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ISSUE: Attorney Liability for Negligent Settlement Advice

COUNSEL: Harry Mooney.
FIRM: Hurwitz & Fine, P.C.
HEADQUARTERS: Buffalo, NY

Co-authored with Laurie Styka Bloom, an attorney with Nixon Peabody of Buffalo, NY

RISK MANAGEMENT NOTE:

It is common knowledge that claims for legal malpractice are on the rise. Attorneys should be aware of the unique burden of proof a plaintiff carries in these sorts of claims and aware of some of the pitfalls of practice that can lead to claims. In light of this growing area of litigation, an attorney must not only represent his/her client zealously and within ethical guidelines, but must also take care to protect against potential claims.

ARTICLE: ANATOMY OF A LEGAL MALPRACTICE CLAIM

Even lawyers who have not yet had the misfortune of being sued are aware of the large increase in legal malpractice claims because of the dramatic increases in their malpractice insurance premiums. Gone forever are the days when legal malpractice actions were rarities. Today those claims are as commonplace as the household cat.

Malpractice claims arise from nearly every type of legal representation. While it is not possible in this article to cover all the bases, we will examine briefly the elements of a malpractice claim, the circumstances that increase the risk of a claim and the most common types of malpractice actions.

Elements of the Action

To prevail in a legal malpractice action, a plaintiff must establish four necessary elements. These are (1) the existence of an attorney-client relationship creating a duty on the part of the attorney, (2) breach of the duty, (3) constituting the proximate cause of the client's injury, and (4) damages.

There is nothing mysterious about these elements: they are the simple ingredients of the garden-variety negligence action every lawyer learned about in first-year torts class. They have been dressed up a little to fit the mold of a legal malpractice action, but they remain the same elements as those needed to establish any negligence cause of action-duty, breach of the duty, proximate cause and damages. Basic as these elements are, a brief discussion of each is warranted.

A. Existence of Attorney-Client Relationship

For an attorney to be liable for malpractice, there must be a relationship between the attorney and the claimant that creates a duty on the attorney's part.¹ The existence of a duty, usually created by the formation of the attorney-client relationship, is an essential part of any malpractice cause of action. An attorney may not be held to have committed malpractice for his failure to do that which he has no duty to undertake.²

The attorney-client relationship usually is established by the consent of the parties and is shown by some documentary material—a retainer agreement, the opening of a file or other activity

¹ *Compusort Inc. v. Goldberg*, 606 F.Supp. 456 (S.D.N.Y. 1985).

² *Banerian v. O'Malley*, 42 Cal.App.3d 604, 116 Cal.Rptr. 919 (1974).

evidencing the relationship. The existence of the requisite relationship does not depend on the payment of a fee by the client.³

There are some exceptions, however, to the general rule that a necessary element of a legal malpractice action is the establishment of an attorney-client relationship, in particular, in cases in which the attorney is charged with fraud or malicious action.⁴ There also has been an emerging trend to expand lawyer liability beyond the traditional attorney-client relationship if the legal services were intended to benefit the nonclient plaintiff.⁵

In a recent example of this trend, *Kirby v. Chester*,⁶ the Georgia Court of Appeals held that an attorney may be liable to a third party for failure to use the skill, prudence and diligence that a lawyer of ordinary skill and capacity commonly possesses and exercises in the performance of tasks he undertakes. In *Kirby* a party who wanted to obtain a secured loan retained the attorney to certify title to the property. The attorney's certification was accepted by the lender with the understanding that the borrower retained the attorney for the purpose of certifying the title so that the lender would approve the loan. The title later proved to be defective, and the lender was unable to foreclose when the borrower defaulted. Although no attorney-client relationship existed between the lender and the attorney, the lender's action against the attorney was upheld.

B. Breach of Duty

After the attorney-client relationship has been established, the plaintiff must show that the duty arising from that relationship was breached by the attorney. The attorney must in some manner have failed to exercise ordinary skill and knowledge.⁷ The most common kinds of breaches alleged are a negligent act on the attorney's part, a breach of a contract between the attorney and the client, fraud by the attorney, or a violation of a statutory or ethical duty imposed on the attorney. Most malpractice claims are grounded in negligence.

C. Causation

Like any other injured plaintiff, the malpractice plaintiff must establish that the actions of the attorney were the proximate cause of the damages.⁸ A "but for" standard generally is applied-"but for" the attorney's malpractice, the client would not have suffered damages or the underlying claim would have been resolved differently.⁹ The client must establish that he would have been successful in his endeavor had the attorney not been guilty of malpractice.

D. Damages

Finally, the attorney's malpractice must result in damages to the client.¹⁰ Actual or direct damages are recoverable, and their usual measure is the difference between what the plaintiff's pecuniary position is and what it would have been had the attorney not committed malpractice.¹¹ Consequential damages, as well as disbursements and fees paid to the offending attorney, may be recovered in appropriate circumstances.¹² It is important to remember that the plaintiff must have suffered damages in order to be successful in a malpractice claim. Thus, for instance, an attorney who has missed a statute of limitations on a claim completely without merit may escape

³ *Crest Investment Trust Inc. v. Comstock*, 23 Md.App. 280, 327 A.2d 891 (1974).

⁴ See, e.g., *In re Flight Transportation Corp. Securities Litigation*, 593 F.Supp. 612 (D.Minn. 1984), and *Halperin v. Salvan*, 117 A.D.2d 544, 499 N.Y.S.2d 55 (App.Div.1st 1984).

⁵ *Donald v. Garry*, 19 Cal.App.3d 769, 97 Cal.Rptr. 191 (1971).

⁶ 174 Ga.App. 881, 331 S.E.2d 915 (1985). See also, *Driebe v. Cox*, 416 S.E.2d 314 (Ga.App. 1992); *Atlanta Intern. Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991); *Matter of Papas*, 768 P.2d 1161 (Ariz. 1988).

⁷ *Bowman v. Abramson*, 545 F.Supp. 227 (E.D. Pa. 1982).

⁸ *Stewart v. Hall*, 770 F.2d 1267 (4th Cir. 1985).

⁹ *DuPont v. Brady*, 646 F.Supp. 1067 (S.D. N.Y. 1986); *Gans v. Gray*, 612 F.Supp. 608 (E.D. Pa. 1985).

¹⁰ *Klein v. Clay*, 71 A.D.2d 594, 418 N.Y.S.2d 420 (App.Div.1st 1979), *app. dsmd.* 49 N.Y.2d 759, 426 N.Y.S.2d 479, 403 N.E.2d 184 (1980).

¹¹ *Flynn v. Judge*, 149 A.D. 278, 133 N.Y.S. 794 (App.Div.2d 1912).

¹² *United Fidelity Life Ins. Co. v. Law Firm of Best, Sharp, Thomas & Glass*, 624 F.2d 145 (10th Cir. 1980); *Pete v. Henderson*, 155 Cal.App.2d 772, 318 P.2d 720 (1957).

liability since the plaintiff will be unable to establish the requisite damages. The plaintiff must establish the likelihood of success in the underlying matter for which he sought representation.

An interesting application of the elements of a cause of action in legal malpractice was adopted recently by the New York Court of Appeals in *Carmel v. Lunney*,¹³ in which the court held that a legal malpractice plaintiff who had pleaded guilty to underlying criminal charges was in no position to make a claim against the attorney who represented him at one time in the matter. The plaintiff, a securities salesman with a brokerage firm, became involved with another broker who was under investigation for criminal activity. The New York State Attorney General subpoenaed the plaintiff. He consulted the defendant lawyer, who advised him "to inform the Attorney General unreservedly about his activities." The plaintiff did so, waiving his privilege against self-incrimination and the possibility of obtaining immunity, and he was indicted for various crimes as a result of his testimony. He was defended in the ensuing criminal action by another law firm. Plea bargaining produced a plea of guilty to misdemeanor charges, and the plaintiff then brought a malpractice suit against his first attorney.

While the court agreed that the defendant might be guilty of malpractice, it concluded that the plaintiff's admission of guilt prevented him from maintaining the action. Thus, the plaintiff who claims malpractice in a criminal action, like the plaintiff who claims malpractice in a civil proceeding, must demonstrate the merits of his position in the underlying matter.

As in any tort claim, the plaintiff bears the burden of proof to establish all the necessary elements of his claim. If the attorney raises affirmative defenses, the attorney bears the burden of proof as to them.

Causes for Malpractice Actions

Every lawyer has experienced the disappointment of not achieving the desired result for a client in spite of the use of best efforts and skill. But lawyers understand the adversarial process. They know that there is more than one side to every story and that in contested matters only one party may prevail. Most cases are compromised, but many of these compromises are achieved only after long and tough negotiations. Many lost causes do not result in malpractice claims, but a hard-fought compromise that achieves a remarkable result for a client nevertheless can produce a disgruntled client and a claim for malpractice against the attorney who worked so hard and long on the client's behalf.

How do hard-working, capable attorneys find themselves embroiled in malpractice lawsuits? Some of them, unfortunately, fail to prepare clients for the adversarial process. Or they simply lack good "bedside manners." Either they fail to establish the terms of the relationship clearly when the representation commences or they permit the attorney-client relationship to break down somewhere along the way. When either of these situations occurs, the chances of a malpractice claim being generated increase significantly. Clients who become disgruntled because of some misperception about their relationship with their attorneys are very likely to convert that feeling into a perception that their attorney has failed to represent them competently and skillfully.

Two common situations that often originate at the beginning of the relationship can be barometers of future trouble. One is illustrated by the attorney who makes big promises to the client, often when the client first comes into the office and before the attorney has had an opportunity to get the matter fully in hand. Facts develop later that demonstrate the client's case was not as strong as it initially appeared to be, but the client will never appreciate this and will be disappointed if the result finally achieved is anything less than full delivery of the initial promise. The client is likely to attribute this lack of success to the attorney's incompetence. A second common problem, again often with origins in the first meeting, is a misunderstanding about fees. It is important that attorneys explain to clients at the outset the basis for their fees and obtain their clients' agreements. It is best to record fee understandings or agreements in writing at the start of the relationship so that there need be no misunderstandings later.

Even a relationship that commences on a firm footing can break down later. There is no better way to hasten that breakdown than to begin to ignore the client and the file. This situation is a common and justified basis for many malpractice claims. No self-respecting attorney should ever ignore a client's file, but it happens all too often. An attorney may undertake a matter initially

¹³ 70 N.Y.2d 169, 518 N.Y.S.2d 605, 511 N.E.2d 1126 (1987).

with great enthusiasm but begin to lose zest for the case and for servicing the file for a variety of reasons. Perhaps the case has proved to be of little or no merit. Perhaps the attorney has required certain information from the client, and although this information has been requested many times, the client has not furnished it. Maybe the client has not paid the fee as agreed.

Any number of reasons can cause the attorney to take that file and place it on the office shelf next to the window, where it becomes a "sun-bleached file"-exposed to the sun so that its top discolors and fades. The "sun-bleached file" leads to one of the most common claims of malpractice against litigation counsel-the missed deadline. No lawyer should permit himself to get into the embarrassing situation of having one day to explain to a court-or, worse yet, a disciplinary agency-why he failed to progress the client's file. It is the attorney's responsibility to get in touch with the client to make sure that the relationship is preserved, or if the relationship cannot be preserved, to withdraw from representation in a prompt and ethical fashion so as not to prejudice the client's interests.

Then there is the attorney who, although working diligently on the client's matter, fails to maintain regular and timely communication with the client. He fails to keep the client advised at all stages of the representation. He does not copy the client on letters to other counsel or to the court. He agrees to a settlement without his client's prior approval. He creates the impression of negligence because he has failed to communicate. This failure not only harms the attorney-client relationship but greatly increases the risk of a malpractice claim.

Finally, there is a corollary to the proposition of keeping the client advised: do it in writing. A communication that has not been documented can be misunderstood and later disputed by a client who has become dissatisfied with his lawyer's services.

These circumstances are common to many legal malpractice actions. They are not isolated-often two or more of these situations can arise in one claim-nor are they intended to be a complete description of the kinds of circumstances that lead to legal malpractice claims. Other situations that arise are representation of more than one party, failure to keep the confidence of a client or failure to report to a client a conflict of interest. Lawyers must be alert to all these circumstances because they are not simply indicia of potential malpractice but also signs that lawyers may be running afoul of state codes or rules on professional conduct.

Kinds of Actions

A. Missed Deadline

The most common example of the missed deadline, and the cause of a horde of gray hair on attorneys' heads, is the blown statute of limitations. These claims arise from a failure to file a notice of claim on time, to commence an action on time, or to move for a new trial or appeal within time limits.

But the attorney who has missed a deadline still may be spared liability. It is not enough for the client to prove only that the deadline was missed. The client also must prove that the underlying action was meritorious. This burden to prove a "case within a case" is unique to legal malpractice actions and can work to the attorney's advantage by limiting his exposure.¹⁴ For example, in *Hickox v. Holleman*¹⁵ the Mississippi Supreme Court reversed a trial court's directed verdict for the defendant, holding that an attorney's failure to bring a medical malpractice action within the statutory period was negligence as a matter of law. The case was remanded to the trial court, however, for re-trial of the underlying medical malpractice action.

Other kinds of missed deadlines, while not as dramatic as the blown statute, are nonetheless common sources of meritorious claims. They include the failure to file a responsive pleading, the failure to comply with discovery deadlines established by the court, the failure to bring a case to trial within the prescribed period and the failure to appear at trial.

In *Carpenter v. Weichert*¹⁶ the court held that an attorney's failure to bring a matter to trial within the time allotted, which resulted in a dismissal of the action, subjected the attorney to a legal malpractice claim.

¹⁴ *Sitton v. Clements*, 257 F.Supp. 63 (E.D. Tenn. 1966). See Sullivan, *In Defense of "Case Within a Case,"* 55 DEF. COUN. J. 176 (1988)

¹⁵ 502 So.2d 626 (Miss. 1987).

¹⁶ 51 A.D.2d 817, 379 N.Y.S.2d 191 (App.Div.3d 1976).

In *Kuehn v. Garcia*¹⁷ the plaintiff hired the defendant attorney to represent her in a divorce case. Both the attorney and the client failed to appear for a hearing, and a default was entered against the plaintiff. She sued for malpractice. The Eighth Circuit held that the attorney failed to exercise that degree of care commonly possessed and exercised by other reasonable, careful and prudent lawyers in North Dakota, where the action was brought and where the attorney had been disciplined, and affirmed the trial court's grant of summary judgment to the plaintiff on the liability issue.

In *Universal Film Exchanges Inc. v. Lust*¹⁸ an attorney's failure to file a notice of appearance and his subsequent reliance on another attorney in the matter to keep him informed as to developments were deemed actionable negligence. The Fourth Circuit held that the attorney's "reliance on other parties to keep him informed as to the progress of the case and [his] deliberate decision not to enter an appearance or file an answer enumerating his client's defenses were 'grossly negligent' and could not be deemed excusable neglect." While this case was decided in the context of a motion to vacate summary judgment, the court held that when an attorney's conduct is substantially below what was reasonable under the circumstances, the client would have a remedy in suit for malpractice.

B. Conflict of Interest

Liability may arise when an attorney permits himself to represent adverse interests. In *Kelly v. Greason*¹⁹ the New York Court of Appeals declared: "The representation of conflicting or adverse interests may constitute professional misconduct because a lawyer, as one in a confidential relationship and as any fiduciary, is charged with a high degree of undivided loyalty to this client.... Thus, with rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship."

It ought to be a warning to all lawyers that if they become involved in a conflict of interest, they may find themselves defendants in malpractice actions, although they have given capable representation, simply because the conflict created an appearance of affecting the obligation of undivided loyalty to the client. State codes of professional responsibility and rules of professional conduct instruct attorneys to give undivided loyalty to clients and to avoid even the appearance of impropriety or conflict. Even if a conflict occurs inadvertently, it will be of no comfort to the attorney on whom professional responsibility imposes the obligation to avoid the representation of adverse interests.

The conflict situation can be especially thorny for attorneys who represent institutional clients. The business lawyer who represents corporate clients must take care to distinguish between representation of the corporation and its officers. Often the situation arises in which the corporation and its officers have conflicting interests. It is incumbent on the attorney to recognize these conflicts and advise the officers to seek separate counsel. Attorneys retained by insurance companies also must be careful to avoid conflicts. Defense counsel must recognize that their first loyalty is owed to the client, the insured, and not the insurance company. It is also possible either that the insured in a newly referred matter is an adverse party in a pending matter or that an adverse party in the newly referred matter is a client in a pending matter. Every firm should have a conflicts check system to uncover these potential problems as soon as the file arrives in the office. If a conflict is found promptly, it may not always be necessary to decline representation as long as all interested parties, including the insurance company, are advised and approve of the representation.

C. Misappropriation or Loss of Funds

¹⁷ 608 F.2d 1143 (8th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980).

¹⁸ 479 F.2d 573 (4th Cir. 1973).

¹⁹ 23 N.Y.2d 368, 296 N.Y.S.2d 937 (1968).

Misappropriation or commingling of funds by an attorney, sad to say, is all too common and a leading basis for disbarment, censure or other disciplinary action. It should be no surprise that it also is the basis for malpractice claims.

In *Model Building & Association of Mott Haven c. Reeves*²⁰ the plaintiff alleged that the defendant attorneys diverted approximately \$100,000 of the plaintiff's money to their own personal use. The New York Court of Appeals held that if the allegations were proved, the allegations would state a cause of action and that the defendants would be indebted to the plaintiff in an amount exceeding \$100,000.

D. Fraud

Fraud on an attorney's part may be the basis for a legal malpractice claim, and the elements necessary to prove the claim are essentially the same as those in any fraud cause of action. The plaintiff must establish (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) with the intent to deceive and (5) causing one to act on the representation.²¹ What distinguishes a claim for fraud against an attorney lies in the nature of the representation. An attorney may be liable in fraud for statements concerning future conduct or action and for misrepresentations of the state of the law, neither of which would constitute fraud by a non-attorney.²²

As mentioned above, fraud is often the basis of a claim against an attorney by non-clients and is most often seen in cases involving the investment of funds.

E. Negligent Referral

A 1975 case a federal court in New Jersey, *Tormo v. Yormack*,²³ held that a New York attorney may face liability in legal malpractice for negligently referring a case to a New Jersey attorney. The New York lawyer determined that the New Jersey attorney was licensed to practice in New Jersey but made no further investigation. He was unaware that the New Jersey attorney was facing criminal charges, of which he subsequently was convicted and disbarred. The New Jersey attorney, after settling the referred case, misappropriated the settlement by forging the client's name. The client sued both the New York and the New Jersey attorneys.

With regard to the New York attorney, the court held that an attorney must exercise ordinary care and skill in referring a case as well as in handling it. While the New York attorney did not have an obligation to investigate the New Jersey attorney, the court held that liability against the New York attorney could be based on his knowledge of certain facts that should have put him on notice that the New Jersey attorney had engaged in unethical conduct. The court ruled that unless the referral constituted a termination of the New York attorney's relationship with the client, he should have monitored the matter after it had been referred.²⁴

F. Withholding Information from Client

²⁰ 236 N.Y. 331, 140 N.E. 715 (1923).

²¹ *Applegate v. Dobrovir, Oakes & Gebhardt*, 628 F.Supp. 378 (D. D.C. 1985).

²² *See American Hemisphere Marine Agencies Inc. v. Kreis*, 40 Misc.2d 1090, 244 N.Y.S.2d 602 (Sup.Ct. N.Y.Cty. 1963).

²³ 398 F.Supp. 1159 (D. N.J. 1975).

²⁴ *See also De La Maria v. Powell, Goldstein, Frazier & Murphy*, 612 F.Supp. 1507 (D. Ga. 1985) (attorney may be liable for negligent recommendation of one client to another client for business transactions).

The failure of an attorney to disclose necessary or relevant information to a client may constitute malpractice under certain circumstances. In *Dier v. Hamilton*²⁵ a malpractice action based on the withholding of information, the attorney became aware that property owned by his client was encumbered by a judgment against the former owner, but he did not communicate this information to the client. He also failed to disclose that he, along with a corporation owned by him and his law partner, had an interest in the encumbered property. The property later was seized and sold to satisfy the judgment held by the attorney. The Court of Appeal of Louisiana held that, while the allegations of the plaintiff were vague and lacked specificity, they contained "declarations of professional impropriety and misconduct by the defendant which allegedly caused plaintiff damages, and for this reason the petition states a cause of action in malpractice."

G. Error in Judgment

An attorney generally cannot be held liable in malpractice for an error in judgment. An attorney's statement of opinion or judgment that ultimately proves erroneous cannot be the basis for a malpractice action unless the issuance of the opinion or judgment results from the attorney's failure to exercise ordinary skill and knowledge.

In *Gans v. Mundy*²⁶ the Third Circuit, applying Pennsylvania law, declared that "an attorney's considered decision involving at a minimum the requisite exercise of 'ordinary skill and capacity,' and which is an 'informed judgment,' does not constitute malpractice. An attorney's conscious exercise of such judgment, 'even if subsequently proven to be erroneous is not negligence.... There is no presumption that an attorney has been guilty of a want of care, arising merely from a bad result.'"

Claims that an attorney failed to exercise ordinary skill and knowledge in representing a client often arise in situations where the client is unhappy with the result of has had second thoughts with respect to a negotiated settlement. A client may contend that a poor settlement was forced on him because the attorney mishandled the case²⁷ or that the settlement recommended by the attorney was inadequate.²⁸ Liability also may be imposed on an attorney for failing to achieve settlement,²⁹ entering into an unauthorized settlement³⁰ or failing to inform the client of a settlement offer.³¹

In a Wisconsin case, *Helmbrecht v. St. Paul Insurance Co.*,³² an attorney retained to pursue a divorce action negotiated a property division on the day of the trial. Later the client realized that the negotiated amount was insufficient to maintain her and her children, and she brought a legal malpractice action seeking the difference between what she actually received and what she would have received had her case been competently prepared and presented. A verdict was returned for the plaintiff, but it was set aside by the trial court. On appeal, the Supreme Court of Wisconsin reinstated the jury's verdict, finding sufficient evidence to establish the attorney had failed to negotiate reasonably and that a basis for malpractice liability existed.

Nor is an attorney immune from a malpractice suit if a settlement has been approved by a court. The Supreme Court of Minnesota has held that court approval of an infant's settlement did not bar a malpractice action by a minor against the attorney who settled the claim.³³

To demonstrate that the attorney did not make a mere error of judgment, but actually failed to exercise a reasonable degree of skill, claimants often make use of expert testimony. While expert testimony may be required in many types of claims for malpractice, there are times when carelessness and lack of skill are so explicit that expert testimony will not be necessary. In

²⁵ 501 So.2d 1059 (La.App. 1987).

²⁶ 762 F.2d 338 (3d Cir. 1985).

²⁷ *Lewis v. Alper*, 15 A.D.2d 795, 224 N.Y.S.2d 996 (App.Div.2d 1962).

²⁸ *Gimbel v. Waldman*, 193 Misc. 758, 84 N.Y.S.2d 888 (Sup.Ct. N.Y.Cty. 1948).

²⁹ *Lysick v. Walcom*, 258 Cal.App.2d 133, 65 Cal.Rptr. 406 (1968).

³⁰ *Coopwood v. Baldwin and Gray*, 25 Miss. 129 (1852).

³¹ *Rubenstein & Rubenstein v. Papadakos*, 31 A.D.2d 615, 295 N.Y.S.2d 876 (App.Div.1st 1968).

³² 122 Wis.2d 94, 362 N.W.2d 118 (1985).

³³ *Cook v. Connolly*, 36 N.W.2d 287 (Minn. 1985).

House v. Maddox³⁴ the client, without the use of expert testimony, recovered a judgment against her attorney for allowing the statute of limitations to run prior to suit. Holding the attorney liable for damages for failing to exercise a reasonable degree of care and skill, the Illinois Appellate Court said that the law distinguishes between errors of negligence and errors of judgment. Whether an attorney has exercised a reasonable degree of care and skill in representing his client is generally a question of fact, the court declared, but expert opinion as to the standard of care to which a professional will be held is not always required. Where the record discloses obvious and explicit carelessness, the court concluded, expert testimony is not required to establish negligence.

H. Breach of Contract

In addition to tort liability for malpractice, attorneys also may be liable for breach of contract. If they warrant a particular result or that they will provide services that meet a particular level, they may be liable in contract for breach of those promises. Legal representations also may create an implied warranty that the attorney will exercise the skill and ability possessed by members of the bar under similar circumstances. Falling below that standard may give rise to a breach of contract as well as tort claim. This is particularly significant because contract statute of limitations are generally longer than tort limitations.

In *W.C. Jones v. Wadsworth*,³⁵ the Alaska Supreme Court ruled that an express promise to obtain a specific result or to do a specific thing gives rise to a contract cause of action governed by the six-year statute of limitations. The attorney's liability in contract was based in his promises to move to trial expeditiously and to keep the client informed of the legal proceedings. The Court found, however, that an implied promise in a retainer agreement, such as an implied promise to render competent legal services, is not sufficient to give rise to a contract cause of action.

The New York Court of Appeals went further than the Alaska Supreme Court in holding that implied promises in retainer agreements could form the basis of a contract cause of action for attorney malpractice. In *Santulli v. Englert, Reilly & McHugh*,³⁶ the Court upheld a contract cause of action for a plaintiff who alleged that the attorney breached the retainer agreement by failing to properly draw and record a mortgage. The Court noted, however, that the damages recoverable under this theory are limited to contract damages.

But the mere allegation of breach of contract will not remove a legal malpractice case from the tort context if the claim essentially sounds in tort. In *Citizens Bank of Dickinson v. Shapiro*³⁷ the Texas Court of Civil Appeals ruled that the plaintiff's allegations basically set forth a cause of action in tort rather than contract, and thus the tort statute of limitations applied. The plaintiff's complaint included a count for breach of warranty, but the court held that the conduct complained of was tortious in nature.

Conclusion

The significant increase in legal litigation in recent years, together with a corresponding increase in malpractice insurance premiums, send a strong signal to all lawyers not only to recognize but also to be keenly alert to the common pitfalls of law practice and the bases for malpractice claims.

Harry F. Mooney is a trial partner in Hurwitz & Fine, P.C. of Buffalo, New York. He received a B.A. degree from Canisius College (1961), an M.A. from Seton Hall University (1971) and a J.D. from the State University of New York at Buffalo. He is past President of the Defense Trial Lawyers' Association of Western New York, current President of The Harmonie Group, and member of International Association of Defense Counsel's Board of Directors.

³⁴ 46 Ill.App.3d 68, 360 N.E.2d 580 (1977).

³⁵ 791 P.2d 1013 (Alaska 1990). See also, *Towns v. Frey*, 721 P.2d 147 (Ariz.App. 1986).

³⁶ 78 N.Y.2d 700, 586 N.E.2d 1014, 579 N.Y.S.2d 324 (1992).

³⁷ 575 S.W.2d 375 (Tx.Ct.Civ.App. 1978).

Laurie Styka Bloom is an attorney with Nixon Peabody of Buffalo, New York. She is a graduate of Canisius College (B.A. 1980) and the State University of New York at Buffalo (J.D. 1983).

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THE HARMONIE GROUP

Tim Violet, Esq.
Executive Director
THE HARMONIE GROUP
634 Woodbury Street
St. Paul, MN 55107
Office: 651-222-3000
Cell: 612-875-7744
Fax: 651-222-3508
Email: tviolet@harmonie.org

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