PAUL FELLMAN

Presenting

10 WAYS YOU MAY BE COMMITTING LEGAL MALPRACTICE WITHOUT EVEN KNOWING IT

One (1) Hour Ethics CLE/CPE Credit

Tuesday August 30, 2022

12:30 EST

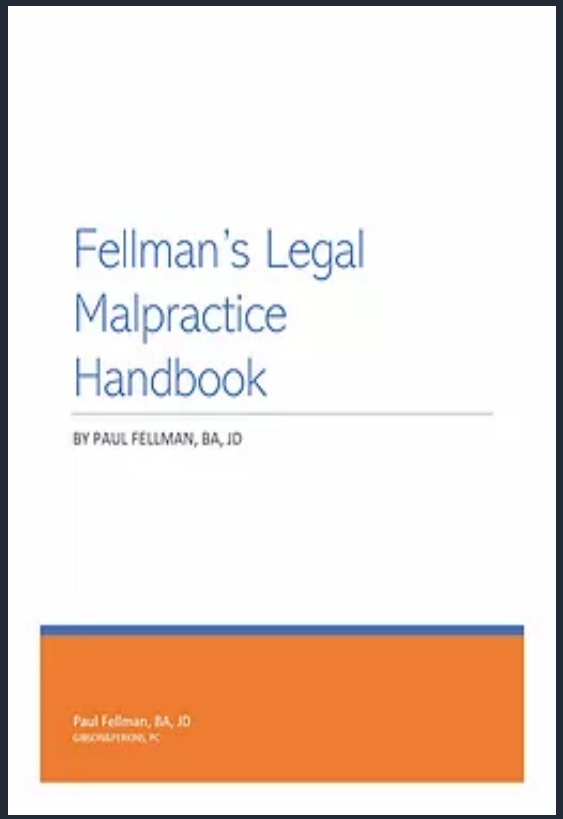
Paul Fellman
Licensed in Pennsylvania

Paul is a Senior Associate in Gibson & Perkins' Litigation Department where he represents clients in personal injury, legal malpractice, and general liability matters. The pride he takes in his work is reflected in the results he achieves for his clients.

Paul enjoys the complex nature of legal malpractice matters and takes each case as an opportunity to deepen his knowledge of the law.

In addition to his trial practice, Paul specializes in the area of appellate practice. Paul has argued cases before Pennsylvania's Supreme Court, Superior Court, and Commonwealth Court. While attending law school, Paul served as a judicial extern to the Honorable Henry duPont Ridgely of the Delaware Supreme Court.

Paul is the author of Fellman's *Legal Malpractice Guide*



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What is legal malpractice?

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Legal malpractice occurs when an attorney fails to possess and exercise that degree of knowledge, skill, and care which would normally be exercised by members of the profession under the same or similar circumstances. *McKpeake v. Cannon, Esquire*, P.C., 574 A.2d 1040, 1042 (Pa. Super. 1990).

What is legal malpractice?

The plaintiff in a legal malpractice case must prove:

(1) the employment of the attorney or other basis for duty;

(2) the failure of the attorney to exercise ordinary skill and knowledge; and

(3) that such negligence was the proximate cause of damage to the plaintiff. *Liberty Bank v. Ruder*, 587 A.2d 761, 764-65 (Pa. Super. 1991).

What is legal malpractice?

A plaintiff claiming legal malpractice in an underlying criminal case must prove by a preponderance of the evidence that *they did not commit any unlawful acts with which they were charged as well as any lesser offenses included therein. Bailey v. Tucker*, 621 A.2d 108, 113 (Pa. 1993).

What is legal malpractice?

A plaintiff claiming legal malpractice in an underlying civil case must prove that they had a viable cause of action against the party they wished to sue in the underlying case and that the attorney they hired was negligent in prosecuting or defending that underlying case (often referred to as proving the “case within a case”). *Kituskie v. Corbman*, 714 A.2d 1027, 1030 (Pa. 1998).

Which practice areas are most likely to lead to legal malpractice claims?

Which practice areas are most likely to lead to legal malpractice claims?

Online sources tend to agree that the largest number of malpractice claims arise from trusts and estates, business transactions, and corporate and securities.

I receive the most calls from people dissatisfied with their family law attorneys.

However, the great majority of these callers are simply frustrated with the process.

They cannot identify specific acts of malpractice. Instead, they want to relitigate the divorce.

Electing against the will.

Electing against the will—CAUTION.

Pursuant to 20 Pa.C.S.A. § 2203, a surviving spouse has a right to an elective share of one-third of certain property, including property passing from the decedent by will or intestacy.

A surviving spouse may take an elective share when doing so results in a greater share of the decedent's property than otherwise provided by the decedent's will.

Electing against the will.

The election must be made before the expiration of six months after the decedent's death or before the expiration of six months after the date of probate, whichever is later. 20 Pa.C.S.A. § 2210(b).

Electing against the will.

Before filing the election, you must determine whether the decedent's will predates the parties' marriage.

If the testator marries after making a will, the surviving spouse shall receive the share of the estate to which they would have been entitled had the testator died intestate, ….

…unless the will shall give them a greater share or unless it appears from the will that the will was made in contemplation of marriage to the surviving spouse. 20 Pa.C.S.A. § 2507.

Election gone wrong.

In *Kilmer v. Sposito*, the plaintiff alleged that she took her attorney's advice to file an election against her husband's will, a move that reduced her share of the estate from one-half to one-third.

The client was able to negotiate a settlement with the personal representative to receive 41.5% of the estate.

The plaintiff then sued her attorney to recover the difference between what she settled for, and what she would have received by operation of the law absent filing the election.

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Avoiding an incomplete disinheritance

Avoiding an incomplete disinheritance

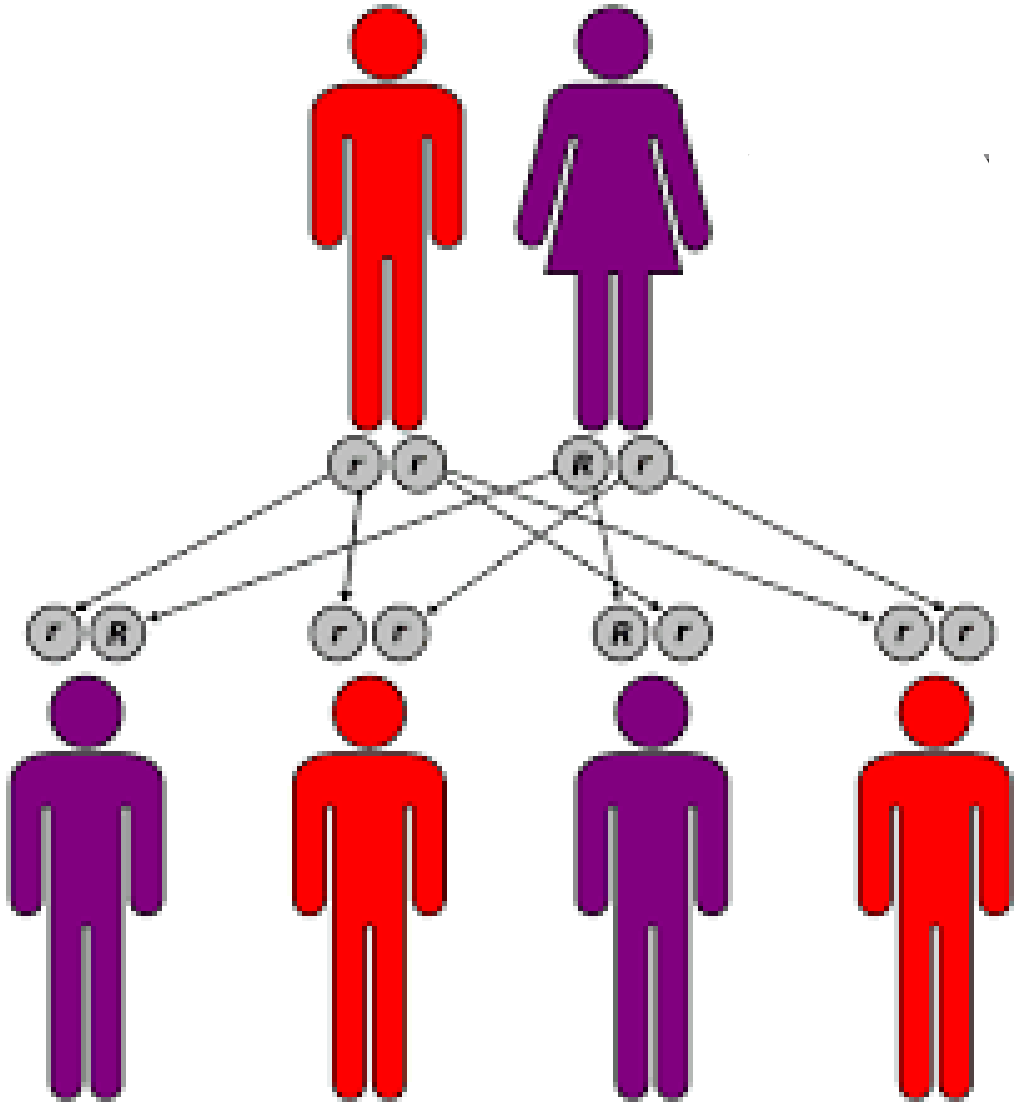
Your client asks you to prepare a will naming his brother as his sole heir. The testator wants everything to go to his brother and his brother's family. The testator also has children. You prepare the following provision:

> *I devise and bequeath my estate, both real and personal, wherever situate, to my brother, JOHN SMITH. In the event that he predeceases me or fails to survive me by thirty days, then in that event, I bequeath his share to his wife, MARY SMITH.*

The will does not contain a provision expressly disinheriting testator's children.

John and his wife predecease the testator but are survived by their son, Bob Smith.

Testator's children also survive him.



Avoiding an incomplete disinheritance

You may be surprised to learn that Bob will not receive John and Mary's share. Instead, John and Mary's share will pass to the testator's surviving children even though he explained to you that he wanted his brother's family to receive his estate.

20 Pa.C.S.A. § 2514 provides rules of interpretation for wills "in the absence of a contrary intent appearing therein…"

Avoiding an incomplete disinheritance

Some attorneys believe that the rules of interpretation would prevent John and Mary's gift from lapsing.

They believe the gift would pass to John and Mary's issue, Bob. However, 20 Pa.C.S.A. § 2514(9) provides that a gift to a sibling shall lapse to the extent to which it will pass to the testator's spouse or issue as part of the residuary estate or under the intestate laws.

Incorporating, but not merging, a marital settlement agreement with the final divorce decree

Incorporating, but not merging, a marital settlement agreement with the final divorce decree

Family law practitioners should be careful when deciding whether the marital settlement agreement, if any, will be incorporated or merged with the final divorce decree.

Negotiating alimony provisions

- Most marital settlement agreements contain heavily negotiated alimony provisions.
- You may be committing malpractice if the marital settlement agreement fails to include conditions which cause alimony to terminate or, in the absence of those provisions, you fail to have the agreement merged into the divorce decree.

Negotiating alimony provisions

In *McMahon v. Shea*, husband and wife entered into a stipulation wherein their prior agreements would be incorporated but not merged into the final divorce decree.

The parties had agreed that the husband would pay alimony until the youngest living child reached the age of twenty-one, was emancipated, or finished college, whichever occurs last.

The wife remarried approximately two months after the final divorce decree.

Negotiating alimony provisions

The husband filed a petition to terminate the alimony because the Divorce Code provided that alimony shall cease upon remarriage.

The court denied the petition because the parties' agreement had survived the decree of divorce and was not merged, i.e., the agreement could not be modified by a change in subsequent circumstances.

Negotiating alimony provisions

The attorney's possible mistakes included:

(1) Failing to include a provision terminating alimony upon remarriage or cohabitation; or

(2) Failing to merge the marital settlement agreement with the divorce decree which would have allowed the husband to invoke the Divorce Code.

Applying the wrong statute of limitations to a will contest

Applying the wrong statute of limitations to a will contest (undue influence).

Attorneys without prior experience litigating will contests can fall victim to their lack of knowledge.

A party seeking to challenge the probate of a will must file an appeal to the Orphans' Court within one year of the decree. 20 Pa.C.S.A. § 908.

The limitations period is strictly enforced.

Failing to preserve abandoned personal property in landlord-tenant matters.

Failing to preserve abandoned personal property in landlord-tenant matters.

Representing landlords in eviction matters is risky unless the attorney is familiar with the applicable landlord-tenant laws.

Not every landlord knows how and when they may legally dispose of a tenant's personal property abandoned on the premises.

It is important that the attorney correctly advise the landlord.

Failing to preserve abandoned personal property in landlord-tenant matters.

Pennsylvania's Landlord And Tenant Act imposes obligations on the landlord that contradict common sense.

The Act requires tenants to remove all personal property from the leased or formerly leased premises upon termination or relinquishment of possession.

The Act permits the landlord to dispose of abandoned personal property at its discretion.

Failing to preserve abandoned personal property in landlord-tenant matters.

However, even though the property is abandoned, the Act requires that:

- the landlord provide written notice to the tenant that they have ten days from the postmark date of the notice to retrieve the property or
- to request that the property be stored for an additional period not exceeding thirty days from the date of the notice.

Failing to preserve abandoned personal property in landlord-tenant matters.

The landlord must exercise reasonable care in handling and securing the tenant’s property and shall make the property reasonably available for purposes of retrieval.

The landlord is permitted to dispose of the personal property only after the notice period.

A landlord that violates this provision of the Act shall be subject to treble damages, reasonable attorney fees and court costs.

Failing to preserve abandoned personal property in landlord-tenant matters.

The Act can be viewed as overly cautious and impractical. It acknowledges that a tenant is required to remove personal property but imposes conditions on the landlord to further protect and preserve property which is abandoned.

Not all landlords are aware of this requirement.

You need to caution the landlord to protect them from claims by disgruntled tenants.

VERIFY YOUR ATTENDANCE

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General releases.

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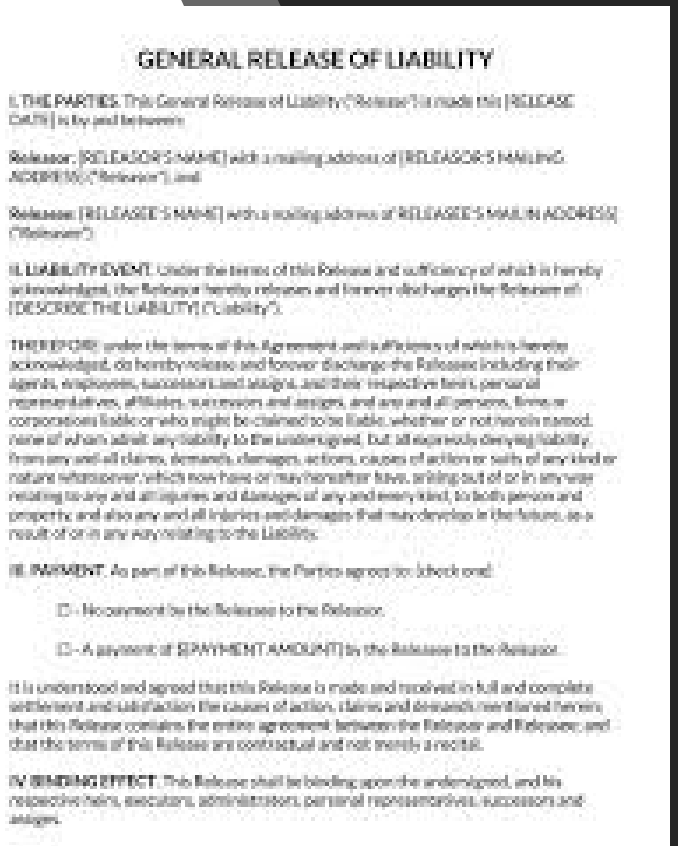

GENERAL RELEASE OF LIABILITY

I. THE PARTIES. This General Release of Liability ("Release") is made this [RELEASE DATE] is by and between:

Releasor: [RELEASOR'S NAME] with a mailing address of [RELEASOR'S MAILING ADDRESS] ("Releasor"), and

Releasee: [RELEASEE'S NAME] with a mailing address of [RELEASEE'S MAILING ADDRESS] ("Releasee").

II. LIABILITY EVENT. Under the terms of this Release and sufficiency of which is hereby acknowledged, the Releasor hereby releases and forever discharges the Releasee of [DESCRIBE THE LIABILITY] ("Liability").

THEREFORE, under the terms of this Agreement and sufficiency of which is hereby acknowledged, do hereby release and forever discharge the Releasee (including their agents, employees, successors and assigns, and their respective heirs, personal representatives, affiliates, successors and assigns, and any and all persons, firms, or corporations liable or who might be claimed to be liable, whether or not herein named, none of whom admit any liability to the undersigned, but all expressly denying liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, which now have or may hereafter have, arising out of or in any way relating to any and all injuries and damages of any and every kind, to both person and property, and also any and all injuries and damages that may develop in the future, as a result of or in any way relating to the Liability.

III. PAYMENT. As part of this Release, the Parties agree to: [check one]

☐ - No payment by the Releasee to the Releasor.

☐ - A payment of [PAYMENT AMOUNT] by the Releasee to the Releasor.

It is understood and agreed that this Release is made and received in full and complete settlement and satisfaction the causes of action, claims and demands mentioned herein, that this Release contains the entire agreement between the Releasor and Releasee, and that the terms of this Release are contractual and not merely recitals.

IV. BINDING EFFECT. This Release shall be binding upon the undersigned, and his respective heirs, executors, administrators, personal representatives, successors and assigns.

- General releases should be viewed with extreme caution.
- A general release is one that is given to a particular individual and “any and all other persons…whether herein named or not…”
- General releases can apply to all tort-feasors despite the fact they were not specifically named in the release. *Hasselrode v. Gnagey*, 172 A.2d 764 (Pa. 1961).

General releases.

General releases should generally be avoided.

They should absolutely not be used in cases involving multiple tort-feasors unless the plaintiff truly intends to release all their claims against all responsible parties.

General releases.

In *Collas v. Garnick*, the plaintiffs had claims arising from a motor vehicle accident. On advice of counsel, the plaintiffs signed a general release in favor of the other driver and all other parties, known or unknown, who might be liable for the damages sustained.

The release later prevented the plaintiffs from suing the vehicle manufacturer.

The plaintiffs sued their attorneys for failing to explain that the general release would bar their claims against non-named parties.

The court recognized that a lawyer has a duty to inform himself or herself of the manner in which a proposed settlement affects the client and to inform the client regarding the consequences thereof. *Collas v. Garnick*, 624 A.2d 117, 120 (Pa. Super. 1993).

Dismissing and refiling a case.

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Dismissing and refiling a case is a dangerous litigation strategy.

Some plaintiffs choose to dismiss a case where they are in danger of missing important deadlines or face trial before they are prepared.

The plaintiff will dismiss the case and refile under a new case number.

The plaintiff may believe that the statute of limitations on the claim was tolled during the pendency of the prior action.

Dismissing and refiling a case.

The second complaint on the same facts is considered a new action and not a continuation of the initial action. *Foster v. Sugarhouse Casino*, 2021 WL 3929383, *4 (Pa. Super. 2021) (non-precedential).

The general effect of dismissal is to place the plaintiff in the same position as if the action had never been instituted.

Dismissing and refiling a case.

Therefore, the pendency of the initial action will not toll the statute of limitations on the claims raised in the second action.

Attorneys considering voluntary dismissal and refiling should consider whether the second action would be timely if it were the initial action.

Otherwise, you may be dismissing a case which was initially timely, only to refile and discover that your client's claim is now time barred.

Acknowledging another attorney's possible malpractice.

Acknowledging another attorney's possible malpractice.

You may have a duty to inform your client of your predecessor's possible malpractice.

In *Jones v. Bresset*, the client sued his attorney for allegedly failing to advise him about the apparent negligence committed by his prior bankruptcy attorneys. *Jones v. Bresset*, 2000 WL 33116007 (C.C.P. Lackawanna County, No. 94-CV-1103).

The defendant in Jones was able to avoid suit because he took proper measures to limit the scope of his representation.

The fee agreement in Jones specifically advised the client that the representation would not include the investigation or evaluation of potential malpractice by prior counsel.

Summary judgment was granted in favor of the attorney based on the effective limitation in the scope of his representation.

Acknowledging another attorney's possible malpractice.

You should advise your client if you believe that your predecessor may have been negligent in representing the client.

Your duty can end at disclosure if you have a written agreement with the client that your representation will not include investigation or evaluation of the potential malpractice claims.

However, your duty is to first and foremost bring the potential claim to your client's attention.

Miscomprehending when the statute of limitations begins to run in legal malpractice cases.

Miscomprehending when the statute of limitations begins to run in legal malpractice cases.

Pennsylvania permits legal malpractice plaintiffs to proceed under negligence and/or breach of contract theories.

The statute of limitations on a negligence claim is two years from the date of the breach of duty.

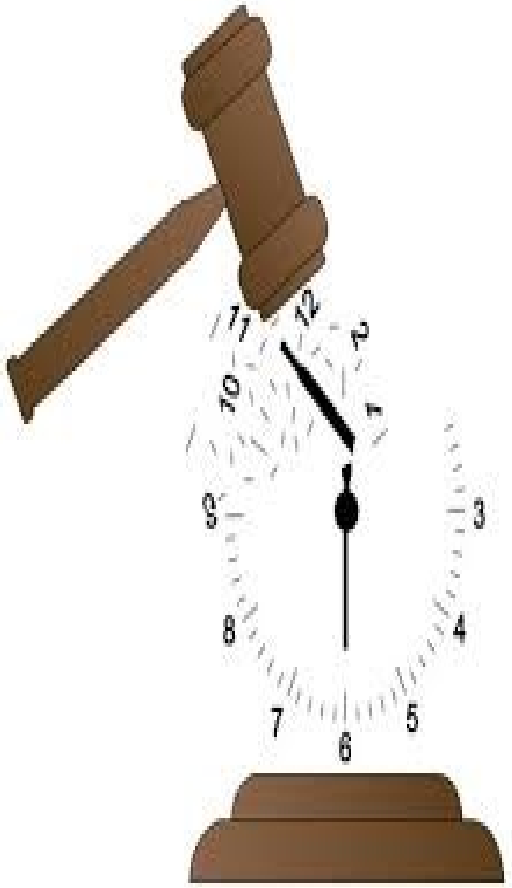
The statute of limitations on a breach of contract claim is four years from the breach of the duty.

Miscomprehending when the statute of limitations begins to run in legal malpractice cases.

Most malpractice claims will sound in negligence, i.e., the attorney's conduct fell below the standard of care required of an ordinarily prudent attorney.

Breach of contract claims are steadily being relegated to only those situations where the attorney has breached a specific promise or client instruction.

These claims are difficult to make because engagement letters are rarely specific as to the work to be performed or the manner in which it should be completed.



Miscomprehending when the statute of limitations begins to run in legal malpractice cases.

Many attorneys are unfamiliar with when the statute of limitations begins to run on their client's potential legal malpractice case.

Attorneys and laypeople alike often hold two mistaken beliefs.

Miscomprehending when the statute of limitations begins to run in legal malpractice cases.

First, that the statute of limitations does not begin to run until the client terminates representation.

This is incorrect.

The Pennsylvania Supreme Court recently confirmed this in *Clark v. Stover*, 242 A.3d 1253 (2020).

There, the Court rejected the plaintiffs' request that Pennsylvania adopt the continuous representation rule which would toll the statute of limitations against an attorney until completion of ongoing representation.

Miscomprehending when the statute of limitations begins to run in legal malpractice cases.

Second, that the statute of limitations does not begin to run until after appeals have been exhausted in the underlying matter or the client suffers actual loss.

This is also incorrect.

The Pennsylvania Superior Court rejected these arguments in *Garcia v. Community Legal Servs. Corp*., 524 A.2d 980 (Pa. Super. 1987) and *Wachovia Bank, N.A. v. Ferretti*, 935 A.2d 565 (Pa. Super. 2007).

Miscomprehending when the statute of limitations begins to run in legal malpractice cases.

In *Wachovia Bank*, the plaintiff argued that the statute of limitations was tolled during the appeal period in the underlying action.

The Superior Court disagreed and held that Pennsylvania follows the occurrence rule, under which the statute of limitations begins to run with the occurrence of the breach of duty. It will be tolled only until the injured party knows, or should reasonably know, of the breach.

The Court found that the plaintiff knew, or should have known, of the breach when a third-party initiated litigation against Wachovia for its attorneys' failure to satisfy a judgment against the third-party.

Miscomprehending when the statute of limitations begins to run in legal malpractice cases.

The third-party's suit was filed in 1994.

Wachovia defended the action until judgment was entered against it in 2003.

The appeals lasted until 2005 when the Pennsylvania Supreme Court denied Wachovia's petition for allowance of appeal.

The Superior Court specifically held that the statute of limitations was not tolled until judgment was entered against Wachovia in 2003, i.e., when Wachovia suffered "actual" or certain loss.

Do not delay in either investigating your client's malpractice claim or advising the client to seek other counsel to investigate and evaluate the claim.

Other ways to avoid or limit malpractice claims.

Other ways to avoid or limit malpractice claims.

1. Calendar all deadlines.
2. Calendar the statute of limitations when you receive a new matter.
3. Perform conflict checks on all matters.
4. Advise your clients of significant developments in writing.
5. Obtain your client's written confirmation authorizing you to act on their behalf, such as making or accepting settlement offers.
6. Have written fee agreements.

Other ways to avoid or limit malpractice claims.

7. Include a provision in your fee agreement precluding claims by third-party beneficiaries.

8. Do not include a provision in your fee agreement that you will provide “best efforts,” or which otherwise incorporates a negligence standard of care as a contractual promise.

9. Do not accept matters that are outside your experience and which you cannot reasonably handle through necessary study and preparation.

10. Be wary of suing clients for unpaid fees. Collection matters often lead to counterclaims alleging legal malpractice.

11. Do not wait until the last minute to file the writ of summons or complaint.

The End

Questions

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