Authored by William T. McCaffery, Esq., a 19 year industry professional and partner at one of New York's leading professional liability defense firms, "Legal Malpractice" provides an overview of common issues that arise in legal malpractice claims across the country.

Legal Malpractice

A Multistate Primer

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INTRODUCTION

People are often surprised to hear that lawyers get sued, but we live in a litigious society and if you are in business today, chances are that you will eventually be sued. Lawyers are in business and that means that at some point (or points) in their careers, they are likely to be sued, whether they do something wrong or not.

It is not a requirement that attorneys maintain legal malpractice insurance, but thankfully most attorneys do have insurance coverage. As a result, when they are sued, the claims are generally submitted to their insurance carriers and ultimately handled by claims professionals.

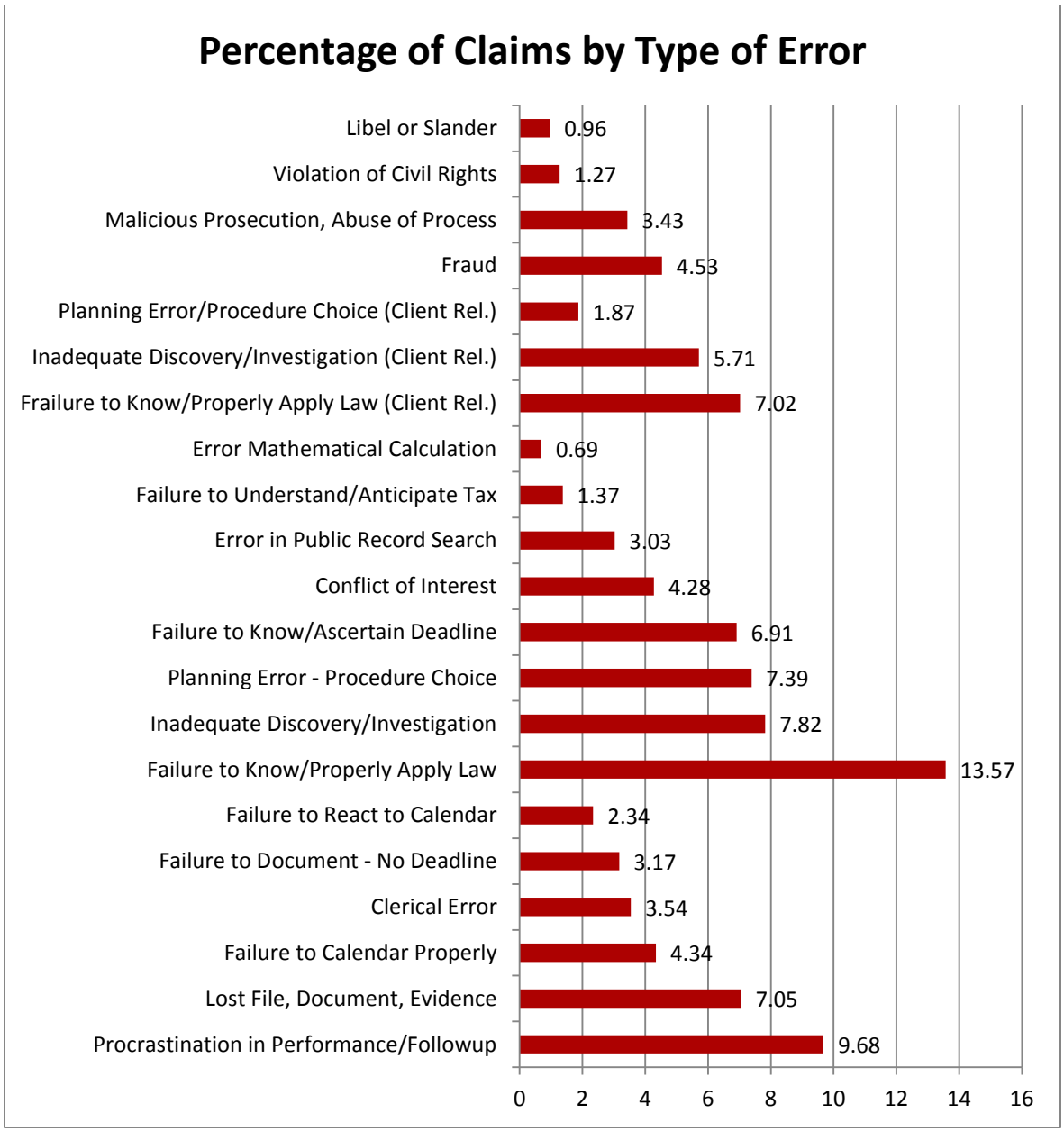
Legal malpractice claims can be challenging because the subject matter of each claim varies depending on the area of law in which the attorney practices. Malpractice claims also arise from every possible type of activity undertaken by attorneys in the course of handling legal matters for their clients.

According to a study conducted by the American Bar Association's Standing Committee on Lawyers' Professional Liability, which was conducted over the course of the years 2008-2011, alleged administrative errors accounted for 30.13% of all legal malpractice claims, alleged substantive errors accounted for 45.07% of all malpractice claims, client relation issues accounted for 14.61% of all claims, and intentional wrongs accounted for 10.19% of all legal malpractice claims.[1]

The following chart[2] details the percentage of claims brought against attorneys by the specific types of errors that were alleged:

[1] *Profile of Legal Malpractice Claims: 2008-2011,* American Bar Association, 2012.

[2] *Id.*



Legal malpractice claims are not "cookie-cutter" claims, but rather most claims are unique, which requires a unique approach to handling each claim. This guide will provide an overview of legal malpractice claims: the necessary elements that a plaintiff must establish in order to prevail on the claim; defenses to legal malpractice claims; common malpractice claims that are brought against attorneys; additional causes of action that are asserted in the context of legal malpractice claims; and important issues to watch when handling a legal malpractice claim.

I. Necessary Elements of a Legal Malpractice Claim

In order to prevail on a legal malpractice claim, there are three basic elements that a plaintiff needs to establish: (1) negligence, (2) proximate cause, and (3) damages.[3] They may be described slightly differently in various jurisdictions,[4] but these are the three essential elements of any legal malpractice claim. A plaintiff cannot prevail on a legal malpractice claim unless and until she can establish each one of these required elements.

As a basic example, an attorney may have failed to timely commence a personal injury action on behalf of his client (*i.e.,* negligence), but that attorney will not be held liable to that client unless the client can establish that she would have prevailed and made a monetary recovery in the personal injury action had it been timely brought by the negligent attorney (*i.e.,* unless she can prove that the negligence was the cause of certain damages).

1. Negligence

The first element that a plaintiff must establish in order to prove a case of legal malpractice against an attorney is negligence. Although negligence is defined in various ways in various jurisdictions, in the context of legal malpractice, an attorney is generally found to be negligent when he fails to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession.[5]

Expert witness testimony is usually required to establish an attorney's negligence,[6] unless the basis for judging the adequacy of the attorney's professional services is within the ordinary experience of the fact finder.[7] For example, expert testimony may be necessary to establish that a certain clause or provision should have been included in a contract drafted by an attorney (because the fact finder (*i.e.,* jury) would have no way to know the standard provisions of a contract), but a court may not require expert testimony in order for a plaintiff to establish that her attorney was negligent in failing to timely commence an action on her behalf, which resulted in the loss of her claim (because the negligence in that case could be deemed so obvious as to be within the ordinary experience of the fact finder).

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[3] *Rorrer v. Cooke,* 313 N.C. 338, 329 S.E.2d 355 (1985);

[4] *Rancho del Villacito Condos., Inc. v. Weisfeld,* 121 N.M. 52, 908 P.2d 745 (1995).

[5] *Rudolph v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 867 N.E.2d 385, 835 N.Y.S.2d 534 (2007); *Rice v. Strunk,* 670 N.E.2d 1280 (Ind. 1996).

[6] *McConnell v. FMG of Kansas City,* 18 Kan.App.2d 839, 861 P.2d 830 (1993); *Progressive Sales v. Williams,* 86 N.C.App. 51, 356 S.E.2d 372 (1987).

[7] *Shopsin v. Siben & Siben,* 268 A.D.2d 578, 702 N.Y.S.2d 610 (2d Dep't 2000); *Rizzo v. Haines,* 520 Pa. 484, 555 A.2d 58 (1989); *Bowman v. Doherty,* 235 Kan. 870, 686 P.2d 112 (1984).

Certain jurisdictions, such as New Jersey, even require that an affidavit of merit from an attorney attesting to the defendant-attorney's negligence be served at or around the time of the service of the Summons and Complaint in order to commence or maintain a legal malpractice action.[8]

2. Proximate Cause

Not only must a plaintiff establish that her attorney was negligent in order to prevail on a legal malpractice claim, but the plaintiff must also establish that the attorney's negligence was a proximate cause of her alleged damages.[9]

Said another way, in order to establish proximate cause, the plaintiff must establish that she would have prevailed in the underlying matter or that she would have had a better result in the underlying matter "but for" the attorney's negligence.[10] This element requires the plaintiff to prove a "case within a case" and to demonstrate what would have been the result of the underlying matter had the attorney not been negligent in the handling of that matter.[11]

The reason a plaintiff in a legal malpractice action is required to establish proximate cause in order to prevail is clear: only if plaintiff can prove that she would have prevailed in the underlying matter or that she would have had a better result in the underlying matter "but for" the attorney's negligence, can she establish that she sustained damages as a result of the attorney's negligence.

3. Damages

Finally, in order to prevail on a legal malpractice claim, a plaintiff must be able to establish that she sustained damages as a result of the attorney's negligence.[12] These damages cannot be hypothetical or speculative,[13] the claimed damages must be actual and ascertainable.[14]

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[8] N.J.S.A. 2A:53A-27; *Burns v. Belafsky,* 166 N.J. 466, 766 A.2d 1095 (2001).

[9] *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, supra; Tush v. Pharr,* 68 P.3d 1239 (Alaska 2003).

[10] *Barbara King Family Trust v. Voluto Ventures LLC,* 46 A.D.3d 423, 849 N.Y.S.2d 41 (1st Dep't 2007); *Gates v. Riley ex rel. Riley,* 723 N.E.2d 946 (Ind. Ct. App. 2000).

[11] *Aquino v. Kuczinski, Vila & Associates, P.C.*, 39 A.D.3d 216, 835 N.Y.S.2d 16 (1st Dep't 2007); *Webb v. Pomeroy,* 8 Kan.App.2d 246, 655 P.2d 465 (1983).

[12] *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, supra; Miller v. Sloan, Listrom, Eisenbarth, Sloan and Glassman,* 267 Kan. 245, 978 P.2d 922 (1999).

[13] *McConnell v. FMG of Kansas City,* 18 Kan.App.2d 839, 861 P.2d 830 (1993); *Brown v. Samalin & Bock, P.C.,* 168 A.D.2d 531, 563 N.Y.S.2d 426 (2d Dep't 1990); *Lovington Cattle Feeders, Inc. v. Abbott Lab.,* 97 N.M. 564, 642 P.2d 167 (1982).

[14] *Cummings v. Sea Lion Corp.,* 924 P.2d 1011 (Alaska 1996); *Zarin v. Reid & Priest, Esqs.,* 184 A.D.2d 385,

The damages recoverable in a legal malpractice action are compensatory damages. The object of compensatory damages is to make the injured client whole. For example, where the injury suffered is the loss of a cause of action, the measure of damages is generally the value of the claim lost.[15]

II. Defenses to a Legal Malpractice Claim

The plaintiff has the burden of establishing the three necessary elements of a legal malpractice case, but that does not mean those elements will go unchallenged. Each of those elements is subject to a defense. The most basic defenses are, of course, to the elements themselves: the attorney was not negligent; the attorney's representation was not the cause of the plaintiff's claimed damages; and/or the plaintiff sustained no damages as a result of the attorney's alleged negligence. There is a potential defense to each element of a malpractice claim.

Sometimes the negligence of an attorney is clear and may not be disputed, but generally an attorney's alleged negligence is an issue of fact to be determined by a jury. In such circumstances, a legal expert can be hired by the defense to offer testimony that, contrary to the plaintiff's allegations, the attorney was, in fact, not negligent in his representation of the client.

Similarly, while the plaintiff will argue that the attorney's negligence was the proximate cause of her alleged damages, there may be defenses to the proximate cause aspect of a legal malpractice case. On the most basic level, in order to establish proximate cause, the plaintiff must establish that she would have prevailed or had a better outcome on the underlying matter but for the attorney's negligence. This opens the door to a "case within a case" defense. Perhaps the attorney was negligent; if so, the focus then turns to the merits of the underlying matter. If it can be demonstrated that the client would not have been successful in the underlying action, then it can be successfully argued that the attorney's alleged negligence was not the proximate cause of the alleged damages (*i.e.,* the client would not have prevailed in the underlying matter but for the attorney's alleged negligence).

Similarly, defenses can be raised to the issue of a plaintiff's claimed damages. Using the example discussed above, even if an attorney was negligent (*i.e.,* in failing to timely commence an action on the client's behalf), if the client would not have been able to recover in the underlying action (*i.e.,* if the underlying defendant was bankrupt), then it can be successfully argued that the client sustained no damages as a result of the attorney's negligence.

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585 N.Y.S.2d 379 (1st Dep't 1992).

[15] *Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor,* 115 N.M. 159, 848 P.2d 1086 (Ct. App. 1993); *Campagnola v. Mulholland, Minion & Roe,* 76 N.Y.2d 38, 555 N.E.2d 611, 556 N.Y.S.2d 239 (1990); *Schneider v. Wilson,* 521 N.E.2d 1341 (Ind. Ct. App. 1988).

There are a number of defenses to legal malpractice actions that go beyond simply refuting plaintiff's allegations with respect to the three basic elements of a malpractice claim. While not exhaustive of all potential defenses to a legal malpractice claim, this section will discuss some of the most common defenses that can be asserted.

1. Privity

"Privity" in the context of a legal malpractice case means the existence of an attorney-client relationship. Of course, the existence of an attorney-client relationship is generally a pre-condition to any legal malpractice action. In fact, in some jurisdictions privity is considered one of the basic elements of a legal malpractice claim.[16]

The general rule is that absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity or near-privity for harm caused by professional negligence.[17]

"Near-privity" can be achieved when there is a relationship between the parties that closely resembles privity.[18] Such near-privity can occur in circumstances where an attorney is retained to draft a coverage opinion that affects a third-party. Although the attorney was not retained by the third-party, the opinion was for its benefit and had a direct impact upon that third-party. Accordingly, it has been held that such is a relationship that so closely resembles privity as to give the third-party a cause of action for legal malpractice against the attorney-drafter of the opinion.[19] Moreover, in some jurisdictions, executors[20] and/or beneficiaries[21] of estates have been given the right to bring malpractice claims against a decedent's attorney even though there is no direct privity between them and the attorney.

Rules of privity and near-privity differ between jurisdictions, so it is important to identify the relationship that the plaintiff has to the attorney and ensure that the claimant, in fact, has the legal authority to bring the claim. If the plaintiff does not have the required privity with the attorney in the jurisdiction in which the claim is brought, then the claim is subject to dismissal.

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[16] *Emery v. Carnahan,* 88 S.W.3d 138 (Mo. App. S.D. 2002); *Worth v. Tamarack American, a Division of Great American Ins. Co.,* 47 F.Supp2d 1087 (S.D Ind. 1999); *Holland v. Lawless,* 95 N.M. 490, 623 P.2d 1004 (Ct. App. 1981).

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

[18] *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Company,* 5 N.Y.3d 582, 842 N.E.2d 471, 808 N.Y.S.2d 573 (2005).

[19] *Prudential Insurance Company of America v. Dewey, Ballantine, Bushby, Palmer & Wood,* 80 N.Y.2d 377, 605 N.E.2d 318, 590 N.Y.S.2d 831 (1992); *see also, Donahue v. Shughart, Thompson & Kilroy, P.C.,* 900 S.W.2d 624 (Mo. Banc 1995).

[20] *Estate of Schneider v. Finmann,* 15 N.Y.3d 306, 933 N.E.2d 718, 907 N.Y.S.2d 119 (2010); *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.,* 192 S.W.3d 780 (Tex. 2006).

[21] *Walker v. Lawson,* 514 N.E.2d 629 (Ind. Ct. App. 1987).

2. Standing

Similar to the issue privity is the issue of standing. "'Standing to sue' means that party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of the controversy."[22] A defense based upon a plaintiff's lack of standing can arise under several different circumstances.

Very simply, if an attorney did not represent the plaintiff, the plaintiff does not have standing to pursue a legal malpractice claim against that attorney.[23]

In a case where individual partners of a limited partnership pursued a legal malpractice action against the attorney that represented the limited partnership, the individuals were held to be without standing both because the attorney did not represent them (privity) and because they could not have made a recovery on the underlying claim independent of the limited partnership (damages).[24]

Similarly, in a case where an individual retained an attorney, but the claimed damages were sustained by the individual's company, the individual had no standing to assert a claim against his attorney for those damages; likewise, since the attorney only represented the individual and not the company, the company did not have standing to assert a legal malpractice claim against the individual's attorney.[25]

Where an attorney represents a client, but is paid by a different party, the party paying the attorney generally does not have standing to maintain a legal malpractice action against the attorney because the attorney-client relationship is between the attorney and the client regardless of who is paying the attorney.[26]

As discussed above, jurisdictions differ on whether a beneficiary of an estate has standing to sue the draftsman of a decedent's will for legal malpractice. In New York, for example, which has a relatively strong privity requirement for legal malpractice actions, beneficiaries do not have standing to bring a legal malpractice action against the decedent's attorney, since there is no privity between the beneficiary and the decedent's attorney.[27] However, this seems to be a minority view and most states allow beneficiaries to pursue legal malpractice claims against a decedent's attorney, since it is the beneficiary who was intended

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[22] *Black's Law Dictionary,* Sixth Edition, West Publishing Co., 1990; *citing, Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636.

[23] *Burton v. Rogovin,* 262 A.D.2d 72, 692 N.Y.S.2d 37 (1st Dep't 1999).

[24] *Breslin Realty Development Corp. v. Shaw,* 72 A.D.3d 258, 893 N.Y.S.2d 95 (2d Dep't 2010).

[25] *Schaeffer v. Lipton,* 243 A.D.2d 969, 663 N.Y.S.2d 392 (3d Dep't 1997).

[26] *Alexander v. Russo,* 1 Kan. App. 2d 546, 571 P.2d 350 (1977).

[27] *Viscardi v. Lerner,* 125 A.D.2d 662, 510 N.Y.S.2d 183 (2d Dep't 1986).

to benefit from the attorney's representation of the decedent.[28]

Even New York has loosened its strict privity requirement in recent years and has allowed the executor of an estate to bring a legal malpractice claim against the decedent's attorney under certain limited circumstances (*i.e.,* where it is alleged that the attorney's negligence diminished the total value of the estate).[29]

Particularly noteworthy is that a previously bankrupt client may not have standing to pursue a legal malpractice claim against his former attorney. A potential legal malpractice claim is an asset and if a party goes into bankruptcy, that asset becomes the property of the trustee in bankruptcy and no longer belongs to the individual. Failure of a party to disclose a cause of action as an asset in a prior bankruptcy proceeding, which the party knew or should have known existed at the time of that proceeding, deprives him or her of the legal capacity (standing) to sue subsequently on that cause of action.[30] As a result, a bankruptcy search should be conducted of every legal malpractice plaintiff to determine if there is a defense to the plaintiff's standing.

3. Professional Judgment Rule

As discussed above, a plaintiff in a legal malpractice action must demonstrate that the attorney was negligent in his representation in order to prevail on a legal malpractice claim. However, simply because the client lost the case or because the attorney made a wrong decision or made an error in strategy or judgment in the course of handling a case does not necessarily mean that there was legal malpractice.

For example, in a case where an attorney represented a client to assist in filing an application to construct and operate an ambulatory surgical center, the court held under the attorney judgment rule that the attorney was not liable to the client for recommending that the client should seek approval for a multi-specialty facility. In dismissing the legal malpractice action, the court held that "the choice of one of several reasonable alternatives certainly does not amount to malpractice."[31] Other courts have explained that where the "plaintiff alleges no more than an error of judgment," such "does not rise to the level of malpractice."[32]

4. Subsequent Representation

In order to establish "proximate cause," plaintiff must be able to demonstrate that "but

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[28] *Walker v. Lawson, supra.*

[29] *Estate of Schneider v. Finmann, supra.*

[30] *Potruch & Daab, LLC v. Abraham,* 97 A.D.3d 646, 949 N.Y.S.2d 396 (2d Dep't 2012).

[31] *Brook Plaza Ophthalmology Associates, P.C. v. Fink, Weinberger, Fredman, Berman & Lowell, P.C.,* 173 A.D.2d 170, 569 N.Y.S.2d 25 (1st Dep't 1991).

[32] *Rosner v. Paley,* 65 N.Y.2d 736, 481 N.E.2d 553, 492 N.Y.S.2d 13 (1985).

for" the attorney's alleged negligence he would have prevailed or had a better result in the underlying matter. One defense to the proximate cause element of a malpractice claim is that the client or her subsequent counsel had an opportunity to protect the client's interests after the original attorney last represented the client.[33]

For example: a client has a personal injury claim with a three year statute of limitations. The client is originally represented by "Attorney A" for two years and "Attorney A" never commences an action on the client's behalf. The client then fires "Attorney A" and retains "Attorney B" to represent her in the personal injury claim, but "Attorney B" fails to commence plaintiff's personal injury action over the course of the remaining year. Plaintiff's personal injury claim then becomes barred by the three year statute of limitations. "Attorney A" is not two-thirds liable to plaintiff and "Attorney B" one-third liable to the plaintiff for the loss of her personal injury claim; rather, "Attorney B" is one hundred percent liable to the plaintiff for the loss of the claim because after "Attorney A's" representation of the plaintiff ended, "Attorney B" still had a full and fair opportunity to protect the client's interests.

It is important to note that if a client is not given a "full and fair" opportunity to protect her interests, the original attorney may still be held liable to the client. For example, in the case, *Burke v. Law Offices of Landau, Miller & Moran,*[34] the original attorney ceased representing the client when there were only thirty-three days left on the statute of limitations and the attorney failed to advise the client of the imminent expiration of the statute of limitations. Plaintiff then failed to commence the personal injury action within the ensuing thirty-three days, and her claim was then time barred as a result. Under these circumstances, the *Burke* court held that the issue of whether the attorney's representation was the proximate cause of plaintiff's damages was a question of fact.

5. Speculative Damages

One defense to the damages element of a legal malpractice claim is that the damages claimed by the plaintiff are speculative. Damages in a legal malpractice action must be actual and ascertainable, and not merely speculative.[35] In other words, "speculation on future events" is insufficient to establish that a lawyer's malpractice was a proximate cause of plaintiff's claimed damages.[36] In *Brooks v. Lewin,* the Court held that the "hypothetical course of events on which any determination of damages would have to be based constitutes such a chain of

[33] *Maksimiak v. Schwartzapfel Novick Truhowsky Marcus, PC,* 82 A.D.3d 652, 919 N.Y.S.2d 330 (1st Dep't 2011); *Faulkner v. Ensz,* 109 F.3d 474 (8th Cir. 1997).

[34] 289 A.D.2d 16, 733 N.Y.S.2d 416 (1st Dep't 2001).

[35] *Luniewski v. Zeitlin,* 188 A.D.2d 642, 591 N.Y.S.2d 524 (2d Dep't 1992); *Zarin v. Reid & Priest,* 184 A.D.2d 385, 585 N.Y.S.2d 379 (1st Dep't 1992); *Heartland Stores, Inc. v. Royal Ins. Co.,* 815 S.W. 39 (Mo. App. W.D. 1991); *Pirchio v. Noecker,* 82 N.E.2d 838 (Ind. Ct. App. 1948).

[36] *Brooks v. Lewin*, 21 A.D.3d 731, 800 N.Y.S.2d 695 (1st Dep't 2005).

'gross speculations on future events' as to be incapable of legal proof."[37]

Similarly, in *Phillips-Smith Specialty Retail Group v. Parker Chapin Flattau & Klimpl, LLP,*[38] it was held:

> ...[A]ssuming that defendants were negligent in perfecting plaintiffs' security interests in Valley Advisor's assets, plaintiffs cannot establish that such negligence proximately caused any injury to plaintiffs. Nor can plaintiffs show that defendants' actions were a proximate cause of any loss to them, since the hypothetical course of events on which any determination of damages would have to be based, involving the nature and timing of acts by plaintiffs themselves, other parties having interests in Valley Advisors and the bankruptcy court, constitutes a chain of "gross speculations on future events" (citation omitted) which is incapable of proof.[39]

Where the damages claimed by the plaintiff are based upon nothing more than plaintiff's own speculation, such will not be sufficient to maintain a claim for legal malpractice.

6. Collectability

Collectability is also a defense to the damages aspect of a legal malpractice claim.[40] For example, if a client would have prevailed on a personal injury action but for his attorney's negligence, but the defendant in the underlying personal injury action had no insurance coverage and had no personal assets and as a result the client could not have collected on any judgment that could have been obtained against the underlying defendant, then the client sustained no damages as a result of the attorney's negligence.

Similarly, if the full value of the client's injuries was $100,000, but the defendant in the underlying personal injury claim only had $25,000 of insurance coverage (and the underlying defendant had no personal assets), then even if the attorney's negligence resulted in the loss of the client's claim, the damages sustained by the client are only $25,000 (the amount that could have been recovered on the underlying claim), not the full $100,000 value of the client's injuries.

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[37] *Id.* at 698 [internal citations omitted].

[38] 265 A.D.2d 208, 696 N.Y.S.2d 150 (1st Dep't 1999).

[39] *Id. a*t 151.

[40] *Lindenman v. Kreitzer,* 7 A.D.3d 30, 775 N.Y.S.2d 4 (1st Dep't 2004); *Power Constructers, Inc. v. Taylor & Hintze,* 960 P.2d 20 (Alaska 1998); *Kituskie v. Korbman,* 552 Pa. 275, 714 A.2d 1027 (1998).

It should be noted that we are discussing collectability as a defense to a legal malpractice action, but in some venues, the issue of collectability is part of the legal malpractice plaintiff's burden of proof; *i.e.,* in some venues, the plaintiff in a legal malpractice action must affirmatively demonstrate that he would have been able to make a recovery on the underlying claim but for the attorney's negligence (and the extent of the recovery that could have been made) and unless the plaintiff can demonstrate collectability, she cannot prevail in the legal malpractice claim.[41]

7. Statute of Limitations

The statute of limitations to commence a legal malpractice action varies from state to state. In New York, for example, there is a three year statute of limitations for a legal malpractice action.[42] This is the case regardless of whether the claim is premised upon negligence (a cause of action which generally carries a three year statute of limitations)[43] or breach of contract (a cause of action which carries a six year statute of limitations).[44]

In some states, such as New York, a cause of action for legal malpractice accrues and consequently, the statute of limitations to commence an action begins to run on the date of the malpractice, whether the client is aware of the malpractice or not.[45] In other states, such as Texas, a cause of action for legal malpractice does not accrue until the malpractice is discovered.[46] However, even in those states where the statute of limitations begins to run on the date the malpractice is committed, the statute of limitations can be tolled if the attorney (or firm) that committed the malpractice continues to represent the client in the same matter. This is known as the "continuous representation doctrine."[47] (A minority of states, such as North Carolina and Missouri, do not recognize the continuing representation doctrine.[48])

In order for the continuous representation doctrine to toll the statute of limitations for a legal malpractice action, the attorney-client relationship must be ongoing, continuous,

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[41] *Jedlicka v. Field,* 14 A.D.3d 596, 787 N.Y.S.2d 888 (2d Dep't 2005); *Davis v. Gabriel,* 111 N.M. 289, 804 P.2d 1108 (1990); *George v. Caton,* 93 N.M. 370, 600 P.2d 822 (Ct. App. 1979).

[42] CPLR 214(6).

[43] CPLR 214.

[44] CPLR 213.

[45] *Goldman v. Akin Gump Strauss Hauer & Feld, LLP,* 46 A.D.3d 481, 850 N.Y.S.2d 7 (1st Dep't 2007).

[46] *Apex Towing Co. v. Tolin,* 41 S.W.3d 118 (Tex. 2001).

[47] *Biomet, Inc. v. Barnes & Thornberg,* 791 N.E.2d 760 (Ind. Ct. App. 2003); *Pittman v. McDowell, Rice & Smith, Ctd.,* 12 Kan. Ap. 2d 603, 752 P.2d 711 (1988).

[48] *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.,* 132 N.C. App. 160, 510 S.E.2d 690 (1999), rev. dismissed, 350 N.C. 379, 536 S.E.2d 71 (1999), rev. den., 350 N.C. 379, 536 S.E.2d 70 (1999); *Zero Mfg. Co. v. Husch,* 743 S.W.2d 439 (Mo. App. E.D. 1987).

developing, and dependent.[49] The application of the continuous representation doctrine envisions a relationship between the parties that is marked with trust and confidence[50] and there must be a mutual understanding between the parties of the need for further services.[51]

The following chart lists the statute of limitations for legal malpractice actions in each of the 50 states:[52]

State	Statute of Limitations
▪ Alabama	2 years from damages
▪ Alaska	3 years from discovery
▪ Arizona	2 years from discovery
▪ Arkansas	3 years from malpractice
▪ California	4 years from malpractice or 1 year from discovery
▪ Colorado	2 years from malpractice
▪ Connecticut	3 years from malpractice
▪ Delaware	2 years from discovery
▪ Florida	2 years from discovery
▪ Georgia	1,2, or 6 years depending on damages sought
▪ Hawaii	6 years from malpractice
▪ Idaho	2 years from malpractice unless malpractice was concealed
▪ Illinois	2 years from discovery

[49] *Joyce v. JJF Associates, LLC* 8 A.D.3d 190, 781 N.Y.S.2d 62 (1st Dep't 2004).

[50] *Piliero v. Adler & Stavros,* 282 A.D.2d 511, 723 N.Y.S.2d 91 (2d Dept. 2001); *Muller v. Sturman,* 79 A.D.2d 482, 437 N.Y.S.2d 205 (4th Dept. 1981).

[51] *Joyce v. JJF Associates, LLC, supra.*

[52] *N.B.:* Statutes are regularly changed through both legislative and court action. While this chart provides the basic statutes of limitations for legal malpractice actions in each state, related statutes and court rulings, along with the particular facts of each case, may alter the statute of limitations for a particular case. An attorney practicing in the state where the malpractice action is venued should be consulted for more detailed information and an evaluation of the statute of limitations for each particular case.

▪ Indiana	2 years from discovery
▪ Iowa	5 years from discovery
▪ Kansas	2 years in tort; 3 or 5 years in contract (oral or written)
▪ Kentucky	1 year from discovery
▪ Louisiana	1 year from discovery
▪ Maine	6 years from malpractice (except will drafting which is 6 years from discovery); 20 years from real estate opinion
▪ Maryland	3 years from discovery
▪ Massachusetts	3 years from discovery
▪ Michigan	6 years from malpractice
▪ Minnesota	6 years from damages
▪ Mississippi	3 years from discovery
▪ Missouri	5 years from damages
▪ Montana	3 years from discovery
▪ Nebraska	2 years from malpractice or 1 year from discovery (but not more than 10 years from malpractice)
▪ Nevada	4 years from damages or 2 years from discovery (whichever is sooner)
▪ New Hampshire	3 years from discovery
▪ New Jersey	6 years from discovery
▪ New Mexico	4 years from discovery
▪ New York	3 years from malpractice
▪ North Carolina	3 years from malpractice or 2 years from discovery (up to 4 years from malpractice)
▪ North Dakota	2 years from discovery (up to 6 years from malpractice)

▪ Ohio	1 year from malpractice or discovery
▪ Oklahoma	2 years from damages
▪ Oregon	2 years from damages
▪ Pennsylvania	2 years in tort; 4 years in breach of contract
▪ Rhode Island	3 years from discovery
▪ South Carolina	3 years from discovery
▪ South Dakota	3 years from malpractice
▪ Tennessee	1 year from discovery
▪ Texas	2 years from discovery
▪ Utah	4 years from malpractice
▪ Vermont	6 years from discovery
▪ Virginia	3 or 5 years from damages (oral or written contract)
▪ Washington	3 years from discovery
▪ West Virginia	2 years from discovery
▪ Wisconsin	6 years from damages
▪ Wyoming	2 years from discovery

8. *Res Judicata*/Claim Preclusion

The doctrine of *res judicata,* or claim preclusion, prohibits the re-litigation of a claim that has previously been adjudicated between the same parties. For example, if "Driver A" sues "Driver B" for personal injuries resulting from a car accident and in the context of that action "Driver B" is found to be 100% responsible for the accident, "Driver B" cannot later commence an action for damages against "Driver A" because it has already been determined in an adjudicated action between the parties that "Driver B" was fully liable to "Driver A" for the accident; *i.e.,* "Driver B's" claim is precluded by the prior determination.

The same principle applies in the context of legal malpractice actions. If a claim between the attorney and client has previously been adjudicated, then a subsequent legal malpractice action by the client against the attorney may be precluded by the doctrine of *res*

judicata. This circumstance occurs most commonly when the attorney has brought a previous fee claim against the client, prevailed against the client on that fee claim, and was awarded legal fees. An attorney is not entitled to collect a fee if there has been malpractice during the representation.[53] As a result, an award of legal fees to an attorney necessarily decides that there was no malpractice in the attorney's representation of the client. As a result, in circumstances where an attorney sues for legal fees, is awarded those fees, and then the client later attempts to commence a legal malpractice action against the attorney, the malpractice claim will be dismissed as precluded under the doctrine of *res judicata.*[54]

9. Collateral Estoppel/Issue Preclusion

The doctrine of collateral estoppel, or issue preclusion, precludes the re-litigation of an issue that has previously been adjudicated.[55] It is closely related to *res judicata,* but *res judicata* precludes an entire claim from being re-litigated whereas collateral estoppel precludes a particular issue within a claim from being re-litigated. For example, if "Driver A" sues "Driver B" for personal injuries arising from an automobile accident and "Driver A"" is found to be 60% responsible for the accident and "Driver B" is found to be 40% responsible for the accident, if "Driver B" later sues "Driver A," the issue of the percentage of each party's liability for the accident cannot be re-litigated; "Driver B" will be held to the same 60/40 liability that was previously established in the context of "Driver A's" litigation.

Collateral estoppel can arise in the context of a legal malpractice action when an issue has already been determined in the underlying matter against the client. For example, if it has already been held in the context of the underlying matter that the plaintiff's claims lacked merit, then in a subsequent legal malpractice action, the attorney can argue that the issue of (lack of) merit has already been determined against the plaintiff in the context of the underlying action and as a result, plaintiff cannot establish that "but for" the attorney's alleged negligence, she would have prevailed in the underlying action (*i.e.,* because it has already been determined that plaintiff would not have prevailed in the underlying action because it was held to have lacked merit).[56]

The issue of collateral estoppel often arises in the context of legal malpractice actions based upon underlying criminal convictions. The general rule is that a client cannot maintain a legal malpractice action against his former attorney in a criminal matter unless and until the criminal conviction has been vacated[57] (*i.e.,* the client is collaterally estopped from arguing in

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[53] *Doviak v. Finfelstein & Partners, LLP,* 90 A.D.3d 696, 934 N.Y.S.2d 467 (2d Dep't 2011).

[54] *Breslin Realty Development Corp. V. Shaw,* 72 A.D.3d 258, 893 N.Y.S.2d 95 (2d Dep't 2010); *Brunacini v. Kavanah,* 117 N.M. 122, 869 P.2d 821 (Ct. App. 1993).

[55] *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322 (1979).

[56] *Duncan v. Campbell,* 123 N.M. 181, 936 P.2d 863 (Ct. App. 1997).

[57] *Johnson v. Schmidt,* 719 S.W.2d 825 (Mo. App. W.D. 1986).

the context of the legal malpractice action that he was not guilty). It is important to note that not every state follows this general rule.[58]

While the client will be collaterally estopped by determinations made in the underlying action, an argument can be made that the attorney should not be held collaterally estopped by determinations in the underlying action because the attorney, himself, was not a party to the underlying action.[59]

10. Prematurity

Because the basis of any legal malpractice claim is an attorney's underlying representation of a client, by its very nature, there is sometimes a defense to the malpractice claim based upon the prematurity of the claim, if there is still an opportunity to protect a client's interests with respect to the underlying matter.

In *Stettner v. Bendet,*[60] the plaintiff brought a legal malpractice action against his former attorney for failing to file a claim on his behalf in the bankruptcy court against a debtor. The appellate court held that the legal malpractice action was premature and stayed the action on the grounds that plaintiff's remedies in the bankruptcy court were uncertain and plaintiff did not have a cause of action against the attorney unless he lost his remedy in the bankruptcy court due to the attorney's alleged negligence.

11. Redundant/Duplicative Claims

Plaintiffs in legal malpractice actions will often assert all cognizable claims against the attorney. As a result, in addition to a simple cause of action for legal malpractice, plaintiffs will often assert additional causes of action such as negligence, breach of contract, fraud, and breach of fiduciary duty. Generally, these additional causes of action can be dismissed as redundant/duplicative of the legal malpractice cause of action.

The general rule is that if the cause of action arises from the same facts and seeks the same damages as the legal malpractice claim, then the additional claim is duplicative of the malpractice claim and is subject to dismissal. In *Mecca v. Shang,*[61] the plaintiff's legal malpractice claim was accompanied by claims of fraud, breach of fiduciary duty, breach of contract, negligent misrepresentation and disgorgement of legal fees. Although the court found the plaintiff's legal malpractice cause of action to be sufficiently plead, it dismissed the other causes of action. As to each one (except for the breach of contract claim, which was

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[58] *Godby v. Whitehead,* 837 N.E.2d 146 (Ind. Ct. App. 2005).

[59] *Lyons v. Medical Malpractice Insurance Association,* 275 A.D.2d 396, 713 N.Y.S.2d 61 (2d Dep't 2000).

[60] 227 A.D.2d 202, 642 N.Y.S.2d 253 (1st Dep't 1996).

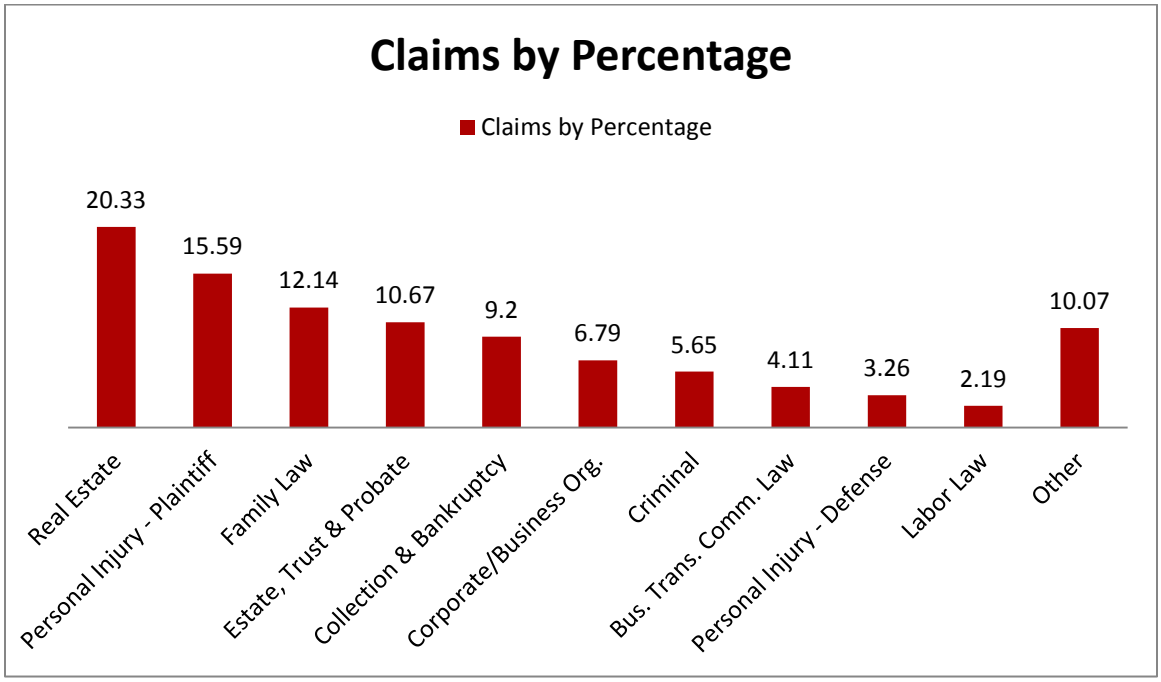
[61] 258 A.D.2d 569, 685 N.Y.S.2d 458 (2d Dep't 1999) *mot. for lv. dismissed,* 95 N.Y.2d 791, 711 N.Y.S.2d 158 (2000).

dismissed on other grounds), the court found that the causes of action arose "from the same facts as [the] legal malpractice claim and do not allege separate damages."[62]

III. Common Claims

Claims of all kinds arise in the context of legal malpractice cases. There are innumerable areas of law in which lawyers practice and claims arise in each of them. As a result, handling malpractice claims can be difficult because they are not "cookie cutter" claims, each claim is different, involves distinct facts, and involves varied areas of the law.

While claims arise in each area of the law, there are certain areas of practice that result in greater numbers of claims.



According to the ABA, as depicted in the above diagram, the five practice areas that resulted in the most legal malpractice claims between 2008 and 2011 were:[63]

1. Real Estate (20.33% of all claims);

2. Personal Injury - Plaintiff (15.59% of all claims);

[62] 258 A.D.2d at 570, 685 N.Y.S.2d at 460. *See also, Daniels v. Lebit,* 299 A.D.2d 310, 749 N.Y.S.2d 149 (2d Dep't 2002); *Sonnenschine v. Giacomo,* 295 A.D.2d 287, 744 N.Y.S.2d 396 (1st Dep't 2002); *Laruccia v. Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, L.L.P.,* 295 A.D.2d 321, 744 N.Y.S.2d 335 (2d Dep't 2002).

[63] *Profile of Legal Malpractice Claims: 2008-2011, supra.*

3. Family Law (12.14% of all claims);

4. Estate, Trust and Probate (10.67% of all claims); and

5. Collection and Bankruptcy (9.20% of all claims).

In this section, we will discuss these most commonly brought legal malpractice claims and discuss common claims that arise in the context of each of these practice areas.

1. Real Estate

Legal malpractice claims can arise in many ways in the context of real estate transactions: an error can be made in contract drafting; the client can lose a contract deposit; a client can lose the ability to purchase property; a client can lose a sale; a client can lose rental income; title to property can be lost; liens may not be removed; unknown easements can encumber the property; the property may not have the required certificates of occupancy; and any number of other things can go wrong in the context of a real estate transaction that results in a legal malpractice claim against an attorney.

While there are endless ways that legal malpractice claims can arise in the context of a real estate transaction, there has been one type of real estate transaction that seems to have resulted in a significant number of claims in recent years: transactions involving a lease-back (or buy-back) agreement (often called a "mortgage rescue"). The increase in the number of these types of transactions occurred in conjunction with the collapse of the real estate market in and around 2008. These transactions were often appealing to financially troubled homeowners because they provided the possibility of avoiding foreclosure and retaining possession and ownership of the property. Usually arranged by a real estate broker, the broker would find an investor willing to purchase a property from a homeowner in arrears on her mortgage and facing a possible foreclosure. The investor would agree to purchase the property from the homeowner, but agree to lease the property back to the homeowner for a period of time after the closing (usually one year); that time would give the homeowner time to save money and improve her credit rating such that she could re-purchase the property from the buyer after that year. The problem with many of these transactions was that the buyer was a "straw" buyer who took a mortgage sufficient to pay all of the expenses associated with the closing, including a payoff of the existing mortgage, a payment of the broker's commission, and a "seller's concession," which returned a certain amount of cash to the buyer. After the closing (after the broker received his commission and after the buyer received his "seller's concession"), the broker and buyer would disappear, the buyer would default on the mortgage, and the bank would foreclose on the property, leaving the seller with no property and generally a loss of the equity that had been in the home prior to the sale. After these transactions collapsed, the sellers would often bring legal malpractice actions against their attorneys contending that the attorneys failed to protect their interests, failed to inform them of the true nature of the transaction, failed to detect the fraud that was being perpetrated against them, all of which resulted in the loss of their property and the equity therein.

There are various ways this type of transaction is structured, but most of them in some way result in a default on the new mortgage, the loss of the property, and the loss of equity. While some of these transactions appear to be outright frauds, others seem to be legitimate efforts to help the seller remain in possession of the home with the possibility of re-purchasing the home from the buyer. One problem that arises in the context of these transactions is that the outright frauds appear almost identical to the legitimate transactions and thus all such transactions appear suspect.[64]

2. Personal Injury - Plaintiff

According to the ABA study, the practice area that results in the second most number of claims is the representation of clients in plaintiffs' personal injury actions. Errors in representation in the context of a plaintiff's personal injury action can arise in many ways: failure to sue the correct defendant; failure to properly oppose a summary judgment motion; failure to assert certain claims in the case (*i.e.,* lost earnings or medical expenses); errors at trial; and even simple procedural errors that result in the dismissal of the client's action.

The most common error that is made by attorneys in the context of handling a plaintiff's personal injury claim is probably the simple mistake of failing to timely commence the personal injury action within the applicable statute of limitations. There are a number of reasons why this error is so common, such as: procrastination, failure to properly diary/calendar, unfamiliarity with the statute of limitations (*i.e.,* cases against municipalities or governmental entities where the statute of limitations is reduced).

Whatever the reason for failing to timely commence a personal injury action on a client's behalf, there is generally no defense to the negligence aspect of such a legal malpractice claim. Instead, the defense of the malpractice claim turns to the merits of the underlying personal injury claim: would the client have been able to prevail on that personal injury claim "but for" the attorney's failure to timely commence the action and, if so, what would have been the extent of the client's recovery in the context of that action.

3. Matrimonial

It seems that the most common claim against attorneys arising from the representation of clients in matrimonial actions is the alleged failure of the attorney to obtain a fair and reasonable settlement on the client's behalf. This type of claim will often arise despite the fact that there is an executed settlement agreement signed by the client in which she consented to the terms of the subject settlement. Not only is there usually a signed settlement agreement in these cases, but there is also often an allocution of the client under oath where the client attests in open court to her consent to the terms of the settlement, that she was satisfied with her attorney's representation, that she understands that the settlement is a full and final

[64] *E.g., Watson v. Melnikoff,* 19 Misc.3d 1130(A), 866 N.Y.S.2d 96 (Sup. Ct. Kings Cty. 2008).

settlement of all claims, and that she has no questions for the court about the terms of the settlement. Despite the client's consent to the terms of the settlement of the divorce action, it is remarkable how often an attorney is sued after the terms of the divorce are made final. In such cases, the client is obviously dissatisfied in some way with the terms of the settlement; however, rather than simply claiming dissatisfaction with the terms of the settlement, clients will generally allege that the attorney failed to properly value the ex-spouse's assets or failed to discover certain assets possessed by the ex-spouse or that the attorney otherwise failed to attain an appropriate settlement on her behalf. While under certain facts and circumstances the court may allow a claim such as this despite the prior settlement,[65] courts are generally more likely to dismiss such claims holding that such claims "are belied by the terms of the stipulation and [the client's] approval of those terms."[66]

4. Estates, Trusts & Probate

Nationwide, the trusts, estates and probate practice area is fourth on the list of practice areas from which the most legal malpractice claims arise. Legal malpractice claims arising from trust and estates work generally arise from the attorney's drafting of an estate planning document for a client, such as a will or a trust. As a simple example, if a client has five children and intends to leave the proceeds of his estate to each of them equally, but due to a drafting error of the attorney, the client's will leaves the proceeds of the client's estate to only four of the five children, then when this error is realized upon the death of the client, the fifth child who was an intended beneficiary will bring a legal malpractice action against the decedent's attorney for the damages that have been incurred.

The plaintiff bringing the legal malpractice action against the attorney in this type of circumstance is not the attorney's client. As a result, in states with strong privity requirements, such actions are not permissible.[67] However, many states hold that an intended beneficiary has standing to bring a legal malpractice action against the decedent's attorney because it was the beneficiary that was intended to benefit from the attorney's work for the decedent. As a result, many states hold that there is a relationship between the attorney and the beneficiary that is sufficiently close to privity as to allow the beneficiary standing to bring the legal malpractice claim against the decedent's attorney.[68] It should be noted that while a state may not permit a beneficiary to maintain a legal malpractice action against a decedent's attorney, the decedent's estate may have standing to bring a legal malpractice action against the decedent's attorney.[69]

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[65] *Fielding v. Kupferman,* 65 A.D.3d 437, 885 N.Y.S.2d 24 (1st Dep't 2009).

[66] *DeGregorio v. Bender,* 4 A.D.3d 384, 772 N.Y.S.2d 89 (2d Dep't 2004); *Schloss v. Steinberg,* 100 A.D.3d 476, 954 N.Y.S.2d 37 (1st Dep't 2012).

[67] *Barcelo v. Elliot,* 923 S.W.2d 575 (Tex. 1996).

[68] *Walker v. Lawson,* 514 N.E.2d 629 (Ind. Ct. App. 1987); *Guy v. Liederbach,* 459 A.2nd 744 (Pa. 1983).

[69] *Estate of Schneider v. Finmann, supra; Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., supra.*

5. Collection & Bankruptcy

There are any number of claims that can arise for an attorney practicing in the areas of collections and bankruptcy. In recent years, however, there has been a steady increase in the number of claims brought against collections attorneys under the federal Fair Debt Collection Practices Act (FDCPA).[70]

The FDCPA is a federal law that was enacted to curtail the "abusive, deceptive, and unfair debt collection practices by many debt collectors."[71] The term "debt collector" is defined in the statute as "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."[72] Since collections attorneys "regularly collect...debts...owed...another," they are governed by the requirements of the FDCPA. Claims brought against attorneys under the FDCPA are not legal malpractice claims, but such claims are generally covered under an attorney's professional liability insurance policy because the claims arise from the attorney's practice of law.

The FDCPA establishes very strict rules for debt collectors, including setting specific requirement as to how a debt collector can communicate with a debtor. For example, a debt collector generally cannot communicate with a debtor at any unusual time or place (generally only between 8:00 a.m. and 9:00 p.m.); cannot communicate with the debtor if it is known that she is represented by counsel; and cannot communicate with a debtor at his/her place of employment.[73] A debt collector cannot engage in any conduct to harass, oppress or abuse the debtor[74] and cannot make any false, deceptive or misleading representations to the debtor.[75] A debt collector is also specifically required to provide the debtor with notice of the following:[76]

> (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

[70] 15 U.S.C. 1692, *et seq.*

[71] 15 U.S.C. 1692(a).

[72] 15 U.S.C. 1692a(6).

[73] 15 U.S.C. 1692c.

[74] 15 U.S.C. 1692d.

[75] 15 U.S.C. 1692e.

[76] 15 U.S.C. 1692g(a).

> 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.

A collections attorney who violates any provision of the FDCPA can be held statutorily liable to the consumer/debtor for the following damages:[77]

> (1) any actual damage sustained by such person as a result of such failure;
>
> (2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
>
> (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

It is particularly important to note paragraph "3" (above), which directs that the damages imposed under the FDCPA include the debtor's attorney's fees. As such, it is generally recommended that claims under the FDCPA be resolved as expeditiously as possible in order to avoid incurring additional costs in the form of plaintiff's counsel's attorney's fees.

[77] 15 U.S.C. 1692k(a).

IV. Additional Causes of Action

In the context of a legal malpractice action, the plaintiff will often assert causes of action in addition to the basic malpractice claim. As discussed above, many of the claims that are asserted are duplicative of the legal malpractice claim and are subject to dismissal. However, there are a number of claims that are commonly asserted by plaintiffs in legal malpractice actions that may be permissible as independent of or additional to the malpractice claim because they are based upon separate and distinct facts and/or seek separate and distinct damages from that of the legal malpractice claim. Some of the more common additional claims that are asserted are causes of action for fraud, emotional distress, concealment, ethical violations and punitive damages.

1. Fraud

A fraud claim asserted in the context of a legal malpractice action could be duplicative of the legal malpractice claim if the claim arises from the same facts and seeks the same damages as the malpractice claim. Under such circumstances, the fraud claim would be subject to dismissal as duplicative of the malpractice claim.[78]

However, there are often circumstances where the fraud alleged is separate and distinct from the facts that form the basis of the malpractice claim. Where the facts giving rise to the fraud claim are different from those that form the basis of the malpractice claim, the fraud claim is distinct from the malpractice claim and is not subject to dismissal as duplicative. For example, in *Rupolo v. Fish*[79] it was held that plaintiffs' fraud claim survived despite the dismissal of plaintiffs' legal malpractice claim because the fraud cause of action against the attorney-defendants was independent of alleged legal malpractice. The court held that the fraud cause of action was based upon the attorneys' alleged misrepresentation that one attorney in the firm was eligible to practice law in Florida and that the plaintiff's alleged damages flowed from this distinct conduct.

It should be noted that plaintiffs' attorneys are generally reluctant to bring fraud claims without accompanying legal malpractice claims and generally will not emphasize a fraud claim over a malpractice claim because the alleged fraud is an intentional act, which will not be covered under the terms of the defendant-attorney's professional liability insurance policy.

2. Emotional Distress

Plaintiffs in a legal malpractice action will often claim that they have suffered emotional distress as a result of the attorney's malpractice. Many states do not permit claims for

[78] *Financial Services Vehicle Trust v. Saad,* 72 A.D.3d 1019, 900 N.Y.S.2d 353 (2d Dep't 2010); *see also, Fender v. Deaton,* 153 N.C. App. 187, 571 S.E.2d 1 (2002).

[79] 87 A.D.3d 684, 928 N.Y.S.2d 596 (2d Dep't 2011).

emotional distress in the context of legal malpractice actions on the grounds that a cause of action for legal malpractice does not afford recovery for any item of damages other than pecuniary loss, so there can be no recovery for claimed emotional or psychological damages.[80] However, some jurisdictions such as Kansas and Indiana allow claims for emotional distress or mental suffering in limited circumstances where physical injury resulted from the mental suffering or when the attorney's conduct was willful and the attorney acted with the intent to injure.[81]

3. Concealment of Malpractice

It will sometimes be alleged that following the malpractice by the attorney, the attorney concealed the malpractice from the client. The client will then often assert a separate cause of action for concealment or fraudulent concealment in the context of the legal malpractice action. Such claims are generally not viable. Courts have held that "a defendant's concealment or failure to disclose his own malpractice without more does not give rise to a cause of action for fraud or deceit separate and distinct from the customary malpractice action."[82] The logic behind this holding is that no separate damages are incurred by the client as a result of the concealment; the damages incurred by the client were a result of the attorney's alleged malpractice.

4. Ethical Violations

In addition to a standard legal malpractice claim, a plaintiff will often assert that the attorney also committed an ethical violation or violated a disciplinary rule. However, without more, there is no independent cause of action for an ethical violation or the violation of a disciplinary rule. It has been held that "an ethical violation will not, in and of itself, create a duty that gives rise to a cause of action that would otherwise not exist at law."[83] In the State of Florida, the preamble to the rules regulating the Florida bar specifically states that "the violation of a rule should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached," and Florida courts have dismissed claims against attorneys on these grounds as a result.[84]

If, however, it can be demonstrated that the ethical violation was a breach of the attorney's duty of care to the client and it was that breach that resulted in certain damages, the

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[80] *Wolkstein v. Morganstern,* 275 A.D.2d 635, 713 N.Y.S.2d 171 (1st Dep't 2000).

[81] *Bowman v. Doherty,* 235 Kan. 870, 686 P.2d 112 (1984); *see also, Shuamber v. Henderson,* 579 N.E.2d 452 (Ind. 1991).

[82] *LaBrake v. Enzien,* 167 A.D.2d 709, 562 N.Y.S.2d 1009 (3d Dep't 1990).

[83] *Shapiro v. McNeill,* 92 N.Y.2d 91, 699 N.E.2d 407, 677 N.Y.S.2d 48 (1998).

[84] *Holton v. Florida,* 2007 WL 951726 (U.S.D.C. M.D. Fla 2007).

alleged ethical violation may be actionable.[85] For example, if a client alleges that an attorney had a conflict of interest (an ethical violation and a breach of a duty to the client), and that the client sustained damages as a direct result of the conflict, a claim of legal malpractice based upon the alleged ethical violation may be permissible.[86]

5. Punitive Damages

Plaintiffs will often assert punitive damages claims in the context of legal malpractice actions.

> To obtain an award of punitive damages, which does not constitute a separate cause of action, the claimant must demonstrate recklessness or a conscious disregard of the rights of others. *Hartford Accident & Indemnity Co v. Hempstead,* 48 N.Y.2d 218, 422 N.Y.S.2d 46, 397 NE 2d 737 (1979). Thus punitive damages require more than mere intentional conduct; they are permitted when the conduct evinces a high degree of moral turpitude and demonstrate such wanton dishonesty as to imply criminal indifference to civil obligations. *Ross v. Louise Wise Services, Inc.,* 8 NY3d 478, 835 N.Y.S.2d 509, 868 NE 2d 189 (2007). The United States Supreme Court has asked courts to consider, inter alia, whether: 1) the tortious conduct evinced an indifference to or disregard for the health or safety of others; 2) the target of the conduct was financially vulnerable; 3) whether the conduct involved repeated actions of a similar type or was an isolated incident; and 4) whether the harm was as a result of intentional malice, trickery or deceit, as opposed to mere accident. *State Farm Mutual Ins Co v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513(2003).[87]

In addition to common law claims for punitive damages, states like New York and Indiana also provide statutory authority for the imposition of treble damages for certain improper acts of an attorney.[88]

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[85] *Tilton v. Trezza,* 12 Misc.3d 1152(A), 819 N.Y.S.2d 213 (Sup. Ct. Nass. Cty. 2006).

[86] *Roller v. Walsh,* 278 A.D.2d 811, 718 N.Y.S.2d 519 (4th Dep't 2000).

[87] *Oikonomos, Inc. v. Bahrenberg,* 38 Misc.2d 1207(A), 966 N.Y.S.2d 347 (Sup. Ct. Suff. Cty. 2013); *see also, Briggs v. King,* 714 S.W.2d 694 (Mo. App. W.D. 1986; *Rodriguez v. Horton,* 95 N.M. 356, 622 P.2d 261 (Ct. App. 1980).

[88] N.Y. Judiciary Law § 487; Ind. Code § 33-43-1-8.

With regard to claims for punitive damages, it is important to note:

> ...an insurer may not indemnify an insured for a punitive damages award, and a policy provision purporting to provide such coverage is unenforceable (*see Zurich Ins. Co. v. Shearson Lehman Hutton,* 84 N.Y.2d 309, 316–317, 618 N.Y.S.2d 609, 642 N.E.2d 1065 [1994]). The rationale underlying this public policy exception emphasizes that allowing coverage "would defeat the purpose of punitive damages, which is to punish and to deter others from acting similarly" (*Home Ins. Co. v. American Home Prods. Corp.,* 75 N.Y.2d 196, 200, 551 N.Y.S.2d 481, 550 N.E.2d 930 [1990] [internal quotation marks omitted]). Second, as a matter of public policy, an insured may not seek coverage when it engages in conduct "with the intent to cause injury" (*Town of Massena v. Healthcare Underwriters Mut. Ins. Co.,* 98 N.Y.2d 435, 445, 749 N.Y.S.2d 456, 779 N.E.2d 167 [2002]; see also *Austro v. Niagara Mohawk Power Corp.,* 66 N.Y.2d 674, 676, 496 N.Y.S.2d 410, 487 N.E.2d 267 [1985] ["Indemnification agreements are unenforceable as violative of public policy only to the extent that they purport to indemnify a party for damages flowing from the intentional causation of injury"]).[89]

V. Other Considerations

As with all types of claims, there are certain unique factors that must be considered when handling a legal malpractice claim. These factors include issues of burden of proof, how damages are calculated, the plaintiff's own actions, and insurance considerations.

1. Expert Witness Requirements

As with all areas of professional liability, expert witness testimony will generally be required in order for a plaintiff to establish negligence in the attorney's representation.[90] In fact, in some states such as Pennsylvania, the plaintiff is required to submit an affidavit of merit from an attorney in order to commence a legal malpractice action.[91]

While expert testimony is generally required in order for a plaintiff to establish an attorney's negligence, sometimes expert testimony is not required if the issue of the attorney's

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[89] *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.,* 21 N.Y.3d 324, 992 N.E.2d 1076, 970 N.Y.S.2d 733 (2013).

[90] *McConwell v. FMG of Kansas City,* 18 Kan. App. 2d 839, 861 P.2d 830 (1993); *Progressive Sales v. Williams,* 86 N.C. App. 51, 536 S.E.2d 372 (1987).

[91] Pa.R.C.P. 1042; see also, *Moore v. Luchsinger,* 862 A.2d 361 (Pa. Super. 2004).

negligence is within the experience of the fact finder.[92] For example, in a simple case of an attorney failing to commence an action on behalf of her client within the applicable statute of limitations, the issue of whether the attorney was negligent in this regard may be deemed within the knowledge of the fact finder and obviate the need for expert testimony.

Conversely, the burden of proof shifts to the defendant on a motion for summary judgment made on behalf of the defendant to affirmatively demonstrate that there was no negligence on the part of the attorney in his representation of the plaintiff. As a result, expert testimony will generally be required on behalf of the defendant on a motion for summary judgment in order to demonstrate that there was no negligence. An affidavit from the attorney-defendant, himself, in some jurisdictions will sometimes be sufficient for the attorney to establish that there was no negligence in the representation. Additionally, the sworn opinions of the attorneys for the respective parties may be sufficient expert witness testimony in some jurisdictions to meet the parties' respective burdens.

2. Pre-Judgment Interest

One issue that can be a significant factor in handling a legal malpractice claim is the issue of pre-judgment interest. In many states, interest on a legal malpractice plaintiff's damages will begin to accrue from the date of the legal malpractice or the date the damages were incurred (as opposed to interest beginning to accrue from the date a judgment is ultimately entered against the attorney-defendant). This means that the extent of plaintiff's damages increases every day from the date of the malpractice (or damages) until the case is resolved. This can account for a significant increase in a plaintiff's recovery over the course of a legal malpractice case, particularly in those states that have a high statutory interest rate such as New York where the statutory interest rate is calculated at 9% per year. Accordingly, if a plaintiff incurs damages of $100,000 as a result of an attorney's legal malpractice in New York and the case is litigated over the course of three years, the plaintiff's damages will increase to $127,000. This addition of pre-judgment interest can significantly increase the value of a legal malpractice case if the plaintiff's actual damages are large to start and if the case takes time to litigate. As a result, in states that allow for pre-judgment interest on legal malpractice claims, the timely handling of those claims in order to achieve an expeditious resolution is particularly important.

3. Prior Settlement

It may seem that if a plaintiff in a legal malpractice action settled her underlying claim that she should be precluded from later pursuing a legal malpractice action against her attorney. As discussed above, in certain circumstances such as a client's action against her attorney after the settlement of a divorce action, the client can be precluded from pursuing a subsequent legal malpractice action arising from that settlement. However, the general rule is

[92] *Bowman v. Doherty,* 235 Kan. 870, 686 P.2d 112 (1984).

that a claim for legal malpractice is viable, despite the client's settlement of the underlying action if it is alleged that the settlement of the underlying action was effectively compelled by the mistakes of counsel.[93] For example, in a case where a legal malpractice plaintiff had agreed to settle her action to recover property, rather than risk dismissal of that action on the basis of a defense of laches (allegedly available to the underlying defendant based upon plaintiff's attorney's conduct), the plaintiff was not precluded from maintaining a later legal malpractice action against the former attorneys.[94] The logic behind such holdings is that a settlement and release in an underlying action enable a plaintiff to minimize the full extent of the damage that would otherwise have flowed from the attorney's negligence. As a result, a settlement of the underlying action will not generally preclude a subsequent action for legal malpractice where the settlement was compelled because of the mistakes of former counsel.[95]

It is important to note that not all states permit legal malpractice actions after a plaintiff's voluntary settlement of the underlying claim. For example, in Pennsylvania the courts have held, "we will not permit a suit to be filed by a dissatisfied plaintiff against his former attorney following a settlement to which that plaintiff agreed."[96] This is but another example of the distinct rules between the various states and why the particular laws of each state should be confirmed before resolving a legal malpractice claim.

4. Other Liable Parties

When evaluating a legal malpractice claim, it is important to determine if there are any other parties that might also be liable to the plaintiff. Other liable parties may be obligated to contribute to any recovery ultimately made by the plaintiff and as a result may defray the extent of the attorney's contribution.

In particular, it should be determined whether the plaintiff was represented by any other attorney with respect to the matter at issue in the legal malpractice claim. If the client was represented by other counsel at some point during the underlying matter, that attorney may be responsible to the plaintiff for her claimed damages.

Additionally, it should be determined whether there was a referral of the underlying matter either to the attorney-defendant from another attorney or from the attorney-defendant to another attorney. The general rule is that if an attorney was to share in the legal fee that was to be derived from a representation, then he too shares in the liability to the client. Moreover, there are circumstances where third-parties, other than attorneys, may be liable to

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[93] *Tortura v. Sullivan Papain Block McGrath & Cannavo, P.C.,* 21 A.D.3d 1082, 803 N.Y.S.2d 571 (2d Dep't 2005); *see also, Baldridge v. Lacks,* 883 S.W.2d 947 (Mo. App. E.D. 1994); *Collins ex rel. Collins v. Perrine,* 108 N.M. 714, 778 P.2d 912 (Ct. App. 1989).

[94] *Leone v. Silver & Silver, LLP,* 62 A.D.3d 962, 880 N.Y.S.2d 676 (2d Dep't 2009).

[95] *Lattimore v. Bergman,* 224 A.D.2d 497, 637 N.Y.S.2d 777 (2d Dep't 1996).

[96] *Muhammed v. Strassburger,* 526 Pa. 541, 547, 587 A.2d 1346 (1991).

the plaintiff. For example, if the client sought other professional representation with regard to the underlying matter such as accounting services or architectural services, these other parties may likewise be liable to the plaintiff.

5. Consent to Settlement Provision

Professional liability insurance policies each contain a consent to settlement provision. This means that the attorney's consent is required before a settlement of the claim can be achieved. It often seems that the attorney's willingness to consent to a settlement of the claim is directly proportional to the amount of his deductible: the higher the deductible, the less willing the attorney is to consent to a settlement of a claim and conversely, the lower the deductible, the more willing the attorney is to consent to a settlement of a claim.

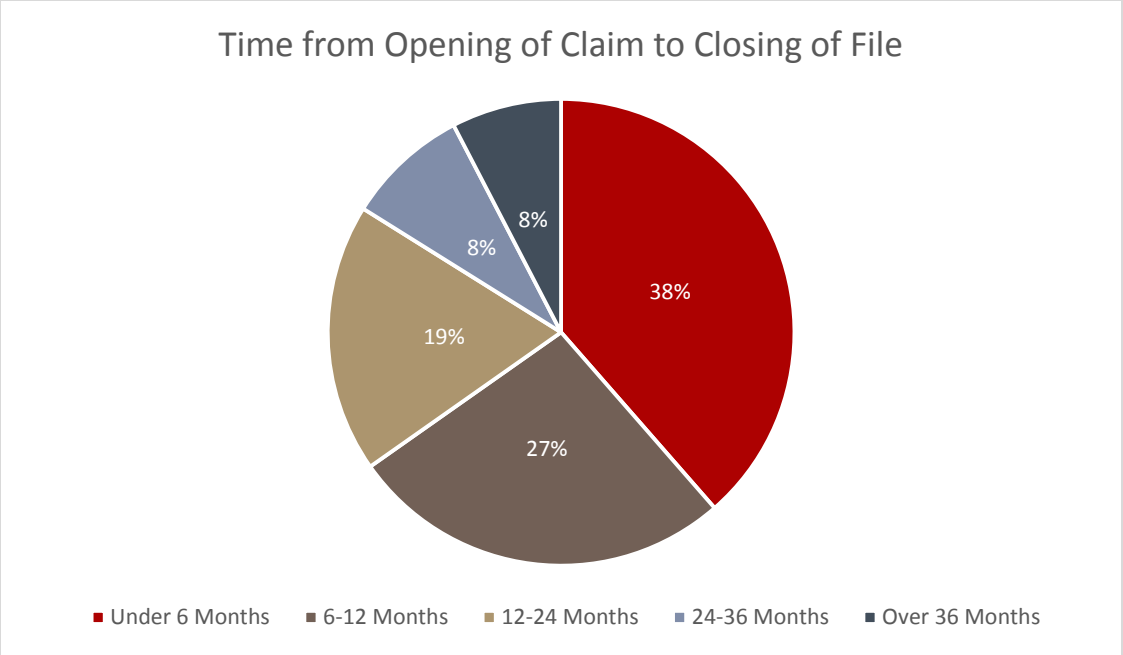
The lawyers' professional liability insurance policy contains another provision which enables the insurance carrier an ability to protect its own financial interests from an attorney that is reluctant to settle. This provision is commonly called the "hammer" clause. The hammer clause provides that if an attorney unreasonably withholds his consent to settle a claim, the insurance carrier can cap its future costs and expenses on the claim at the amount for which the case could have been settled with the claimant. For example, if the carrier could settle a claim for $25,000, but the attorney is unreasonably unwilling to consent to the settlement of the claim, the carrier can exercise the hammer clause and cap its future costs on the claim at $25,000 (less the attorney's deductible). To the extent the continued litigation of the claim costs more than that amount at which the costs have been capped (*i.e.,* the amount for which the case could have been settled), the attorney will be personally liable for the overage, including costs, legal fees, and any settlement with or award to the plaintiff. The carrier's exercise of the hammer clause will generally persuade the attorney to consent to a settlement of the claim against him rather than face exposure and personal liability beyond the amount that remains available from the insurance policy.

CONCLUSION

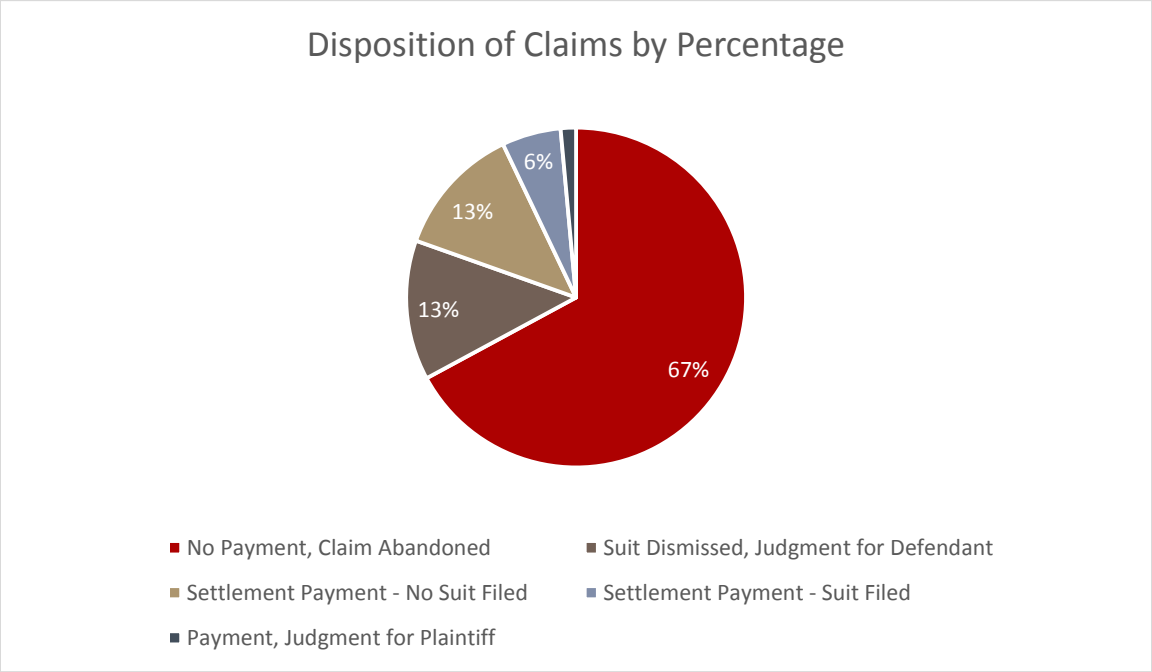
British philosopher Jeremy Bentham once said, "Lawyers are the only persons in whom ignorance of the law is not punished." Lawyers and those who handle claims brought against them know better. Lawyers certainly are punished for their ignorance of the law and for every other possible error that can be made. As a result, they carry insurance. They then entrust the capable and fair resolution of the claims brought against them to the insurance professionals and attorneys handling those claims. Those claims are generally resolved expeditiously and often favorably for the attorney.

According to ABA statistics, [97] more than 60% of all legal malpractice actions are resolved within a year of being opened with the insurance carrier:

[97] *Profile of Legal Malpractice Claims: 2008-2011, supra.*



Additionally, only about 20% of all legal malpractice claims ultimately result in payment to the claimant:



Handling legal malpractice claims can be challenging due to the varied nature and subject matter of each claim, but with capable and informed claims professionals and attorneys handling these claims, lawyers will continue to be well represented and claims against them will continue to be resolved in a timely and effective manner.

About the Author

William T. McCaffery is a partner in the New York law firm of L'Abbate, Balkan, Colavita & Contini, L.L.P. His practice concentrates in the areas of legal malpractice defense, professional liability, commercial litigation, and general liability defense. He is experienced in both trial and appellate practice. Among other areas of professional liability and defense litigation, he represents attorneys and law firms that have been sued for legal malpractice in cases ranging from real estate and personal injury matters to complex business transactions and commercial litigation.

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

Mr. McCaffery has received an AV rating from Martindale-Hubbell, their highest rating for ethical standards and legal ability, and he has received the highest rating of "Superb" from AVVO. He is a member of the Claims and Litigation Management Alliance (CLM); Vice President of the Long Island Chapter of CLM; and a member of CLM's Professional Liability Committee. He is also a member of the Nassau County Bar Association, the University of Scranton Council of Alumni Lawyers, and the Chaminade Lawyers Association. He has authored articles for the *New York Law Journal* (*"Trusts and Estates Lawyers Face Increasing Risks of Malpractice Claims," "Build a Stronger Firm Through Risk Management," "Basic Principles Make Exceptional Attorneys," and "Avoiding Attorney Fee Claim Litigation"*), the *Nassau Lawyer* (*"Time Management for Lawyers"*), *and co-authored* the CLM Claims Handling Resources for New York. He is a regular speaker on matters of legal malpractice, professional liability, risk management, and litigation before insurance carriers and groups such as the New York State Bar Association, the Nassau County Bar Association, the Suffolk County Women's Bar Association, and the Affiliated Lawyers of the Americas (ALTA).

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

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