms' arguments, the Appellate Division ruled that there were circumstances under which the culpable conduct affirmative defense would not afford third party plaintiff attorney all of the relief sought. This issue, however, remains far from settled and further test of the defense is warranted.

2. Sophisticated Client

Even where it is alleged that a law firm rendered negligent advice to a client, where the client was 'sophisticated' and already aware of the advice in question, the claim will be dismissed since the law firm's actions are not the proximate cause of the plaintiff's injuries.[139] As a result, where a sophisticated client imposes a strategic decision on counsel, the client's action absolves the attorney from liability for malpractice.[140]

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133 *Beattie v. Brown & Wood*, 243 A.D.2d 395, 663 N.Y.S.2d 199 (1st Dep't 1997).

134 *Arnav Indus., Inc. v. Brown, Raysman, Millstein, Felder & Steiner, LLP,* 96 N.Y.2d 300, 727 N.Y.S.2d 688 (2001).

135 *Bishop v. Mauer*, 33 A.D.3d 497, 823 N.Y.S.2d 366 (1st Dep't 2006).

136 *Laruccia v. Forchelli, Curto, Schwartz, Mineo, Carlino & Cohen, LLP*, 295 A.D.2d 321, 744 N.Y.S.2d 335 (2nd Dep't 2002).

137 *New York Islanders Hockey Club, LLP v. Comerica Bank – Texas*, 115 F.Supp.2d 348 (E.D.N.Y. 2000)(dismissing third party action against plaintiff's attorneys since any culpable conduct by team's law firm was attributable to team, so that bank could not maintain contribution claim against law firm).

138 *Millennium Import, LLC v. Reed Smith LLP*, 2013 WL 257389 (1st Dep't 2013).

139 *Stolmeier v. Fields*, 280 A.D.2d 342, 721 N.Y.S.2d 313 (1st Dep't 2001); *Merz v. Seaman*, 265 A.D.2d 385, 697 N.Y.S.2d 290 (2nd Dep't 1999); *Smookler v. Kronish Lieb*, 1/6/2006 NYLJ 1, (col. 3), index no. 604165/02 (N.Y. Sup. 2006). However, where plaintiff raises questions of fact as to the level of sophistication claimed by defendant law firm, a pre-answer motion to dismiss on this basis may result in a denial of the motion. *SF Holdings Group, Inc. v. Kramer, Levin, Naftalis &Frankel, LLP,* 56 A.D.3d 281, 866 N.Y.S.2d 674 (1st Dep't 2008).

140 *Town of North Hempstead v, Winston & Strawn, LLP,* 28 A.D.3d 746, 814 N.Y.S.2d 237 (2nd Dep't 2006).

C. Standing/Capacity to Sue

1. Shareholder May Not Assert A Legal Malpractice Claim Against the Corporation's Attorney

As a corollary of the well-settled rule that privity must exist between plaintiff and defendant in a legal malpractice case, a law firm does not owe a duty to a former member of its limited liability company client to amend the offering plan after the former member's buyout so as to remove the former member from the list of managers of the company.[141] Similarly, a shareholder lacks standing to assert a claim for legal malpractice against the attorney for a corporation[142] and a corporation's principal may not maintain a legal malpractice action against the attorney even where the principal paid the attorney fees.[143]

2. The Wagoner/Hirsch Rule and *In Pari Delicto*

Breach of fiduciary duty and "aiding and abetting" claims against attorneys and other professionals asserted by bankruptcy trustees are problematic in terms of exposure, as well as venue. Very often motions to withdraw the reference are denied or deferred until trial. The attorney, alleged to have wronged the debtor, possibly to the detriment of the creditors, rarely fares well in the bankruptcy court. However, a very strong but underutilized defense does exist to claims where the facts suggest that the debtor joined with third party professionals in wronging its creditors. If facts can be demonstrated that "management" was the architect or complicit in the alleged wrongdoing, the bankruptcy trustee lacks standing to recover against the third party, on a professional malpractice or other theory, for damage to creditors.[144] This powerful defense, known as the *Wagoner/Hirsch* Rule, has its genesis in the common law theory of *in pari delicto*. Criticized in some jurisdictions, the defense is still very much viable.

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141 *Berkowitz v. Fischbein, Badillo, Wagner & Harding, LLP*, 7 A.D.3d 385, 777 N.Y.S.2d 99 (1st Dep't 2004).

142 *Griffin v. Medical Quadrangle, Inc.,* 5 A.D.3d 151, 772 N.Y.S.2d 513 (1st Dep't 2004).

143 *Moran v. Hurst*, 32 A.D.3d 909, 822 N.Y.S.2d 564 (2nd Dep't 2006).

144 *See, Hirsch v. Arthur Andersen & Company*, 72 F.3d 1085 (2nd Cir. 1995); *Shearson Lehman Hutton v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991). In *In re The Bennett Funding Group, Inc.*,[144] the trustee of the corporate debtor's bankruptcy estate brought an adversary proceeding against the debtor's accountants and attorneys for their alleged malpractice, breach of fiduciary duty and negligence in failing to report, to debtor's innocent directors and officers, their suspicions that management was using the debtor to perpetrate a Ponzi scheme. The district court granted the defendant professional's motion for summary judgment and the Second Circuit affirmed holding that where the corporation's management and the professionals have allegedly collaborated in a scheme to defraud corporate creditors, the trustee of the debtor corporation's bankruptcy estate can sue only if he can establish that there has been damage to the corporation apart from damage to creditors and, even in those circumstances, the trustee cannot recover if alleged malfeasor was the corporation's sole shareholder and decision-maker. The court also rejected the trustee's attempts to portray public relations figureheads, such as sports figures or others who held titles in the company but performed no decision-making ability, as innocent members of management to whom defendant professional could have reported the wrongdoing.

In *Kirschner v. KPMG,*[145] the Court of Appeals was asked by the Second Circuit to define New York's position on the application and role of *in pari delicto*:

> The justice of the *in pari delicto* rule is most obvious where a willful wrongdoer is suing someone who is alleged to be merely negligent. A criminal who is injured committing a crime cannot sue the police officer or security guard who failed to stop him; the arsonist who is singed cannot sue the fire department. But, as the cases we have cited show, the principle also applies where both parties acted willfully. Indeed, the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that we have said the defense applies even in difficult cases and should not be "weakened by exceptions" (*McConnell v. Commonwealth Pictures Corp.,* 7 N.Y.2d 465, 470, 199 N.Y.S.2d 483, 166 N.E.2d 494 [1960] ["We are not working here with narrow questions of technical law. We are applying fundamental concepts of morality and fair dealing *not to be weakened by exceptions* " (emphasis added)]; *see also Saratoga County Bank v. King,* 44 N.Y. 87, 94 [1870] [characterizing the doctrine as "inflexible"])..

As a result, although the adverse interest exception exists, it will be narrowly applied.[146] As the Court of Appeals decision in *Kirschener* made clear "[s]o long as the corporate wrongdoer's fraudulent conduct enables the business to survive-to attract investors and customers and raise funds for corporate purposes-this test is not met."[147]

3. Capacity to sue

If the plaintiff lacks capacity to maintain suit against the attorney, the legal malpractice claim will be dismissed. One example of this defense is the fact that a dissolved corporation lacks the capacity to maintain a legal malpractice action where it does not relate to the plaintiff's winding up of its corporate affairs.[148]

In addition, a plaintiff who has filed for bankruptcy and failed to list the potential malpractice claim as an asset of the bankrupt estate lack capacity to sue the attorney and is judicially estopped from maintaining the legal malpractice claim.[149] The fact that the bankruptcy proceeding

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145 15 N.Y.3d 446, 457, 938 N.E.2d 941, 912 N.Y.S.2d 508 (2010).

146 *In re CBI Holding Co., Inc.*, 529 F.3d (2nd Cir. 2008)

147 *Kirschner v. KPMG,* 15 N.Y.3d 446, 468, 938 N.E.2d 941, 912 N.Y.S.2d 508 (2010).

148 *2 North Broadway Food, Inc. v. Anduze*, 33 A.D.3d 992, 822 N.Y.S.2d 733 (2nd Dep't 2006).

149 *Whelan v. Longo*, 7 N.Y.3d 821, 822 N.Y.S.2d 751 (2006); *DiBenedetto v. Hadziyianis*, 13 Misc.3d 1231(A), 2006 WL 3069284 (N.Y. Sup. 2006). *Cf., Kremin v. Benedict Morelli & Associatates, P.C.*, 54 A.D.3d 596, 864

was dismissed rather than discharged does not change the result.[150] This defense, however, must be raised affirmatively by the defendant or it may be considered waived.[151]

D. Collateral Estoppel

The equitable remedy of collateral estoppel is based upon the notion that a party or one in privity with a party, should not be permitted to re-litigate an issue decided against it.[152] A party will be collaterally estopped if: (i) the issue to be precluded is identical to the issue decided in the prior proceeding; (ii) the issue was necessarily decided in the prior proceeding; and (iii) the party sought to be precluded had a full and fair opportunity to litigate the issue. The use of collateral estoppel has four separate applications in the context of legal malpractice actions.

1. Fee Actions

In the area of fee dispute claims, the law has long been settled that a legal malpractice claim is barred by the attorney's successful prosecution of a prior action to recover fees for the legal services which the client now alleges were negligently performed.[153] Although the concept has its genesis in some rather ancient cases, the principle remains good law today. "A judicial determination fixing the value of a professional's services necessarily decides that there is no malpractice."[154] The doctrine of collateral estoppel, or issue preclusion, forecloses "issues which were necessarily decided in the first action and applies even if the plaintiff does not actually raise the legal malpractice as a defense to the fee claim.[155] The test is whether plaintiff had an opportunity to raise it. Thus, "[u]nder New York law, a determination of entitlement to attorney's fees necessarily decides the issue of malpractice and any subsequent action for malpractice is barred under the doctrine of collateral estoppel."[156] Where the court approves a class settlement, including an award

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N.Y.S.2d 2 (1st Dep't 2008).

150 *Nationwide Associates, Inc. v. Epstein*, 24 A.D.3d 738, 809 N.Y.S.2d 118 (2nd Dep't 2005).

151 *Edwards v. Siegel, Kelleher & Kahn*, 26 A.D.3d 789, 811 N.Y.S.2d 828 (4th Dep't 2006).

152 *D'Arata v. N.Y. Central Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 563 N.Y.S.2d 24 (1990).

153 *Gates v. Preston*, 41 N.Y. 113 (1869); *Blair v. Bartlett*, 75 N.Y. 150 (1878).

154 *Altamore v. Friedman*, 193 A.D.2d 240, 246, 602 N.Y.S.2d 894, 898 (2d Dep't. 1993), *quoting Kagan Meat & Poultry v. Kalter*, 70 A.D.2d 632, 416 N.Y.S.2d 646 (2d Dep't. 1979).

155 *Kinberg v. Garr,* 28 A.D.3d 245, 811 N.Y.S.2d 568 (1st Dep't 2006); *Chisholm-Ryder Company, Inc. v. Sommer & Sommer*, 78 A.D.2d 143, 434 N.Y.S.2d 70 (4th Dep't. 1980).

156 *Best v. Law Firm of Queller & Fisher*, 278 A.D.2d 441, 718 N.Y.S.2d 397 (2d Dep't. 2000), *cert. denied sub nom. Best v. Sears Roebuck and Co.*, 534 U.S. 1080, 122 S.Ct. 812, 151 L.Ed.2d 696 (2002); *Hutton v. County of Rockland*, 1997 WL 291954, at 3 (S.D.N.Y. June 2, 1997). *But see, York v. Landa,* 57 A.D.3d 980, 870 N.Y.S.2d 459 (2nd Dep't 2008) (where underlying action was to enforce settlement agreement that addressed fee claim rather than to fix the attorney's fee, plaintiff is not collaterally estopped from asserting subsequent legal malpractice action)

of "fair and reasonable" attorneys' fees to class counsel, a subsequent malpractice action against class counsel is precluded under the "relitigation" exception to the Anti–Injunction Act.[157]

A collateral estoppel defense may be based upon an order finding that the attorney is entitled to a charging or retaining lien (even where the amount of the lien is not yet set),[158] an arbitration award in the attorney's favor,[159] or bankruptcy court approval of the attorney's fee.[160] It is immaterial whether the professional had obtained a default judgment in connection with the fee suit or that there was a significant disparity in the amount of money sought on the fee claim from the malpractice claim also will not avoid preclusive effect.[161]

2. Underlying Criminal Proceedings

To maintain a cause of action for legal malpractice arising out of an attorney's representation in a criminal matter, the client has the heavy burden of establishing that "the conviction was due to the attorney's actions alone and not due to some consequence of his guilt."[162] So long as the conviction stands, the convicted client cannot assert a malpractice claim against the attorney who represented him in the criminal matter.[163] Even if the conviction has been vacated, plaintiff may not assert a legal malpractice claim where plaintiff cannot assert his innocence, such as where, following the vacatur of the conviction, plaintiff pleas to a lesser charge.[164]

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157 *Wyly v. Weiss, et al*, 697 F.3d 131 (2nd Cir, 2012).

158 *Zito v. Fischbein Badillo,* 80 A.D.3d 520, 2011 WL 166721 (1st Dep't 2011) (Causes of action for legal malpractice and violation of Judiciary Law § 487 barred by doctrines of collateral estoppel and res judicata by prior court's imprimatur of retaining lien); *Coburn v. Robson & Miller, LLP*, 2004 WL 2984870 (1st Dep't. 12/28/04); *John Grace & Co., Inc. v. Tunstead, Schechter & Torre*, 186 A.D.2d 15, 588 N.Y.S.2d 262 (1st Dep't. 1992); *Nat Kagan Meat & Poultry, Inc. v. Kalter*, 70 A.D.2d 632, 416 N.Y.S.2d 646 (2d Dep't. 1979).

159 *Altamore v. Friedman*, *supra*, 602 N.Y.S.2d at 898; *but see, Soni v. Pryor*, 102 A.D.3d 856, 958 N.Y.S.2d 721 (2nd Dep't 2013) (Arbitration award under Part 137 Fee Dispute Program is not collateral estoppel of subsequent legal malpractice case even where award is affirmed by trial court since legal malpractice claims are excluded from program).

160 *Orchard Motorcycle Distributors, Inc. v. Morrison Cohen Singer & Weinstein, LLP*,49 A.D.3d 294, 853 N.Y.S.2d 320 (1st Dep't 2008); *Izko Sportswear Co., Inc. v. Flaum*, 25 A.D.3d 534, 809 N.Y.S.2d 119 (2nd Dep't 2006). *But see, Breslin Realty Dev. Corp. v. Shaw,* 19 Misc.3d 1127(A), 866 N.Y.S.2d 90 (N.Y. Sup 2008).

161 *Harris v. Stein*, 207 A.D.2d 382, 615 N.Y.S.2d 703 (2d Dep't 1994).

162 *Britt v. Legal Aid Society*, 95 N.Y.2d 443, 718 N.Y.S.2d 264 (2000); *Carmel v. Lunney*, 70 N.Y.2d 169, 518 N.Y.S.2d 605 (1987); *Cummings v. Donovan*,36 A.D.3d 648, 828 N.Y.S.2d 475 (2nd Dep't 2007); *Boomer v. Gross,* 34 A.D.3d 1096, 825 N.Y.S.2d 171 (2nd Dep't 2006); *Casement v. O'Neill,* 28 A.D.3d 508, 812 N.Y.S.2d 649 (2nd Dep't 2006); *Biegin v. Paul K. Rooney, P.C.*, 269 A.D.2d 264, 703 N.Y.S.2d 121 (1st Dep't 2000); *Malpeso v. Burstein & Fass*, 257 A.D.2d 476, 684 N.Y.S.2d 201 (1st Dep't 1999); *Doyle v. Ruskin,* 230 A.D.2d 888, 646 N.Y.S.2d 889 (2nd Dep't 1996); *Kaplan v. Sachs,* 224 A.D.2d 666, 639 N.Y.S.2d 69 (2nd Dep't 1996);

163 *Daly v. Peace,* 54 A.D.3d 801, 863 N.Y.S.2d 770 (2nd Dep't 2008); *Young Wong Park v. Wolff & Sampson, P.C.*, 56 A.D.3d 351, 867 N.Y.S.2d 424 (1st Dep't 2008); *Carmo v. Lazzaro*, 5 A.D.3d 128, 771 N.Y.S.2d 892 (1st Dep't 2004); *D'Amato v. Bray*, 83 Fed.App. 380, 2003 WL 22976108 (2d Cir. 2003).

164 *Rosado v. Legal Aid Society*, 12 A.D.3d 356, 784 N.Y.S.2d 154 (2nd Dep't 2004).

Where, however, the state or federal court has vacated a conviction on the basis of ineffective assistance of counsel, the court will not collaterally estop the defendant attorney in a subsequent legal malpractice action from maintaining that the services rendered did not deviate from accepted standards inasmuch as the attorney did not have a full and fair opportunity to litigate the allegation.165

3. Underlying Civil Proceedings

In general, a plaintiff will not be collaterally estopped from pleading a fact adjudicated in the underlying proceeding when the issue resolved in the underlying case is not identical to the issue in the legal malpractice claim.[166] Where a litigant rests the claim for collateral estoppel on an alternate holding nor reviewed by the appellate court, a claim of collateral estoppel will not lie.[167]

However, there have been a number of cases in which the court has collaterally estopped plaintiff from proceeding based upon a finding in the underlying matter.[168] In *Rosenkrantz v. Steinberg*,[169] the court applied the doctrine of collateral estoppel to bar a legal malpractice action in a situation commonly confronted by attorneys in the defense of legal malpractice claims. In *Rosenkrantz*, the plaintiff sued her attorney for malpractice based upon the dismissal of the underlying action due to the attorney's failure to appear at a court conference. Upon the dismissal of the underlying action, the attorney moved to vacate, which was denied. The attorney then filed an appeal from the denial of the motion to vacate, which was denied because the plaintiff failed to establish a reasonable excuse for the default and a meritorious cause of action. In the subsequent legal malpractice action, the First Department held that its prior determination in the underlying action, that the plaintiff's claims lacked merit, served as a bar to plaintiff's malpractice claims because she could not establish that she would have prevailed 'but for' the attorney's negligence.

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165 *Gersten v. Lemke,* 2008 WL 549152 (Trial Order) (N.Y. Sup.).

166 *Weiss v. Manfredi,* 83 N.Y.2d 974, 616 N.Y.S.2d 325 (1994).

167 *Tydings v. Greenfield, Stein & Senior, LLP*, 11 N.Y.3d 195, 866 N.Y.S.2d 563 (2008).

168 *Rosenkrantz v. Steinberg*, 13 A.D.3d 88, 786 N.Y.S.2d 35 (1st Dep't 2004); *DeGregorio v. Bender,* 4 A.D.3d 384, 772 N.Y.S.2d 89 (2d Dep't. 2004); *Colleran v. Rockman*, 712 N.Y.S.2d 108 (1st Dep't. 1999), dismissing legal malpractice action where plaintiff could not establish any damages due to attorney's recommendation to accept settlement; *Choi v. Dworkin*, 230 A.D.2d 780, 646 N.Y.S.2d 531 (2d Dep't. 1996), dismissing complaint where plaintiff failed to show that attorney's negotiation of the settlement or his advice that the plaintiff accept the terms of it was wrongful or negligent; *Neff v. Schwartzapfel*, 254 A.D.2d 137, 679 N.Y.S.2d 37 (1st Dep't. 1998). *But see, Richter v. Davidson & Cohen, P.C.,* 25 A.D.3d 595, 807 N.Y.S.2d 637 (2nd Dep't 2006) (client not collaterally estopped from claiming attorney settled case without her authority since plaintiff did not have a full and fair opportunity to litigate the issue of actual authority in the underlying hearing).

169 13 A.D.3d 88, 786 N.Y.S.2d 35 (1st Dep't 2004).

DeGregorio v. Bender[170] presents another situation commonly confronted, namely a legal malpractice claim predicated upon an allegedly inadequate settlement,[171] this time in the context of an underlying matrimonial action. Although not dismissed upon the strict grounds of collateral estoppel, the Appellate Division reversed the trial court and granted summary judgment to the defendant attorneys because in the underlying action the plaintiff entered into a detailed stipulation of settlement and allocuted to the terms of it in open court. During the allocution, the plaintiff acknowledged that she participated in the settlement negotiations and understood the terms of settlement, that she had not been forced into the settlement and that she wanted the court to approve it. Issues of a wife's distributive award and mental state litigated in a prior matrimonial action collaterally estops re-litigation of the same issues in a subsequent legal malpractice action.172

4. Affirmative Use of Collateral Estoppel Against Attorney

(a) Civil Proceedings

In a legal malpractice action, an attorney is not bound by an adverse decision rendered in the underlying action or affidavits submitted by the attorney adv ocating the former client's position since the attorneys were not parties to the underlying action and, consequently, were not afforded a full and fair opportunity to litigate the issue determined.[173]

(b) Disciplinary Proceedings

However, an attorney who is found to have committed an act warranting disbarment

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170 4 A.D.3d 384, 772 N.Y.S.2d 89 (2nd Dep't 2004).

171 Many jurisdictions provide that settlement of the underlying claim precludes a subsequent legal malpractice action absent fraud in the inducement or erroneous advice about the effect of the settlement. *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 256 Pa. 541, 587 A.2d 1346 (Penn. 1991); *Glinne v. Sullivan*, 245 N.W.2d 869 (Minn. 1976). In this jurisdiction, however, a claim for legal malpractice is viable despite the settlement of the underlying action if it is alleged that the settlement of the action was effectively compelled by the mistake of counsel. *N.A. Kerson Co. v. Shayne, Dachs, Weiss, Kohlbrenner, Levy & Moe Levine*, 45 N.Y.2d 730, 408 N.Y.S.2d 475 (1978) *aff'g* 59 A.D.2d 551, 397 N.Y.S.2d 142 (2nd Dep't 1977) on the concurring opinion of Suozzi, J. The mere allegation that the settlement is inadequate in the absence of negligence on the part of the attorney that necessitates the settlement is insufficient. *Somma v. Dansker & Aspromonte Associates*, 13 Misc.3d 1232(A), 2006 WL 3113181 (N.Y. Sup. 2006). Furthermore, the courts will not recognize plaintiff's claim that the settlement was coerced: "When informed further as to the prospects of losing the case altogether, plaintiff thereafter accepted the offer . . . that does not spell out coercion . . . Recognition of the inevitable is not tantamount to duress." *Becker v. Julien, Blitz & Schlesinger*, 95 Misc.2d 64, 406 N.Y.S.2d 412 *aff'd* 66 A.D.2d 674, 411 N.Y.S.2d 17 (1st Dep't 1978).

172 *Weissman v. Kessler*, 78 A.D.3d 465, 912 N.Y.S.2d 25 (1st Dep't 2010).

173 *Reisner v. Litman & Litman,* 29 Misc.3d 1208(A), 2010 WL 3959620 (N.Y.Sup.) (Attorney is not bound by affidavit submitted in support of client's motion to file a late notice of claim since attorney ". . . was not a 'witness' in the plaintiff's action against the County, but was the plaintiff's advocate. Needless to say, an attorney's position in his client's underlying case is going to be diametrically opposed to the position he advances in his defense in a legal malpractice action."); *See also Lyons v. Medical Malpractice Ins. Ass'n*, 275 A.D.2d 396, 713 N.Y.S.2d 61 (2d Dep't 2000).

may be collaterally estopped from contesting the act at a subsequent disciplinary proceeding.[174] Furthermore, an attorney who has been disbarred based upon the same facts and circumstances resulting in a subsequent legal malpractice suit may also be estopped from contesting the facts determined during the course of the disbarment proceedings.[175]

E. Professional Judgment

A lawyer, with the informed consent of the client, may select one of several reasonable alternatives and will not be liable for legal malpractice as an attorney is not liable for an honest mistake of judgment where the appropriate steps to be taken are open to reasonable doubt.[176]

The client's subsequent dissatisfaction with a settlement obtained by the defendant attorney does not rise to the level of legal malpractice.[177] The fact that there may be an alternative strategy which might have been pursued by the defendant is protected by the professional judgment rule.[178] Allegations which amount to a client's criticism of counsel's strategy may be dismissed as insufficient inasmuch as the attorney cannot be held liable for choosing a reasonable, although unsuccessful course of action.[179] Furthermore, an attorney who achieves success for the client will not be liable to a client complaining that another strategy would have been more efficient[180] or the result was not achieved in the precise manner the client would have preferred.[181]

Reasonable strategic decisions made as to the selection of appropriate trial exhibits,[182]

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174 *In re Abady,* 22 A.D.3d 71, 800 N.Y.S.2d 651 (1st Dep't 2005); *In re Truong,* 768 N.Y.S.2d 450 (1st Dep't 2003); *In re Dorfman*, 304 A.D.2d 273, 760 N.Y.S.2d 413 (1st Dep't 2003); *In re Harley*, 746 N.Y.S.2d 137 (1st Dep't 2001).

175 *Burton v. Kaplan*, 184 A.D.2d 408, 585 N.Y.S.2d 359 (1st Dep't 1992).

176 *Lok Prakashan, Ltd. v. Berman*, 349 Fed.Appx. 640, 2009 WL 3377908 (2nd Cir. 2009); *Rosner v. Paley,* 65 N.Y.2d 736, 492 N.Y.S.2d 13 (1985); *Rubinberg v. Walker,* 252 A.D.2d 466, 676 N.Y.S.2d 149 (1st Dep't 1998); *Geller v. Harris,* 258 A.D.2d 421, 685 N.Y.S.2d 734 (1st Dep't 1999); *see also, Bernstein v. Oppenheim & Co.,* 160 A.D.2d 428, 430, 554 N.Y.S.2d 487 (1st Dep't 1990).

177 *Noone v. Stieglitz*, 59 A.D.3d 505, 873 N.Y.S.2d 661 (2nd Dep't 2009) (Plaintiff was adequately informed of consequences of high-low settlement); *Holschauer v. Fisher*, 5 A.D.3d 553, 772 N.Y.S.2d 836 (2nd Dep't 2004).

178 *Dweck Law Firm v. Mann,* 283 A.D.2d 292, 293, 727 N.Y.S.2d 58 (1st Dep't 2001).

179 *Palazzolo v. Herrick, Feinstein, LLP***.** 298 A.D.2d 372, 751 N.Y.S.2d 401 (2nd Dep't 2002).

180 *AmBase Corp. v. Davis Polk & Wardwell,* 30 A.D.3d 171, 816 N.Y.S.2d 438 (1st Dep't 2006) *aff'd* 8 N.Y.3d 428, 834 N.Y.S.2d 705 (2007).

181 *Novak v. Fischbein, Olivierie, Rozenholc & Badillo*, 151 A.D.2d 296, 542 N.Y.S.2d 568 (1st Dep't 1989).

182 *Noone v. Stieglitz*, 59 A.D.3d 505, 873 N.Y.S.2d 661 (2nd Dep't 2009) (Alleged failure to introduce road maps and accident reports reasonable strategy in light of reliance on non-party witness testimony); *Ideal Steel Supply Corp. v. Beil,*55 A.D.3d 544, 865 N.Y.S.2d 299 (2nd Dep't 2008) (decision to prosecute a RICO claim on behalf of client to exclusion of other causes of action was reasonable exercise of attorney's professional judgment); *Orchard Motorcycle Distributors, Inc. v. Morrisson Cohen Singer & Weinstein, LLP,*49 A.D.3d 294, 853 N.Y.S.2d 320 (1st Dep't 2008)

expert witnesses,[183] witnesses[184] and the timing of arguments[185] have been held protected by the courts as the proper exercise of an attorney's professional judgment.

An attorney similarly will not be held liable for reasoned judgments made in connection with unsettled areas of law.[186]

F. Prematurity

The doctrine of prematurity in a legal malpractice action is simply the reverse corollary of the well known principle that a plaintiff cannot recover unless he shows he would not have sustained damage 'but for' his attorney's negligence. If plaintiff has a viable avenue of recovery still available despite the attorney's conduct, the cause of action is premature. Logical as this principle may seem, cases in New York have been slow to adopt the theory, at least under the banner of prematurity.

1. Dismissal Based Upon Prematurity

In New York, the doctrine of prematurity has its genesis in a lower court decision of *Wright v. Diebold*.[187] In *Wright*, plaintiff commenced a legal malpractice action arising out of services performed by defendant attorney in a still pending contract action. The court dismissed plaintiff's complaint holding

> In this Court's opinion, the cause of action here sought to be asserted by plaintiff has not yet accrued and will not accrue, if at all, unless and until plaintiff sustains damage as the result of the main action.
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> . . .

(plaintiff's claim that defendants failed to advise plaintiff that Chapter 11 reorganization could be accomplished as opposed to liquidation was protested as selection of one of several reasonable alternatives); *Dimond v. Kazmierczuk & McGrath,* 15 A.D.3d 526, 527, 790 N.Y.S.2d 219 (2nd Dep't 2005) (choice of expert found later unqualified by trial court was reasonable exercise of attorney's judgment as to how to proceed in the underlying action); *Iocovello v. Weingrad & Weingrad, LLP***,** 4 A.D.3d 208, 772 N.Y.S.2d 53,(1st Dep't 2004) (reasonable rationale for n*ot introducing attendance records into evidence protected by professional judgment rule*); *Ianazzo v. Day Pitney, LLP,* 2007 WL 2020052 (S.D.N.Y.) (reliance on document evidence at trial protected by professional judgment rule).

183 *Pacesetter Communications Corp. v. Solin & Breindel, P.C.,* 150 A.D.2d 232, 541 N.Y.S.2d 404 (1st Dep't 1989).

184 *LIC Commercial Corp. v. Rosenthal,* 202 A.D.2d 644, 609 N.Y.S.2d 301 (2nd Dept 1994); *but see Gonzalez v. Ellenberg,* 5 Misc.3d 1023(A), 2004 WL 2812884 (N.Y.Sup.).

185 *Holmberg, Galbraith, Holmberg, Orkin and Bennett v. Khoury***,** 176 A.D.2d 1045, 575 N.Y.S.2d 192 (3rd Dep't 1991).

186 *Darby & Darby v. VSI Intl.,* 95 N.Y.2d 308, 315, 716 N.Y.S.2d 378 (2000); *Duane Morris, LLP v. Astor Holdings, Inc*., 61 A.D.3d 418, 877 N.Y.S.2d 250 (1st Dep't 2009).

187 217 N.Y.S.2d 238 (N.Y. Co. 1961).

> Since damage is an essential ingredient of the cause and plaintiff has not yet made allegations of ultimate fact establishing any present damage, it would seem the cause of action sought to be alleged has not yet accrued and is premature.

Following *Wright*, the courts have dismissed numerous legal malpractice actions for want of ascertainable damages.[188] Rarely, however, has the dismissal been on the basis of the doctrine of prematurity.[189] Rather, the dismissals hinge upon plaintiff's inability to demonstrate damages, an "essential" element of a legal malpractice claim.

However, the decision in *Lopes v. Mangiatordi, Maher & Lemmo*, LLC,[190] indicates that the doctrine of prematurity is alive and well. In *Lopes*, plaintiff was injured in the fall from a ladder at a worksite. The claims asserted under Labor Law Sections 200, 241(6) and 240 were dismissed, although a common law negligence claim remained standing. In a legal malpractice action filed before the common law negligence claim was adjudicated, defendant attorneys moved to dismiss the complaint as "premature" since the plaintiff's cause of action against the subcontractor based on common-law negligence remains viable and may result in a complete recovery.

Citing the well known principal that "plaintiff must show that but for the attorney's negligence, what would have been a favorable outcome was an unfavorable outcome," the trial court dismissed the legal malpractice complaint, holding that plaintiff

> . . . cannot show that he has sustained demonstrable damages for legal malpractice proximately caused by the defendants' alleged negligence until after the resolution of the underlying personal injury action, if then. (*See, Pudalov v. Brogan,* 103 Misc.2d 887; *Taylor v. Robustelli,* New York State Supreme Court, County of Westchester, Index No. 1401/98; *Schwartzberg v. Tucciarone,* New York State Supreme Court, County of Westchester, Index No. 1197/00.) There is still the possibility of recovery from the subcontractor. The appeal in the underlying action did not directly concern the cause of action for common-law negligence. While the Appellate Division dismissed the cause of action based on Labor Law § 200 against the subcontractor on the ground that it did not have the authority to control the worker's activity producing the injury (*see, Lopes v. Interstate Concrete, Inc., supra*), there remains an open issue concerning whether the dismissal

188 *Novack v. Fischbein, Olivieri, Rozenholc & Badillo*, 151 A.D.2d 296, 542 N.Y.S.2d 568 (1st Dep't 1989); *Murphy v. Stein*, 156 A.D.2d 546, 549 N.Y.S.2d 53 (2d Dep't 1989); *St. John v. Tepper*, 54 A.D.2d 712, 387 N.Y.S.2d 457, 458 (2d Dep't 1976); *Becker v. Julien, Blitz & Schlesinger*, 66 A.D.2d 674, 411 N.Y.S.2d 17 (1st Dep't 1978).

189 In *Johnston v. Raskin*, 193 A.D.2d 272, 598 N.Y.S.2d 272 (2d Dep't 1993), the court appeared to reject "prematurity" as a basis for dismissal.

190 6 Misc.3d 1004(A), 800 N.Y.S.2d 349 (Table) (N.Y.Sup. 2004).

> of that cause of action necessitates the dismissal of the cause of action for common-law negligence. That issue should be determined by the court having jurisdiction over the underlying action and over the proper parties. At this time, the cause of action for common law negligence remains pending in the underlying action, not having been discontinued or otherwise disposed of.

2. Severance and Stay of the Legal Malpractice Action

Where an outright dismissal is not granted, the courts have also acknowledged a willingness to stay a legal malpractice action commenced prior to the resolution of the underlying claim and before plaintiff has actually suffered damage. In *Stettner v. Bendet*,[191] the Appellate Division held that where a plaintiff's right to proceed against a doctor's personal assets as a result of a claimed malpractice was still in question, the malpractice action against the attorneys would be stayed:

> Since the client's remedies in the bankruptcy proceedings are uncertain, and since the client can have no cause of action for legal malpractice unless he would have a remedy in the bankruptcy proceeding but for the attorney's negligence (*see, Geraci v. Bauman, Greene & Kunkis*, 17 A.D.2d 454,455, *app dismissed* 78 N.Y.2d 907), we modify to stay the instant action until such time as the client's rights in the bankruptcy proceeding, and his contingent right to prosecute the underlying action are settled.

In *Corrado v. Rubine*,[192] the Appellate Division held that the trial court's failure to stay a legal malpractice action pending resolution of a matrimonial matter in which some or all of the components of damage claimed in the legal malpractice case would be addressed, was an improvident exercise of discretion.

In addition, citing prejudice to defendants and confusion to the jury, the courts have also resisted the efforts of former clients to try jointly a still pending underlying action with a legal malpractice action based upon the underlying claim.[193] At least one commentator has stated that the severance and stay is

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191 227 A.D.2d 202, 642 N.Y.S.2d 253 (1st Dep't 1996); *See, also, Washington Mut. Bank v. Law Office of Robert Jay Gumenick, P.C.*, 561 F. Supp.2d 410 (S.D.N.Y. 2008) (bank's claim against attorney will be stayed in favor of claim asserted by bank in bankruptcy court since the bankruptcy court can grant the bank a substantial amount of the relief it seeks); *But see*, *Creditanstalt Inv. Bank AG v. Chadbourne & Parke LLP*, 14 A.D.3d 414, 788 N.Y.S.2d 104 (1st Dep't 2005), holding that the court appropriately declined to dismiss or indefinitely stay the malpractice claim pending completion of the Russian legal proceedings since plaintiffs allege damages that have already been incurred; *Jones v. Pricewaterhousecoopers, LLP*, 6 Misc.3d 1014(A), 800 N.Y.S.2d 348 (N.Y.Sup. 2004).

192 25 A.D.3d 748, 807 N.Y.S.2d 878 (2nd Dep't 2006).

193 *See*, *Brown v. Brooklyn Union Gas Company*, 137 A.D.2d 479, 524 N.Y.S.2d 228 (2d Dep't 1988). "Although the personal injury and legal malpractice actions involve a 'common question of law and fact' as required by CPLR

> . . . particularly appropriate where the attorney's alleged error is the basis for the client's adversary's defense, but that issue is yet to be resolved. The issue to be resolved may be whether the client will sustain an injury. Abatement or a stay enables resolution of an issue central to the legal malpractice claim, avoiding unnecessary expense and litigation for all.[194]

While the New York courts' treatment of this issue is not uniform, counsel representing plaintiffs are well advised to consider the impact of joining the underlying claim with a legal malpractice action against the original attorney. In ***Buxton v. Ruden***,[195] plaintiff joined for trial her dental malpractice claim against one defendant dentist with a legal malpractice claim against her original attorney alleging that the failure to join another potentially liable dentist prejudiced the still pending claim. The Appellate Division rejected plaintiff's attempt to prevent production of the legal file maintained by defendant attorney to counsel representing defendant dentist holding:

> "The prevailing view is that once a client waives the privilege to one party, the privilege is waived *en toto*" *Matter of Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 [6th Cir.2002], particularly since the actions were joined for trial, at the plaintiff's request, and it would be highly prejudicial to deny Ruden access to relevant discovery material. Thus, the Supreme Court properly granted Ruden's application and directed the plaintiff to turn over the case file to him.

As a result, the potentially adverse consequences of joining a legal malpractice action with a pending underlying action should be carefully considered.

G. Release

Although circumstances do exist where an attorney may utilize the existence of a general release executed by the client to defeat a subsequent legal malpractice action, the circumstances surrounding the execution of the release will be closely scrutinized. Similar to its

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602(a), under the facts of this case consolidation was an improvident exercise of discretion, since a consolidation of this action would be unduly prejudicial to the appellant's right to a fair trial. Accordingly we reverse . . . Furthermore, the actions involve many dissimilar issues which may confuse the jury. "[S]eparate trial will enable the juries to focus on the factual issues presented as to each [case]." *Shackleford v. Mills*, 110 A.D.2d 630, 487 N.Y.S.2d 371 (2nd Dep't 1985). *See, also*, *Gouldsbury v. Dan's Supreme Market, Inc.*, 138 A.D.2d 675, 526 N.Y.S.2d 779 (2nd Dep't 1988); *But see*, *Coakley v. Africano*, 181 A.D.2d 1071, 581 N.Y.S.2d 515 (4th Dep't 1992); *Rist v. Comi*, 260 A.D.2d 890, 688 N.Y.S.2d 806 (3rd Dep't 1999).

194 5 Mallen & Smith, *Legal Malpractice*, 5th ed., § 33.7, p. 66 (West 2000).

195 12 A.D.3d 475, 784 N.Y.S.2d 619 (2nd Dep't 2004).

predecessor,[196] the Rules of Professional Conduct provide

> A lawyer shall not:
> (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or
> (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.[197]

Provided the client has been demonstrably apprised of the advisability of retaining counsel, an attorney may negotiate a settlement with a former client including obtaining a General Release. As a practical matter, the release is more likely to be sustained if the former client is represented by counsel at the time of execution and better practice would dictate that once an area of malpractice is uncovered, not only should the client be advised to retain counsel, but the potential defendant law firm should likewise have a third party firm undertake any settlement communications with the former client and his attorney.

It is all too frequent that a defendant attorney will assert a third party claim against plaintiff's current counsel or an interim successor counsel for tactical purposes seeking contribution for the damages asserted by plaintiff. Assuming no basis for the claim exists and the release was not procured by fraud, a nominal settlement and release may be entered into that will result in a dismissal of the third party claim for contribution under General Obligations Law § 15-108.[198] Of course the plaintiff-client should be advised by independent counsel as to the benefits and risks of entering into the nominal settlement.

However, where a general release exchanged releases the law firm's client and its "agents" barred any claim against the law firm which accrued prior to the date of the release.[199]

III. ALTERNATIVE BASES OF LIABILITY TO CLIENTS AND NON-CLIENTS

A. Judiciary Law Section 487

The assertion of claims under Section 487 of the Judiciary Law in malpractice actions

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196 22 NYCRR §1200.31.

197 22 N.Y.C.R.R § 1200 et seq. Rule 1.8(h).

198 *Balkheimer v. Spanton*, 2013 WL 440595 (2nd Dep't 2013).

199 *Blum v. Perlstein,* 47 A.D.3d 741, 851 N.Y.S.2d 596 (2nd Dep't 2008); *Hugar and LKC, LLC v. Damon & Morrey*, LLP, 51 A.D.3d 1387, 856 N.Y.S.2d 434 (4th Dep't 2008); *Berkowitz v. Fischbein, Badillo, Wagner & Harding, LLP*, 7 A.D.3d 385, 777 N.Y.S.2d 99 (1st Dep't 2004*); see also, Littman v. Magee*, 2007 WL 419373 (N.Y.Sup.).

has accelerated in recent years most likely due to the seemingly attractive trebling of damages should a violation of the statute be proven. In addition, because the penalty may not be insured, plaintiffs realize that defendant attorneys are particularly sensitive to the allegation that the statute was breached.

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

Inclusion of a claim under Section 487 as an add-on to the garden variety malpractice claim is a misuse of the statute. Section 487 was enacted as a vehicle to punish attorneys who engage in a "pattern of delinquent, wrongful or deceitful behavior" directed at the court or a party in a pending litigation.[200] Claims of deceit or delay where there is no pending litigation or other judicial proceeding will fail.[201] The factual allegations supporting this pattern of conduct must be plead with specificity or the complaint will be dismissed. Where the only misrepresentation alleged is contained in a letter upon which plaintiff could not have reasonably relied, the Section 487 standard is not met.[202] In addition, where plaintiff alleges that the fraud was committed in the context of a prior proceeding before the court, "plaintiff's remedy lies exclusively in that lawsuit itself, i.e. by moving pursuant to CPLR 5015 to vacate the civil judgment due to its fraudulent

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200 *Robinson v. Way*, 57 A.D.3d 872, 871 N.Y.S.2d 233 (2nd Dep't 2008); *Jaroslawicz v. Cohen*, 12 A.D.3d 160, 783 N.Y.S.2d 467 (1st Dep't 2004); *Kaiser v. VanHouten*, 12 A.D.3d 1012, 785 N.Y.S.2d 569 (1st Dep't 2004); *Markard v. Bloom*, 4 A.D.3d 128, 770 N.Y.S.2d 869 (1st Dep't 2004); *Havell v. Islam,* 292 A.D.2d 210, 739 N.Y.S.2d 371 (1st Dep't 2002); *Pellegrino v. File,* 291 A.D.2d 60, 64, 738 N.Y.S.2d 320 (1st Dep't 2002), *lv. denied* 98 N.Y.2d 606, 746 N.Y.S.2d 456 (2002); *Hansen v. Caffry,* 280 A.D.2d 704, 705-706, 720 N.Y.S.2d 258 (3rd Dep't 2001), *lv. denied* 97 N.Y.2d 603, 735 N.Y.S.2d 492 (2001); *Schindler v. Issler & Schrage,* 262 A.D.2d 226, 228, 692 N.Y.S.2d 361 (1st Dep't 1999), *lv. dismissed* 94 N.Y.2d 791, 700 N.Y.S.2d 422 (1999); *Estate of Steinberg v. Harmon,* 259 A.D.2d 318, 686 N.Y.S.2d 423 (1st Dep't 1999); *Henry v. Brenner,* 271 A.D.2d 647, 706 N.Y.S.2d 465 (2nd Dep't 2000).

201 *Costalas v. Amalfitano*, 305 A.D.2d 202, 760 N.Y.S.2d 422 (1st Dep't 2003) (Since alleged misconduct related to the creation of the corporation and the execution of the transfer documents is not within the course of a judicial proceeding, statute is inapplicable); *Empire Purveyors, Inc. v. Brief Justice Carman & Kleinman*, LLP, 21 Misc. 3d 1137(A), 2008 WL 5056406 (N.Y.Sup 2008).

202 *Briarpatch Ltd., L.P. v. Frankfurt Garbus Klein & Selz, P.C.,* 13 A.D.3d 296, 787 N.Y.S.2d 267 (1st Dep't 2004); *Beshara v. Little*, 215 A.D.2d 823, 626 N.Y.S.2d 310, 311 (3rd Dep't 1995).

procurement, not a second plenary action collaterally attacking the judgment in the original action."[203] Section 487 does not apply to fee disputes among attorneys.[204]

Similarly, where liability is predicated upon the Judiciary Law § 487(2) claim that an attorney intentionally prolonged proceeding for the sole purpose of personal gain, it is insufficient to allege that the defendant attorneys permitted a medical malpractice claim languish for 25 years.[205] Allegations of neglect alone will not support a claim under Section 487(2).

Even assuming the egregious pattern of behavior or intentional prolonging of a claim for the attorney's personal profit is proven, plaintiff cannot recover under Judiciary Law § 487 unless the plaintiff can prove that compensable damages were proximately caused by the claimed deceit or intentional delay.[206] In the event there is an award of treble damages under Judiciary Law § 487, plaintiff is not entitled to pre-judgment interest.[207]

In 2012, the Court of Appeal, in response to a certified question interposed by the Second Circuit, held that a claim under § 487 did not necessarily track the requirements for a fraud claim and held that where the court was not deceived by counsel's attempt to perpetrate a fraud upon the court, damages flowing from the attempted deceit are recoverable.[208] This holding – essentially stating that litigants need not meet the elements of fraud in order to recover under Section 487 has lead to a flurry of claims against attorneys by victorious litigants looking to recover the attorney fees that they paid to their own counsel to counter claims the attorneys allegedly knew were not meritorious.[209] The Court of Appeals, however has declined to hear Facebook's appeal from the Section 487 suit filed against the attorneys who represent the now-fugitive Ceglia who was – without basis – attempting to claim ownership rights in Facebook, signaling that the statute will not be applied to attorneys who in good faith represent their clients without knowledge of the client's

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203 *Cramer v. Sabo*, 31 A.D.3d 998, 818 N.Y.S.2d 680 (3rd Dep't 2006); *see, also, Melnitzky v. Owen*, 19 A.D.3d 201, 796 N.Y.S.2d 612 (1st Dep't 2005).

204 *Leskinen v. Fusco*, 18 A.D.3d 387, 796 N.Y.S.2d 54 (1st Dep't 2005).

205 *Gotay v. Breitbart*, 14 A.D.3d 452, 790 N.Y.S.2d 1 (1st Dep't 2004).

206 *Stanski v. Ezersky*, 228 A.D.2d 311, 644 N.Y.S.2d 220 (1st Dep't 1996), *lv. denied* 89 N.Y.2d 805, 653 N.Y.S.2d 918, 676 N.E.2d 500 (1996); *Feldman v. Jasne*, 294 A.D.2d 307, 742 N.Y.S.2d 540 (1st Dep't 2002); *Havell v. Islam*, 292 A.D.2d 210, 739 N.Y.S.2d 371 (1st Dep't 2002); *Burton v. Kaplan*, 184 A.D.2d 408, 585 N.Y.S.2d 359 (1st Dep't 1992); *DiPrima v. DiPrima*, 111 A.D.2d 901, 490 N.Y.S.2d 607 (2nd Dep't 1985).

207 *Resnick v. Socolov*, 5 A.D.3d 125, 771 N.Y.S.2d 889 (1st Dep't 2004).

208 *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 874 N.Y.S.2d 868 (2009).

209 In *Dupree v. Voorhees*, 876 N.Y.S.2d 840 (N.Y. Sup. 2009), the court granted plaintiff's motion to renew the dismissal of the complaint asserted against her husband's attorney on the basis of the Amalfitano holding "it should not be fatal to a plaintiff that the misrepresentation(s) upon which the Judiciary Law claim is based became known during the course of the underlying litigation, and that attorneys' fees alone may be considered damages proximately caused by the wrongful conduct."

fraudulent conduct.210

Finally, a cause of action under Section 487 of the Judiciary Law is subject to a six year period of limitations[211] although a few cases have held where the suit is filed by a client, the limitations period will remain three years.212

B. Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act applies to all attorneys who collect consumer debt on behalf of their clients on a regular basis, even if the activity involves litigation. "Debt collector" is defined to include "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[213] In *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti,*[214] the Second Circuit set forth a non-inclusive test for determining, on a case-by-case basis, whether an attorney is a 'debt collector' under the statute.

> We hold that the question of whether a lawyer or law firm "regularly" engages in debt collection activity within the meaning of section 1692a(6) of the FDCPA must be assessed on a case-by-case basis in light of factors bearing on the issue of regularity. None of the following factors is alone dispositive of the issue; they are illustrative rather than exclusive.
>
> Most important in the analysis is the assessment of facts closely relating to ordinary concepts of regularity, including (1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s), (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems or contractors in place to facilitate such activity, and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations. Facts relating to the role debt collection work plays in the practice as a whole should

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210 *Facebook v. DLA Piper, et al,* 134 AD3d 610 (1st Dep't 2015) lv to app. den. 28 NY3d 903 (2015)..

211 *Melcher v. Greenberg Traurig, LLP,* 23 NY3d 10 (2014).

212 *See, e.g., Farage v. Ehrenberg,* 124AD3d (2nd Dep't 2014).

213 15 U.S.C. § 1692a(6).

214 *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56 (2nd Cir. 2004).

> also be considered to the extent they bear on the question of regularity of debt collection activity (debt collection constituting 1% of the overall work or revenues of a very large entity may, for instance, suggest regularity, whereas such work constituting 1% of an individual lawyer's practice might not). Whether the law practice seeks debt collection business by marketing itself as having debt collection expertise may also be an indicator of the regularity of collection as a part of the practice. If an attorney falls within this category and is not intimately familiar with every provision of the act, an immediate review is warranted since a comprehensive review of the pitfalls under the statute is outside the scope of this article.

A prevalent source of claims under the Fair Debt Collection Practices Act rests upon the allegation that the attorney-debt collector failed to include the language mandated by the statute either in the initial communication with the debtor or within five day thereafter. Section 1692g(a) requires a debt collector to clearly communicate to the debtor certain information, including without limitation:

> (1) the amount of the debt;
> (2) the name of the creditor to whom the debt is owed;
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

While the language of the statute need not appear verbatim, including language that overshadows the statutory notifications is a violation.[215] As a result, deviations from the exact language of the statute should be made only after careful consideration. The issue as to whether the communication does overshadow the Section 1692g(a) requirements is evaluated from the standpoint of the "least sophisticated consumer."[216]

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215 *Shapiro v. Dun & Bradstreet Receivable Management Services, Inc.*, 59 Fed.Appx. 406, 2003 WL 1025581 (2nd Cir. 2003) (validation notice not overshadowed by invitation to call the creditor if debtor wants to settle).

216 *Russell v. Equifax A.R.S.,* 74 F.3d 30, 34 (2nd Cir.1996); *Savino v. Computer Credit, Inc.,* 164 F.3d 81, 85 (2nd Cir.1998).

While there was a split in the federal circuit court of appeals as to whether a pleading served by an attorney-debt collector seeking to collect consumer debt constitutes an "initial communication" so as to trigger the notification outlined above,[217] the statute has been amended to exclude a pleading from the definition of "initial communication."[218]

Of particular concern to attorneys regularly engaged in the practice of consumer debt collection is the decision in *Miller v. Wolpoff & Abramson.*[219] In *Miller*, the Second Circuit apparently accepted the premise that a law firm's failure to have meaningful attorney involvement in the mailing of the letters to debtors constitutes a "false, deceptive, or misleading representation or means in connection with the collection of any debt"[220] and reversed a district court's award of summary judgment in favor of defendant law firms on the basis of the fact that summary judgment was premature since discovery had not yet been conducted. Although this was the result directed by the court, the language of the decision speculates that

> if discovery in this case were to reveal that [defendant attorneys] handled this high volume of accounts, received only the limited information described in the attorney affidavits, reviewed the collection files with such speed that no independent judgment could be found to have been exercised, and then issued form collection letters with a push of a button, a reasonable jury could conclude that [defendant law firms] lacked sufficient professional involvement with plaintiff's file that the letters could be said to be from an attorney.

Since *Miller*, however, the Second Circuit did affirm the decision dismissing plaintiff's complaint on a pre-discovery motion to dismiss filed by defendant attorney in the matter *Shapiro v. Riddle*, [221] In addition, in two cases decided in 2004, the courts suggested that a statement by the law firm to the effect that there was no current intent to sue and the attorney did not form an opinion as to the validity of the debt is sufficient to avoid any claim of deceptive collection practices simply because the letter was written on attorney letterhead.[222]

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217 *Goldman v. Cohen*, 445 F.3d 152 (2nd Cir. 2006) (pleading is an initial communication); *Vega v. McKay*, 351 F.3d 1334 (11th Cir.2003) (pleading is not an initial communication); *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir. Dec 20, 2004) (pleading is an initial communication).

218 15 U.S.C. § 1692g(d) "Legal pleadings - A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a) of this section."

219 321 F.3d 292 (2nd Cir. 2003).

220 15 U.S.C. § 1692e.

221 351 F.3d 63 (2003).

222 *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360 (2nd Cir. 2005)(Letter from attorney stating "[a]t this time, no attorney with this firm has personally reviewed the particular circumstances of your account. . ." belies any claim for deceptive practices); *Pujol v. Universal Fidelity Corp.*, 2004 WL 1278163 (E.D.N.Y. 2004) (Letter from in-house counsel containing the language "[d]o not consider this letter a notification of intent to sue, since I do not have the

While there was clearly a need to impose some checks and balances in the debt collection field prior to 1986, the act imposed by Congress is a morass of technical regulations that provide countless traps for the unwary and enables the consumer to collect damages for even *de minimus* technical violations of the statute. On an individual claim, failure to comply with the statute will subject an attorney to "actual damages" suffered by the debtor, including recovery for "personal humiliation, embarrassment, mental anguish or emotional distress," statutory penalties up to $1,000, at the discretion of the court, together with court costs and attorney fees. Class action damages are capped at up to $1,000 statutory damages to the lead plaintiff, 1% of the debt collector's net worth and, of course, court costs and attorney fees.

As a defense to a claim asserted under the Fair Debt Collection Practices Act, the debt collector may show that by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the fact that safeguards were in place to stop the error.[223] While it is not difficult to establish that the violation occurred as a result of a bona fide error, the defense will not apply unless the debt collector also demonstrates that practices and procedures were in place to prevent the error.[224] Furthermore, the bona fide error may not be a mistake of law arising from the debt collectors misinterpretation of the requirements of the statute.[225] The defense that the action resulting in the claimed violation was the result in reliance on advisory opinion of the Federal Trade Commission also exists[226] but it is rare that an opinion falls squarely on the facts presented in the complaint. Lastly, the period of limitations is one year.[227]

Notwithstanding the continued prevalence of FDCPA claims against attorneys, there is some evidence in recent cases that the courts are fed up with the relentless pursuit of violations which exist only in the eyes of counsel pursuing the claims.[228]

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legal authority to sue. I have not, nor will I, review each detail of your account status, unless you so request . . ." cannot form the basis for a deceptive practice claim).

223 15 U.S.C.A. § 1692k(c).

224 *Johnson v. Equifax Risk Management Services*, 2004 WL 540459 (S.D.N.Y. 2004).

225 *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* 130 S.Ct. 1605 (2010).

226 15 U.S.C.A. § 1692k(e).

227 15 U.S.C.A. § 1692k(d).

228 *See, Jacobson v. Healthcare Financial Services, Inc*., 434 F.Supp.2d 133 (E.D.N.Y. 2006) (reciting the manner in which the statute has enable a class of "professional plaintiffs;" holding that "courts should not construe lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray;" and awarding attorney fees under 15 U.S.C. § 1692k(a)(3) to the defense); *Riddle & Associates, P.C. v. Kelly*, 414 F.3d 832 (7th Cir. 2005) (Law firm retained to collect debt successfully brought action under the Declaratory Judgment Act against debtor and her lawyer, seeking declaration that its collection letter to debtor did not violate the FDCPA by "overshadowing or contradicting" her right to dispute debt and was entitled to sanctions against debtor's attorney under statute permitting sanctions to deter frivolous litigation and abusive practices by attorneys, for his multiplication of proceedings).

C. Fraud

While a fraud claim against one's attorney alleging the same conduct and seeking the same damages as a malpractice claim will be dismissed as duplicative,[229] the problem arises when a third party is in a position to state the elements of a fraud claim against his adversary's counsel. A fraud claim against an attorney is no different from a fraud claim against anyone else; if an attorney commits actual fraud in dealing with a third party, the fact he or she did so in the capacity of attorney for a client does not relieve the attorney of liability. In order to state a cause of action for fraud against an attorney or other party, a litigant must allege (i) a material misrepresentation of fact; (ii) knowledge of falsity or reckless disregard for the truth; (iii) scienter; (iv) justifiable reliance; and (v) damages proximately caused by the claimed fraud.[230] These elements must be proven with "clear and convincing evidence."[231]

As noted above, a fraud claim asserted against an attorney predicated upon the same facts and alleging the same damages as plead in a legal malpractice claim will be dismissed as redundant.

CPLR § 3016(b) provides that in a complaint claiming damages for fraud or breach of trust the "circumstances constituting the wrong shall be stated in detail." Where the strict pleading standard is not met, the complaint will be dismissed.[232]

If the fraud is alleged to have been committed by the omission of a material fact on the part of an adversary's attorney, the third party must show a duty of disclosure in addition to reasonable reliance.

> Reliance is inappropriate in an adversarial context. The theory of negligent misrepresentation is not likely to be available in actual or prospective litigation. Rarely can there be justifiable reliance on, or a duty for, an attorney to act with care regarding a person whose interests are adverse to the client. The ethical dictates of the adversarial system impose on an attorney obligations to pursue his client's interests with undivided loyalty, independent judgment and to resolve doubts concerning the law and facts in the client's favor.[233]

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229 *See*, fn. 5, *supra.*

230 *Simcuski v. Saeli*, 44 N.Y.2d 442, 406 N.Y.S.2d 259 (1978); *Kaufman v. Cohen*, 307 A.D.2d 113, 760 N.Y.S.2d 157 (1st Dep't 2003).

231 *Paton v. Kutner & Lynch*, 215 A.D.2d 301, 626 N.Y.S.2d 792 (1st Dep't 1995).

232 *Joyce v. JJF Associates, LLC*, 8 A.D.3d 190, 781 N.Y.S.2d 62 (1st Dep't 2004); *Lanzi v. Brooks*, 54 A.D.2d 1057, 388 N.Y.S.2d 946 (3rd Dep't 1976); *Winkler v. Messinger, Alpain & Hufjay*, 147 A.D.2d 693, 538 N.Y.S.2d 299 (2nd Dep't 1989).

233 1 Mallen & Smith, Legal Malpractice, 5th ed. (West 2000), § 7.10, p. 515.

As a result, a plaintiff cannot reasonably rely upon the actions of one's adversary as a matter of law,[234] particularly where the information sought to be disclosed was equally available to both sides.[235]

An alleged representation by an attorney that an investment would be profitable is not actionable as fraud but is merely "speculation[s] and expression[s] of hope for the future . . ."[236]

The claim that an attorney concealed the existence of acts alleged to constitute malpractice does not create the basis for an independent fraud claim.[237]

D. Retaliatory Claims

A distinct increase in the number of retaliatory lawsuits, *i.e.,* lawsuits against attorneys by their former adversaries or adversaries' counsel, over the last couple of years is apparent. Typically, the suits are premised upon the theories of defamation, abuse of process, malicious prosecution, generalized *prima facie* tort, interference with prospective business advantage, interference with contractual relations, litigation fraud and spoliation of evidence. Often these claims are dismissed on motion but the cost of litigation continues to be a problem.

1. Malicious Prosecution

In order to maintain an action for malicious prosecution it is essential to prove: (1) that the prosecution was malicious; (2) that it was without reasonable or probable cause; and (3) that it terminated favorably to plaintiff.

In New York, a litigant is also required to allege the existence of a special injury in order to recover on a malicious prosecution claim.[238] As a result, in *Gershon v. Goldberg*,[239]

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234 *I.L.G.W.U. Nat'l. Retirement Fund v. Cuddlecoat, Inc*., 2004 WL 444071 (S.D.N.Y.); *Karsanow v. Kuehlewein,* 232 A.D.2d 458, 458-459 (2nd Dep't 1996) ("plaintiffs' allegation that they consented to the inclusion of a non-recourse clause in the extension agreements because [defendant's attorney] assured them that such a provision was 'customary' is insufficient to establish a claim for fraud. The plaintiffs could not reasonably rely on the legal opinions or conclusions of their adversary's counsel."); *Aglira v. Julien & Schlesinger, P.C.,* 214 A.D.2d 178, 185, 631 N.Y.S.2d 816, 820 (1st Dep't 1995); *Lazich v. Vittorio & Parker*, 592 N.Y.S.2d 418, 189 A.D.2d 753 (2nd Dep't 1993) *app. dism'd*, 81 N.Y.2d 1006, 599 N.Y.S.2d 805.

235 *Jachetta v. Vivona Estates, Inc.,* 249 A.D.2d 512, 672 N.Y.S.2d 111 (2nd Dep't 1998).

236 *Zaref v. Berk & Michaels*, 192 A.D.2d 346, 596 N.Y.S.2d 773, 774 (1st Dep't 1993).

237 *Weiss v. Manfredi*, 83 N.Y.2d 974, 977, 616 N.Y.S.2d 325, 327 (1994) *rearg. den.* 84 N.Y.2d 848, 617 N.Y.S.2d 134. *See, also*, *Boyd v. Gering, Gross & Gross,* 226 A.D.2d 489, 641 N.Y.S.2d 108 (2nd Dep't 1996).

238 *Engels v. CBS, Inc.*, 93 N.Y.2d 195, 689 N.Y.S.2d 411 (1999).

239 30 A.D.3d 372, 817 N.Y.S.2d 322 (2nd Dep't 2006).

plaintiff sued the litigants and their attorney that had previously maintained a civil rights claim against plaintiff that had been resolved in plaintiff's favor. The Appellate Division held that the failure to allege a special injury causally connected to the claimed malicious prosecution warranted a dismissal of the complaint.

2. Abuse of Process

Attorneys have always been the target of abuse of process claims asserted by their clients' adversaries. To be successful on an abuse of process claim, plaintiff must show (1) regularly issued process, either civil or criminal; (2) an intent to do harm without excuse or justification; (3) use of process in a perverted manner to obtain a collateral objective.[240] In New York, the courts have taken the position that issuance of a civil summons and complaint cannot form the basis for an abuse of process claim.[241]

3. Defamation

New York recognizes the existence of a strong "litigation" or "judicial proceedings" privilege which provides an absolute privilege for allegedly defamatory statements made in the context of a judicial proceeding so long as the statements bear some relation to the proceeding.

Statements in a malpractice complaint to the effect that plaintiff "defrauded" client and "used the retainer provisions as a club" to extort fees; statements to an arbitration panel that plaintiff attorney was a "thief," "liar" and pathological character; and statement in law journal article that clients had been "poorly served" by plaintiff were privileged.[242]

4. Prima Facie Tort

While many jurisdictions have relaxed the pleading elements for a *prima facie* tort, New York has long maintained that plaintiff must allege that the complained-of conduct by the defendants was motivated solely by malice, *i.e.,* "disinterested malevolence."[243] Where plaintiff fails to set forth allegations of special damages or to demonstrate that malice was the defendants' only motive in commencing the prior lawsuit, the cause of action must be dismissed.[244]

5. Interference with Contractual Relations

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240 *Curiano v. Suozzi,* 63 N.Y.2d 113, 480 N.Y.S.2d 466 (1984).

241 *Siegel v. Smith, Panish & Shapiro, P.C.,* 136 A.D.2d 620, 523 N.Y.S.2d 866 (2nd Dep't 1988).

242 *Lacher v. Engel*, 33 A.D.3d 10, 817 N.Y.S.2d 37 (1st Dep't 2006).

243 *Curiano v. Suozzi*, 63 N.Y.2d 113, 480 N.Y.S.2d 466 (1984).

244 *Burns Jackson Miller Summit & Spitzer v. Lindner,* 59 N.Y.2d 314, 333, 464 N.Y.S.2d 712 (1983); *Siegel v. Smith, Panish & Shapiro, P.C.*, 136 A.D.2d 620, 523 N.Y.S.2d 866 (2nd Dep't 1988); *Vevaina v. Paccione,* 125 A.D.2d 392, 509 N.Y.S.2d 113 (2nd Dep't 1986).

The tort of intentional interference with contractual relations requires a plaintiff to prove (1) existence of a valid contractual relationship; (2) defendant's knowledge of the terms of the contract; (3) defendant's intentional and improper procurement of a third party's breach of that contract without justification; and (4) damages proximately caused by the defendant to the to the party whose relationship has been disrupted.[245]

Under ordinary circumstances, where the attorney is acting on behalf of the client and within the scope of authority, under standard agency-principal theories the courts will not impose liability against the attorney based upon advice which purportedly induces the principal client to breach a contract with a third party.[246]

6. Spoliation of Evidence – E-Discovery

The Court of Appeals has held that New York does not recognize an independent tort based upon spoliation of evidence.[247] However, case law and the e-discovery rules have defined the broad extent to which an attorney may be held responsible to its client's adversary for discovery lapses. In *Zubulake v. UBS Warburg*,[248] the court articulated the scope of the increased burden on counsel to ensure that the client maintains and produces requested discovery and held that "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. However, this is only the starting point of counsel's obligation:

> Once a "litigation hold" is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold," . . . To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information.
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> . . .
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> To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the

245 *Foster v. Churchill*, 87 N.Y.2d 744, 642 N.Y.S.2d 583 (1996).

246 *See, e.g., Hussie v. Bressler*, 122 A.D.2d 113, 114, 504 N.Y.S.2d 510 (2nd Dep't 1986) [quoting *Kartiganer Associates v. Town of New Windsor*, 108 A.D.2d 898, 899, 485 N.Y.S.2d 782 (2nd Dep't 1985)].

247 *Ortega v. City of New York*, 9 N.Y.3d 69, 845 N.Y.S.2d 773 (2007).

248 229 F.R.D. 422 (S.D.N.Y. 2004).

> lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents. When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as "hits" on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost.
>
> In short, it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take *some reasonable steps* to see that sources of relevant information are located.

Against this background, the court set forth three steps counsel must take to ensure compliance with the preservation obligation:

> *First,* counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.
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> *Second,* counsel should communicate directly with the "key players" in the litigation, *i.e.,* the people identified in a party's initial disclosure and any subsequent supplementation thereto Because these "key players" are the "employees likely to have relevant information," it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.
>
> *Finally,* counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place. In cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of backup tapes. In other cases, it might make sense for

> relevant backup tapes to be segregated and placed in storage. Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant backup tapes from others. One of the primary reasons that electronic data is lost is ineffective communication with information technology personnel. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled.[249]

Based upon the discovery lapses of "counsel and client alike," the court order that the jury empanelled would receive the adverse inference instruction and directed defendant to pay for the re-deposition of key witnesses, the restoration of certain back-up tapes and the cost of the motion.

The *Zubulake* standards were addressed in *Phoenix Four, Inc. v. Strategic Resources Corporation*,[250] with the result that counsel and the client were equally sanctioned for the costs of the motion and $30,000 for the re-deposition of witnesses as a result of the "gross negligence" in failing to locate 200-300 boxes of documents discovered on a server abandoned by the defendant during eviction proceedings but then used by a principal of the defendant in a new business venture. In its decision, the court emphasized that "counsel's obligation is not confined to a request for documents; the duty is to search for sources of information." As a result, the court rejected counsel's acceptance of its client's representation that because it "was not longer in operation, there were no computers or electronic collections to search" and noted that counsel's "obligation under *Zubulake V* extends to an inquiry as to whether information was stored on that server and had the defendants been unable to answer that question, directing that a technician examine the server."

Perhaps the decision in *Qualcomm, Inc. v. Broadcom Corp*.[251] best evidences the extent to which the failure to observe e-discovery rules can fracture the attorney-client relationship and further expose the attorney and law firm to potential claims by the client. In *Qualcom*, the court reported six attorneys to the state disciplinary committee and sanctioned Qualcomm and its attorneys $8 million towards Broadcom's defense costs for jointly withholding discovery documents – a lapse the trial court found could only have been done with assistance of counsel. The court thereafter vacated its decision in part and, under the self-defense exception to the attorney-client privilege, allowed the attorneys to defend themselves using confidential information gleaned during the course of the representation. The potential for adversity between a law firm and its client in such situations is evident.

In short, while not creating an independent tort, the scope of counsel's obligations to ensure its client's response to discovery may create exposure to a sanction in favor of a non-client or

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249 *Zubulak*e, at *434-435.

250 2006 WL 1409413 (S.D.N.Y. 2006). *See also, Treppel v. Biovale Corp*., 249 F.R.D. 111 (S.D.N.Y. 2008).

251 *Qualcomm, Inc. v. Broadcom, Corp.*, 2008 WL 66932 (S.D.N.Y. Cal .Jan. 7, 2008) vacated in part, 2008 WL 638108 (S.D. Cal. March 5, 2008) (Six retained attorneys representing Qualcomm that objected to the magistrate's imposition of discovery sanctions are not prevented from defending themselves by the attorney-client privilege).

form the basis for a subsequent legal malpractice case by a client who sustains actual and ascertainable damages as a result of the counsel's failure to advise the client of its discovery obligations.

IV. IDENTIFYING, ANALYZING AND RESOLVING CONFLICTS OF INTEREST

It doesn't matter how long you have been practicing – whenever a new client or a new matter comes into the office – you feel that sense of satisfaction. Having to then reject that representation because of the existence of a non-waivable conflict is one of the most frustrating experiences an attorney faces. A far more frustrating experience, however, is to be the subject of a civil claim or grievance as a result of the existence of a conflict of interest that was missed or ignored. According to statistics compiled on a nationwide basis, 6.3% of all malpractice claims are asserted because of administrative errors that occur in the identification of conflicts.[252] Based solely upon anecdotal evidence, law suits against attorneys involving errors in identifying, analyzing and resolving conflicts in New York well exceed the nationwide statistics.

Conflicts of interest must be addressed every day of a legal career; they are the bane of every attorney's existence. No single topic in the Code of Professional Responsibility is more problematic than the determination as to whether a conflict exists between an attorney and client or former client. Attorneys who believe that the client's consent to a conflict immunizes the attorney or law firm from the consequences of conflict issues are sadly mistaken and grossly misinformed. It is the job of every attorney, not just the senior attorneys in a firm, to identify conflicts and be certain that identified conflicts are resolved. In recent years, the frequency of breach of fiduciary duty claims predicated upon alleged conflicts of interest has increased and has resulted in substantial verdicts.[253] It is important to remember when analyzing a conflicts issue that the appearance of a conflict is nearly as devastating as the existence of a true conflict. The perception of whether a conflict exists is from the point of view of the client or potential client, and it is often made from the vantage point of hindsight. As a result, the process of conflicts identification and resolution should always err on the side of caution.

A. Maintenance of Conflict Procedures

Before any conflicts analysis can take place, the law firm must have in place procedures designed to permit a review of the entities and individuals the firm and its attorneys have represented. The RPC requires all law firms to maintain a conflicts check system and to have a policy in place pursuant to which the law firm regularly implements the system to screen for conflicts whenever (i) the firm agrees to represent a new client; (ii) the firm agrees to represent an existing client in a new matter; (iii) the firm hires or associates with another lawyer; or (iv) an

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252 ABA Standing Committee on Professional Liability, *Profile of Legal Malpractice Claims 2000 – 2003* Table 5, p.12 (ABA 2005).

253 *See, e.g., Milbank, Tweed, Hadley & McCloy v. Chan Cher Boon*, 13 F.3d 537 (2nd Cir. 1994); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 780 N.Y.S.2d 593 (1st Dep't 2004).

additional party is named or appears in a pending matter.[254] The Rule creates what amounts to a *per se* violation of the disciplinary rules and provides a basis upon which attorneys and law firms[255] may be found to have engaged in misconduct without the necessity of demonstrating intent. It is sufficient to show that the firm failed to keep contemporaneous records of engagements by clients and did not maintain a policy for checking past relationships with clients before new retentions are undertaken.

The responsibility for identifying and resolving conflicts is the responsibility of every attorney – not just the senior attorneys in a firm. From the moment an attorney begins to practice, a database and back-up rolodex of all clients and those related to each representation, including non-clients, must be maintained. On each retention or proposed retention, all clients, former clients, opposing parties and their attorneys, and all entities relating to these categories must be entered in the firm's conflicts system, together with the subject matter of retention.[256]

As lateral hires are brought into the firm, care must be taken to incorporate the new attorney's prior representations into the firm's system.[257] Records of the identity of non-clients and the specific matters where engagements are declined must also be recorded in the firm's conflicts program. Attorneys must reflect upon the nature of their practice and adapt conflict procedures to take into account relationships that may be of importance to the attorney's clients. A reasoned conflicts analysis can only be performed if this practice is rigorously and scrupulously maintained.

In 2003, the New York City Bar released a comprehensive ethics opinion addressing the issue of what constitutes an effective procedure for identifying conflicts of interest.[258] The opinion, which should be required reading for all attorneys, may be accessed at abcny.org and is attached to these materials at Appendix 2.

In order to ensure that all attorneys in the firm adhere to the practice, all potential retentions with new or existing firm clients must be entered on standardized intake sheets and entered by third parties in the firm's system. A sample intake sheet is annexed at Appendix 3. The intake sheet should contain, at a minimum, the following information:

- the name, address and contact number of the client and any entities related to the client;
- the date of the intake;

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254 RPC 1.10(e).

255 RPC 1.10(f).

256 *G.D. Searle, Inc. v. Pennie & Edmonds, LLP*, 7 Misc.3d 1010(A), 2004 WL 3270190 (N.Y.Sup.) (New York trial court asked the Departmental Disciplinary Committee to review the conduct of a law firm that represented clients with competing technology, even in the absence of actual adversity between the two clients).

257 RPC 1.10(e)(3).

258 ABCNY, Formal Op. 2003-03, *Checking for Conflicts of Interest*.

- the nature of the representation;
- if the client is a new client without established terms of compensation, the terms and conditions of the engagement;
- if the client is a new client, the identity of the person authorizing the engagement;
- the name, address and contact numbers of all parties involved in the representation;
- the terms/names which should be included in a conflict search.

Remember that accuracy counts. A name misspelled will not be properly recorded in the law firm's conflict system and may form the basis for a missed conflict. Consistency counts as well. Those individuals charged with entering information into the conflict system must be taught to enter names and other information in the same manner every time it is done. Where new representations are declined, be certain the information on these non-engagements is entered in the conflicts system as well.

If a potential conflict is identified, analysis of that conflict must be performed by an individual or committee within the firm, distinct from the attorney originating the retention, who is well versed in the ethical implications of a conflict. Too often a conflicts analysis is left to the attorney seeking to bring the proposed retention into a firm or to a junior attorney. In the former instance, the desire to bring work to the firm may result in "cutting corners" while the latter situation may result in a junior attorney deferring to the wishes of a firm rainmaker. Neither scenario is in a firm's best interests.

Conflict analysis should be the job of every person in a law office. The analysis as to whether a conflict exists does not end upon retention.[259] The Rules provide that attorneys may not continue employment if a conflict arises during a representation. Conflict checking must continue and be constantly updated throughout a representation as additional parties and their counsel are added to the matter. Every attorney and non-attorney staff members have the obligation to comply with the ethical rules. If a conflict comes to your attention, do not take the ostrich approach. Problems ignored only get worse.

(B) Lateral Hires

Lateral hires present special conflicts problems which require careful and frank evaluation.[260] Except with the written consent of the client after "full disclosure," a lawyer may not

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259 RPC 1.10(e)(4).

260 RPC 1.10(e)(3). A good discussion of the information a law firm must seek from a lateral hire is contained in New York State Bar Association Committee on Professional Ethics, Opinion 720, 8/27/99, 2000 N.Y. App. Div. LEXIS 7754. While the opinion concludes that, unless protected as protected confidential information of a

represent a new client in the same or substantially related matter where the new client's interests are materially adverse to the interests of a former client of a law firm with whom the attorney was formerly associated **if** the lawyer had acquired confidential information that is material to the matter.[261]

To even begin such an analysis, law firms are dependent upon the candor of their employees. If the lateral hire never acquired the confidential information of the client in the same or substantially related matter, the inquiry is closed.

Attorneys seeking to change law firms must be very cognizant of the impact that a proper conflicts analysis may have upon a prospective employer or even the attorney's current employer.[262] Before accepting a position, an attorney must effectively analyze the question of whether or not a conflict might preclude a law firm from hiring the attorney or face losing a significant client.[263] The failure to perform such an analysis can be devastating. The decision of *Ogden Allied Abatement & Decontamination Services, Inc. v. ConEd*,[264] presents a factual scenario that constitutes the ultimate nightmare for any associate. A law firm representing a party in the *Ogden* matter was impressed with the representation afforded by an adversary attorney. After several interviews, conducted while the *Ogden* litigation was in the middle of discovery, the law firm made the associate an offer. The law firm, however, rescinded the offer after the associate's current law firm raised the conflict issue by means of a motion to disqualify and after the associate had already given notice but before the associate had commenced his new employment. While the *Ogden* court did not disqualify the law firm that had made the offer to the associate, the firm's conduct in continuing the interview process while discovery was underway was soundly criticized.

(C) 'Of Counsels'

The RPC recognizes the existence of 'of counsel' relationships which it defines as a

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client, the firm must seek the names of clients represented by a new lawyer (or if the former firm was small, all clients of the former firm), the opinion sidesteps the all important issue as to how this information is obtained if the original firm refuses to voluntarily disclose the information or if the lateral hire does not want any contact with the former firm prior to acceptance of the new employment opportunity.

261 RPC 1.10(c).

262 It is recommended that any attorney contemplating a change in employers read Altman,. James, *Ethical Issues Can Cloud Job Search*, NYLJ 10/20/00 and Altman, James, *A Young Lawyer's Nightmare*, NYLJ 2/16/01.

263 Absent the former client's consent, a lawyer changing firms may not undertake representation adverse to the former client if (1) moving lawyer personally "represented" the client or otherwise acquired relevant confidences or secrets of the client, and (2) moving lawyer would be undertaking representation in the same matter or in a matter that is substantially related to one in which the moving lawyer or the old firm previously represented the former client. Absent the client's consent, if the moving lawyer is disqualified from engaging in representation under this rule, the moving lawyer's new law firm is also disqualified. N.Y.S. Bar Association Ethics Opinion No. 723.

264 NYLJ, September 25, 2000, p.25, col. 2.

"continuing relationship with a lawyer or law firm, other than as a partner or associate."[265] The ability to utilize the services of attorneys not technically employed by a law firm is of significant benefit to the newly formed law firm. If there is an 'of counsel' relationship, a law firm or an individual attorney may so indicate on the letterhead. However, as a usual practice, for purposes of analyzing conflicts of interest, the 'of counsel' relationship should be treated as if the 'of counsel' and the law firm are conducting business as a single firm.[266] As was summarized by the New York State Bar Association: "if a lawyer acting alone would be disqualified from a particular representation based on any of the rules enumerated in DR 5-105(D), then that disqualification is imputed to a law firm with which that lawyer has an "of counsel" relationship."[267] In other words, where an "of counsel" relationship exists, their conflicts are your conflicts.

In a recent case, on a disqualification motion where the criteria is whether the conflict has tainted the court proceedings, the Second Circuit rejected the blanket imputation of an 'of counsel's' conflicts to a law firm and instead took a more pragmatic approach in holding that the conflict would depend on the nature of the relationship between the "of counsel" and the law firm.[268] Finding that the relationship between the "of counsel" attorney and the law firm was attenuated and the attorney clearly continued to operate his sole practice in addition to serving as transactional counsel for certain enumerated firm clients and that adequate screening procedures negated any taint, the court denied the motion to disqualify. Notwithstanding the content of this decision, however, from the point of view of compliance with the RPC and effective risk management, law firms having "of counsel" relationships should follow the one entity rule.

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265 RPC 7.5(a)(4).

266 *See, e.g.,* ABA 90-357; ABCNY Formal Op. 1995-8 ("attorneys will need to keep in mind that for purposes of analyzing conflicts of interest, 'of counsel' relationships are treated as if the 'counsel' and the firm are one unit"). ABCNY Formal Op. 2000-4. The same position has been adopted by the *Restatement of theLaw Governing Lawyers*, Restatement (Third), The Law Governing Lawyers, § 123 cmt. c(ii) (1998), which states:

> A lawyer who is of counsel to a firm often has more limited access to confidential client information than firm partners and associates and usually a smaller financial stake in the firm. Nonetheless, the incentive to misuse confidential information, the difficulty of determining when it has been misused, the ostensible professional relationship, as well as the administrative ease of a definite rule, justify extending imputation to lawyers having an of-counsel status.

267 NYSBA Committee on Professional Ethics Op. 773, 1/23/04.

268 *Hempstead Video, Inc. v. Village of Valley Stream*, 409 F.3d 127 (2nd Cir. 2005) ("We believe the better approach for deciding whether to impute an "of counsel" attorney's conflict to his firm for purposes of ordering disqualification in a suit in federal court is to examine the substance of the relationship under review and the procedures in place. The closer and broader the affiliation of an "of counsel" attorney with the firm, and the greater the likelihood that operating procedures adopted may permit one to become privy, whether intentionally or unintentionally, to the pertinent client confidences of the other, the more appropriate will be a rebuttable imputation of the conflict of one to the other. Conversely, the more narrowly limited the relationship between the "of counsel" attorney and the firm, and the more secure and effective the isolation of nonshared matters, the less appropriate imputation will be. Imputation is not always necessary to preserve high standards of professional conduct. Furthermore, imputation might well interfere with a party's entitlement to choose counsel and create opportunities for abusive disqualification motions."

(D) Suitemates

Sharing office space is a common solution to containing the expenses inherent in running a law practice. Before entering into such a relationship, however, you should carefully consider the problems associated with such an arrangement. In the first instance the RPC prohibits attorneys from holding themselves out as having a partnership with one or more attorneys unless they are, in fact, partners.[269] Using a common letterhead, office sign, receptionist, telephone system, computer system and other resources, combined with the physical impression of continuity within the office space, all place the perception of an implied partnership in the public's mind. Such a perception may be difficult to dispel in the event one attorney in a shared suite is the target of a malpractice claim is sued by a client. In addition, office-sharing raises issues involving conflicts of interest and potential breaches of client confidentiality.

If an attorney or law firm is designated as an "affiliate" or "of counsel" on a law firm's letterhead, the majority of ethics opinions reach the conclusion that conflicts must be analyzed as if the "affiliate or the "of counsel" and the law firm were "one unit."[270]

To maintain the independence of the law firm within a suite, an attorney must be certain to use separate letterhead; take affirmative steps to explain the office-sharing arrangement to every client (in writing, perhaps in the content of the engagement letter), maintain distinct directory listings, online, telephone and in the building; keep client files in an area not common to all suite residents; separate computer network systems containing client related documents and obtain independent policies of professional liability insurance (requiring all suite members to do the same with minimum levels of coverage set by agreement). Resist the temptation to refer to a suitemate as an associate or 'of counsel' which serve to blur the lines of distinction in the client's eyes. Above all, make certain that all resident firms within the suite are taking the same precautions in order to avoid the possibility that another suite member is leaving the impression in his or her client's eyes that you are part of their firm.

E. Who is the Client?

In virtually every situation, an attorney represents a client. While the issue of the identity of a client is usually easily ascertained in the litigation context,[271] in the business world, the issue is less defined. In every representation, an attorney must define the identity of the client. Doing so in the context of the retainer agreement is not sufficient where the person or entity who believes the attorney is representing their interests is not privy to the terms of retention. Letters must

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269 RPC 7.5(c) provides: "Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners."

270 The Association of the Bar of the City of New York ["ABCNY"], Formal Op. 2000-4, *Listing "Affiliated" Firms on Letterhead and Elsewhere; Affiliated Law Firms Clearing Conflicts as a Single Unit.*

271 A discussion of the problems faced by attorneys when entering into a tri-partite relationship between the attorney, client and a third party paying the attorney and theoretically retaining control over the litigation must await another time.

be sent to individuals or entities that may reasonably believe their interests are being represented by the attorney in any given transaction when in fact this is not the case

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Where an attorney is retained by an organization and deals directly with the organization's constituents (*i.e.*, directors, officers, shareholders, members, employees, etc.), the RPC places the onus on the attorney to advise the constituents that their interests may differ from the organizations and that the lawyer represents only the organization.[272] To be effective, this advice must, of course, be in writing. If an attorney knows (not suspects) that the conduct of a constituent constitutes (i) a violation of a legal obligation to the organization; or (ii) a violation of law that may reasonably be imputed to the organization and (iii) is likely to result in substantial injury to the organization, the attorney must take all necessary steps to protect the organization.[273] If the highest authority in the organization insists on maintaining the course of conduct, the attorney may reveal confidential information if permitted under RPC 1.6 and should resign.[274]

(F) Conflicts with Current Clients[275]

1. Conflict between Current Client and Attorney

The first step in analyzing the possibility of a conflict between an attorney and the client or potential client requires the attorney to identify his or her financial, personal, business or property interest in the matter. If no such interest exists, the analysis terminates. If an interest is acknowledged, the second step is to determine whether a "reasonable attorney"[276] would conclude

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272 RPC 1.13.

273 RPC 1.13(b) provides "Such measures may include, among others:
(1) Asking reconsideration of the matter;
(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law."

274 RPC 1.13(c).

275 RPC 1.7 provides: (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:(1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

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

276 RPC 1.0(q) provides: "When used in the context of conflict of interest determinations, 'reasonable lawyer' denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation."

that there is a significant risk that the lawyer's exercise of independent judgment will be adversely affected by lawyer's interest. If a reasonable attorney would not conclude that there is a significant risk that the lawyer's judgment would be impaired, there is no conflict. However, if a reasonable attorney does conclude that there is a significant risk that the attorney's independent judgment would be adversely affected by the lawyer's interest, there is a conflict and the determination must be made as to whether the conflict is waivable.

RPC 1.7(b) sets forth the criteria which determine whether or not a conflict can be waived:

(1) the lawyer must "reasonably believes"[277] that he or she will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives "informed consent,"[278] "confirmed in writing."[279]

If any one of these elements cannot be met, the conflict is not waivable.

Under the Rules, a conflict may only be waived if the client's "informed consent" is confirmed in writing. Although the Rules do not specify what must be included in the writing, evidence of the extent of the client's understanding of the ramifications of the potential adverse impact should be included in the written disclosure.[280] A general statement that there are

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277 RPC 1.0(r) - "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

278 RPC 1.0(j) - "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

279 RPC 1.0(e) - "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

280 "Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. See Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. When representation of multiple clients

unspecified conflicts of interest and a waiver based upon that statement will not be sufficient to rebut a client's claim that a particular adverse consequence was not explained. If the issues are complicated, for the waiver to be effective, the client should have the advice of independent counsel.[281] Once subjected to this array of nay-saying, no rational client would choose to waive the conflict. On the flip side, one must question the desirability of a client who is willing to pay an attorney who may benefit from the advancement of a position adverse to the client's interests.

And the process does not end upon the intake of a new client, the same analysis must take place, with the client's "informed consent" continually updated, as new facts come to light during the course of discovery, new witnesses testify and positions of the parties to a representation change. Even where a conflict is not evident at the outset of a relationship, the attorney must be sensitive to conflict issues that emerge as a representation proceeds.

2. Conflicts between Current Clients

An attorney may not take on a new matter[282] or continue with the representation of a client[283] where a "reasonable attorney" would conclude that the representation will involve the lawyer in representing "differing interests."[284] If the reasonable attorney would not conclude that the

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in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved. See Comments [30] and [31] concerning the effect of common representation on confidentiality." RPC 1.7, Comment 18.

281 In *Rhodes v. Buechel*, 258 A.D.2d 274, 685 N.Y.S.2d 65 (1st Dep't 1999), the Appellate Division affirmed the trial court's determination that the attorney had no interest in inventions or patents held by defendants individually despite a written retainer agreement and years of course of conduct:

> No matter the form the parties' relationship assumed, it remained at all times that of attorney -client, a relationship based upon plaintiff's performance of legal services in exchange for an interest initially in defendants' inventions, and then in the corporation, and later the trusts, set up to exploit those inventions. The record supports the trial court's findings that neither the initial arrangement not its subsequent incarnations were entered into upon adequate disclosure to defendants of other possible fee arrangements, and potential conflicts of interest, or with the aid of independent counsel retained for the purpose of safeguarding defendants' interests. Rescission of the parties' arrangements *ab initio*, with payment to plaintiff in quantum meruit for his services, is an equitable result.

282 RPC 1.7, Comment 3 provides "A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b)."

283 RPC 1.7, Comment 4 provides "If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16(b)(1). Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9; see also Comments [5], [29A]"

284 "Differing interests include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." RPC 1.0(f).

representation involved "differing interests," there is no conflict and the analysis stops. However, if the "differing interests" are found, there is a conflict and the same analysis noted in the preceding section must be performed pursuant to RPC 1.7(b) to ascertain if the conflict may be waived.

Once again, the same pitfalls discussed in analyzing the existence of a conflict between an attorney and client must be addressed where clients have competing interests - except the risks are now multiplied. Instead of being concerned with the understanding of one client and the comprehensiveness of "full disclosure" so that "informed consent" may be obtained "confirmed in writing," the process must be repeated with respect to each client potentially involved. In a recent decision, the court deferred decision on a summary judgment motion made by defendants while it sua sponte examined the inherent conflict of plaintiffs' counsel in representing four plaintiffs – one of whom was the driver of the vehicle in which the other three were passengers and noted that the existence of such a conflict may result in forfeiture of any fee.[285]

Furthermore, where one client refuses to consent to a dual representation, an attorney may not jettison the uncooperative client in an attempt to convert a continuing representation into a past relationship.[286]

G. Duties to Former Clients

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.[287] In the lateral hire situation, if a lawyer acquired confidential information as a result of the lawyer's former firm's representation of a client that is material, the lawyer may not thereafter represent another client in the same or substantially related matter where the two clients' interest are materially adverse unless the former client provides informed consent, again confirmed in writing.[288] Further, the attorney may not use any confidential information gained in the course of the former client' representation unless in compliance with RPC 1.6 or if it has become generally known and may not reveal such confidential information except in compliance with Rule 1.6.

The question arises as to when a client is characterized as a "former" as opposed to a "current" client. There is no clear answer. A law firm may represent a client for twenty years and yet have no open matters for a one year period. If the relationship was such that the client expected the law firm to be continuing its services, the client may be considered "current" notwithstanding the absence of any open matters. For this reason, among others, it is a good idea to get into the habit of

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285 *Tavarez v. Hill*, 870 N.Y.S.2d 774 (N.Y. Sup. 2009); *See also, LaRusso v. Katz*, 30 A.D.3d 240, 818 N.Y.S.2d 17 (1st Dep't 2006); *Shaikh v. Waiters*, 185 Misc.2d 52, 710 N.Y.S.2d 873 (N.Y. Co. 2001).

286 *Burda Media, Inc. v. Blumenberg*, 1999 WL 1021104.

287 RPC 1.9(a).

288 RPC 1.9(b)

sending closing letters confirming the termination of the representation in any given matter. In addition to providing some contemporaneous documentation that the client could not reasonably be expecting the law firm to be rendering further services, a termination letter also fixes the accrual date for the period of limitations.

H. Transactions Between Lawyer and Client

While years ago equity in lieu of fees was standard in the Silicon Valley, New York attorneys were not quick to follow suit. However, there was a time when, in order to compete with their California counterparts, and in part to cash in on the potential windfalls once possible in representing a dot-com client, some larger New York City firms began to enter the waters, albeit reluctantly.[289] But investment in or with a client is not for the average attorney or law firm. In addition to the substantial ethical concerns which we will discuss, there can be serious financial concerns as well. Most attorneys or law firms cannot sustain the financial loss of fees should the start-up client fail, as so many do.

[289] *See,* Davis, W., *New York Firms Now Investing in Clients, Taking Equity in High-Techs Stirs Ambivalence*, NYLJ, 3/20/00, p.1; Coffee, J., *The New Compensation*, NYLJ, 3/16/00, p.5, col. 1.

A New York lawyer may not enter into a business transaction with a client if their interests differ and if the client is expecting the attorney to protect the client's interests in the transaction unless:

> (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.[290]

If, after full disclosure, a client still refuses independent counsel, agrees that the attorney has an inherent conflict, but wants to rely upon his or her advice anyway, why would one want to do business with this client who clearly lacks any business judgment? The answer is, you don't. Put mildly, entering into a business transaction with a client is a minefield. Find another source to borrow from or lend to. Invest elsewhere or seek another source of investors. Do what you can to avoid entering into a business transaction with a client and – although the Rules set forth a way in which it can be accomplished ethically – sound principles of risk management dictate that you should never do so unless the client is separately represented by counsel that is truly independent and competent. Remember the reasonableness of each element of the test will be assessed from the vantage point of hindsight. The attorney will never emerge unscathed.

I. Waivers of Conflicts

Once the determination is made that a conflict does exist, steps must be taken to properly document the client's waiver of the conflict. If the requirements of the Rules are met so as to permit waiver, how should the client's agreement to the waiver be documented? First of all, for any waiver to be effective, the client's "informed consent" must be obtained. As one commentator has said:

> In sum, a prudent lawyer will tell the client everything the lawyer knows about present or potential conflicts of interest, and make these disclosures both orally and in writing. The more disclosure, the better. Disclosure is essentially cost-free to the lawyer and is valuable to the client in understanding what lies ahead. Holiday Inn grew into the nation's largest motel chain by offering lodging with "no surprises." I advise lawyers to use the Holiday Inn method of law practice and strive to offer representation with "no surprises."

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290 RPC 1.8(a).

> Conflicts with a lawyer's personal interests are hard to predict, but lawyers should do their best to convey the full situation to their clients so that a client's consent is truly informed. The more the client knows in the beginning, the less is likely to go wrong in the end.[291]

As one might imagine, there is no "form" that can adequately disclose to the client the particulars of a conflict in any particular fact-driven scenario. At a minimum, the written disclosure should set forth:

- The identity of the clients involved;
- An identification of the work involved and any limitations to that work;
- The factual basis for the conflict (without disclosure of client secrets or confidences);
- A discussion as to whether the conflict might cause the attorney to be less zealous on either client's behalf;
- A discussion of how client secrets and confidences will be addressed;
- Whether it is anticipated that the conflict could become more significant than it is presently viewed and the consequences if this takes place;
- A request that each client consider the issues raised carefully before reaching a decision and advising the client, if appropriate, that the advice of independent counsel should be sought;
- Advice that the client ask any additional questions that may assist their decision-making process.

While the exact extent of what must be disclosed to obtain the client's "informed consent" will depend to a large extent on the sophistication of the client,[292] if an attorney is concerned that disclosing a particular risk will cause the client not to consent, that is the very risk that should be included in the document covering the "full disclosure."

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[291] Simon, R., *Simon's New York Code of Professional Responsibility Annotated*, 2005 ed. (West 2005), p. 579.

[292] RPC 1.7, Comment 18. American Bar Association ["ABA"] Formal Op. 372 (1993).

An article appearing in the New York Law Journal suggested that the engagement letter is a "convenient" time to document the waiver of an identified document and proposed the following language:

> We are currently representing Company Y, on matters unrelated to you and the transaction for which this engagement covers. To the extent that we provide advice to you relative to your rights or obligations in respect of Company Y, or advise or assist in your dealings with Company Y, we would be adverse to Company Y and can only proceed with a waiver from you and from Company Y. We have obtained a conflict waiver from Company Y which will cover our work for you on this engagement. We believe that such waivers permit us to represent you in all respects in connection with this engagement, except that we have agreed not to participate in litigation where Company Y is an adverse party. Similarly, you have agreed to waive any conflict that might otherwise arise in connection with our simultaneous representation of you and of Company Y on matters unrelated to this engagement.[293]

Whether or not a prospective waiver of conflicts that an attorney may have in the future would depend upon whether or not the waiver would have been valid if contemporaneously given.[294] The mere fact that a waiver has been obtained with respect to both a current and future conflict is not dispositive as to whether or not the waiver is effective.

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293 Keyko, David G., *Practicing Ethics: Effectively Waiving Conflicts of Interest*, NYLJ Sept. 23, 2005.

294 RPC 1.7, Comment 20. "Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in paragraph (b). The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent "informed" and the waiver effective. See Rule 1.0(j). The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place. See Rule 1.0(t) for the definition of "screening." The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. For example, if the client is unsophisticated about legal matters generally or about the particular type of matter at hand, the lawyer should provide more detailed information about both the nature of the anticipated conflict and the adverse consequences to the client that may ensue should the potential conflict become an actual one. In other instances, such as where the client is a child or an incapacitated or impaired person, it may be impossible to inform the client sufficiently, and the lawyer should not seek an advance waiver. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent. Thus, in some circumstances, even general and open-ended waivers by experienced users of legal services may be effective." *See*, New York County Lawyer's Association Ethics Op. No. 724; ABA Formal Op. 372 (1993).

The analysis of conflicts is not easy. It is, however, absolutely critical to the proper management of a law firm. The failure to appropriately respond to a conflict can have a devastating effect upon a law firm. Incorporating a systematic approach to reviewing and analyzing conflicts into our daily practice will not only avoid claims and grievances, but also will enhance our reputations as attorneys and assist in achieving the goal of becoming better lawyers.

V. CONCLUSION

While both procedural and substantive defenses do exist to legal malpractice actions, there is no defense like prevention. It is hoped that a review of elements and available defenses will provide ideas on the implementation of safeguards to prevent the problems in the first instance rather than simply providing an outline of how to minimize exposure once the claim has been made.