

Legal Malpractice Claims In Pennsylvania

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ATTORNEYS AT LAW

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Legal Malpractice Claims in Pennsylvania

1. Introduction

Various claims can be brought against an attorney for harm to a client. The various claims include breach of contract, breach of fiduciary duty to the client and negligence. “[A]n action for legal malpractice may be brought in either contract or tort.” *Wachovia Bank, N.A. v. Ferretti*, 935 A.2d 565, 570 (Pa. Super. 2007), *citing*, *Garcia v. Community Legal Servs. Corp.*, 524 A.2d 980, 982 (1987); *see also*, *Gorski v. Smith*, 812 A.2d 683 (Pa. Super. 2002) (discussing the different types of claims against attorneys); *Guy v. Liederbach*, 459 A.2d 744, 748 (1983) (trespass or *assumpsit* theory require proof of different elements).

The first aspect of representing a legal malpractice claim involves the initial contact with the potential client. At that point in time, an analysis must be done as to what potential claims exist and what deadlines, especially statute of limitations, apply. Next, one must assess the merits of the case with the information available. Ideally one would have all of the pertinent court documents, if any, and a copy of the client’s file as held by the attorney against whom the legal malpractice is alleged. Also, for many practitioners and their clients, it is also important to determine the ability to collect any damages awarded against the attorney. Thus, one must determine if the attorney has malpractice insurance and the status of the attorney’s business liability, such as whether the law firm, business, or association is liable and whether the attorney is vulnerable personally. Many meritorious malpractice claims may be uncollectable and thus the advice to the client may simply be to report the malpractice to the disciplinary board. At the onset in a legal malpractice action, it is important to determine the scope of coverage of the applicable malpractice insurance. *See, e.g., Post v. St. Paul Travelers Ins.*, 691 F.3d 500 (3d Cir. 2012) (scope of insurer’s duty to defend legal malpractice action did not encompass entirety of sanctions proceeding against attorney in medical malpractice action, but was limited to defense costs incurred by attorney subsequent to hospital filing its answer to plaintiff’s motion for sanctions).

1.1 Statute of Limitations

A critical preliminary matter is ascertaining the deadline for the legal malpractice claims under the correct and applicable statute of limitations. As a general matter, the two-year statute of limitations applies to legal malpractice claims based upon negligence and the four-year period that governs contract disputes applies to legal malpractice claims based upon breach of contract. *Wachovia Bank, N.A. v. Ferretti*, 935 A.2d 565, 571 (Pa. Super. 2007); *Fiorentino v. Rapoport*, 693 A.2d 208, 219 (Pa. Super. 1997); 42 Pa.C.S. §§ 5524(3), 5525.

The next question is when the statute of limitations begins to run. “In Pennsylvania, the **occurrence rule** is used to determine when the statute of limitations begins to run.” (Emphasis added.) *Fiorentino v. Rapoport*, 693 A.2d 208, 219 (Pa. Super. 1997), *citing* *Robbins & Seventko v. Geisenberger*, 674 A.2d 244, 246 (1996). There appears to be inconsistency in what triggers the running of the statute of

limitations in legal malpractice claims. In *Fiorentino*, for example, the Superior Court states that: “[u]nder the Pennsylvania occurrence rule, the statutory period commences when the harm is suffered, or if appropriate, at the time an alleged malpractice is discovered.” *Fiorentino v. Rapoport*, 693 A.2d 208, at 219 (Pa. Super. 1997), *citing Bailey v. Tucker*, 621 A.2d 108, 115 (Pa. 1993). In *Fiorentino, supra*, the statute of limitations on the negligent drafting of an agreement that involved the payment of money did not begin to run until a party defaulted on the agreement, even after knowledge of the negligence, because the right to sue does not vest until harm is suffered. “[T]he mere breach of a professional duty that causes only the *threat* of *unrealized* future harm does not suffice to create a cause of action for negligence.” *Fiorentino, supra, citing Rizzo v. Haines*, 555 A.2d 58, 68 (Pa. 1989). Obviously, this could have significant ramifications in the area of malpractice for transactional attorney negligence.

By contrast, in *Wachovia Bank*, the Superior Court states that the trigger for the accrual of a legal malpractice action “... is not the realization of actual loss, but the occurrence of a breach of duty.” *Wachovia*, 935 A.2d at 572. The court states: “...the statute of limitations in a legal malpractice claim begins to run when the attorney breaches his or her duty, and is tolled only when the client, despite the exercise of due diligence, discovers the injury or its cause.” *Id.* at 573. The Superior Court does not discuss *Fiorentino, supra*, in its decision but rejects the “actual loss” argument that the *Fiorentino* court based its decision upon, and cites numerous cases supporting the rejection of this argument. Furthermore, in *Wachovia*, the Superior Court explains that *Rizzo, supra* (relied upon by *Fiorentino*) is based upon whether damages are remote or speculative and that speculative damages arise only when the question is of the existence of damages as opposed to the amount of damages. Thus, the statute of limitations in the legal malpractice claim in *Wachovia* was not tolled for the pendency or potential pendency of an appeal in the underlying case. *Wachovia*, 935 A.2d at 574.

The Superior Court has rejected the “continuing representation” tolling argument in legal malpractice cases. *Glenbrook Leasing Co. v. Beausang*, 839 A.2d 437, 442 (Pa. Super. 2003). The Court refused to toll the statute of limitations until the date on which the client terminated his attorney. *Glenbrook* involved a real estate matter in which the clients failed to file a writ of summons within two years of discovering that there was a problem with the deed.

The question of when the statute begins to run is decided by the court when there is no factual dispute and by a jury where there is a factual dispute. *Fiorentino, supra*, at 219. In *Fiorentino*, the court noted that the statute of limitations could not begin to run until after the client suffered the harm, and thus, as a matter of law, the statute did not begin to run at the time of the negligent drafting of the agreement. However, there was a factual issue as to when the client was made aware of the harm and that required a jury determination on that issue.

In *Communications Network Int’l v. Mullineux*, 187 A.3d 956 (Pa. Super. 2018), the court found that equitable estoppel did not toll the statute of limitations on a legal malpractice action, as appellant had the duty of due diligence in managing its corporate

litigation and both of appellant's principals conceded that they received copies of the court opinions at issue but did not bother to read them even though they admitted to attending board meetings where the opinions were discussed, and presumably, evaluated.

1.2 Venue

A quality-quantity analysis applies to determine whether a claim against a law firm or partnership is brought in an appropriate venue. *Zampana-Barry v. Donaghue*, 921 A.2d 500 (Pa. Super. 2007). Providing legal services to clients in a county satisfies the quality aspect of the test, whereas incidental acts like advertising, hiring, selling insurance, trainings, or referrals do not. *Id.* at 506. The practice of law in a county satisfies the quality test for a law firm or law partnership. *Id.* Furthermore, a trial court would not be reversed in deciding that the quantity test is met when a law firm or partnership has consistently generated approximately three to five percent of its gross business revenue from cases within the county. *Id.* The quantity analysis turns on whether the business is conducted “regularly” as opposed to “principally”. *Id.* In *Zampana-Barry*, Judge Klein filed a concurring opinion emphasizing that the “quantity” analysis is inconsistent and without specific guidelines, and for this reason a trial court is unlikely to be reversed on the quantity analysis. *Id.* at 507 (concurring opinion). The concurring opinion points out: “[I]n reviewing the case law, there are some cases that say 1-2% of contacts in the particular county is enough to meet the ‘quantity’ test, while others say 3% is *not* enough.” *Id.* Thus, venue may be established under 42 Pa. R.C.P. 2130 (partnerships) or 2179(a)(2) (corporations) when a law firm or partnership regularly represents clients in a county, even though it generates only a small percentage of the annual revenue over a period of ten years. *Zampana-Barry*, 921 A.2d 500, 502, 506-509. It should be noted the *Zampana-Barry* case did not involve a motion to transfer based upon *forum non conveniens* under 42 Pa. R.C.P. 1006(d)(1).

1.3 All Claims Related to the Attorney Malpractice Must Be Joined

Pennsylvania Rule of Civil Procedure No. 1020(d) requires that all claims related to a legal malpractice claim must be joined in one action when they arise out of the same “transaction or occurrence” against the “same person” to avoid waivers of claims related to an attorney’s malpractice. *Wachovia Bank, N.A. v. Ferretti*, 935 A.2d 565, 571 (Pa. Super. 2007), *citing D’Alessandro v. Wassel*, 587 A.2d 724, 276 (1991) (there was no waiver because Rule 1020 requires joinder of actions in the nature of trespass or assumpsit arising from same occurrence but does not apply to equity claims); 42 Pa. R.C.P. 1020(d).

1.4 Certificate of Merit

Pennsylvania Rule of Civil Procedure No. 1042.3 requires that a certificate of merit be filed with the complaint or within sixty days after the filing of the complaint, unless one of the two limited exceptions applies. 42 Pa. R.C.P. No. 1042.3. The 60-day limit applies even when the entry of judgment was technically deficient under Civil Rule 236. *Mumma v. Boswell, Tintner, Piccola & Wickersham*, 937 A.2d 459, 465 (Pa. Super. 2007). 42 Pa. R.C.P. No. 1042.3(b)(1) requires that “[a] separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted.” A

common pleas court has held that a single certificate of merit is sufficient against jointly liable defendants in an attorney malpractice case where the certificate of merit names them both. *Salamoni v. Karoly*, 74 Pa. D. & C.4th 378, 386 (Lehigh Co. 2005).

2. Prima facie case

There are three elements required to make out a *prima facie* case for legal malpractice: (1) there must be an attorney-client relationship or some other basis for establishing a duty by the attorney to the plaintiff; "...(2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that the attorney's failure to exercise the requisite level of skill and knowledge was the proximate cause of damage to the plaintiff." *Parkinson v. Kitteridge, Donley, Elson, Fullem & Embick, LLP* 2006 WL 2008922, at 2 (Phila. Co. 2006), *citing Bailey v. Tucker*, 533 Pa. 237, 246, 621 A.2d 108, 112 (1993); *Accord McMahon v. Shea*, 547 Pa. 124, 688 A.2d 1179 (1997). These elements must be proven by a preponderance of the evidence. *McPeake v. William T. Cannon, Esquire, P.C.*, 381 Pa. Super. 227, 232, 553 A.2d 439, 441 (1989). An attorney will be deemed "negligent" if he or she 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. *Fiorentino v. Rapoport*, 693 A.2d 208, 212 -213 (Pa. Super. 1997), *citing Collas v. Garnick*, 624 A.2d 117, 120, *appeal denied*, 636 A.2d 631 (1993); *Composition Roofers Local 30/30B v. Katz*, 581 A.2d 607, 609-10 (1990); *ei bon ee baya ghananee v. Black*, 504 A.2d 281, 284 (1986).

2.1 Attorney - Client Relationship

A legal malpractice claim against an attorney requires that the plaintiff establish an attorney-client or analogous relationship with the attorney. *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 806 (Pa. Super. 2007), *citing, Guy v. Liederbach*, 459 A.2d 744, 746, 750 (1983) ("reaffirming the requirement that a plaintiff must show an attorney-client or analogous professional relationship or a specific undertaking in order to maintain an action in negligence for legal malpractice"); *Hess*, 925 A.2d at 806; *and Gregg v. Lindsay*, 649 A.2d 935, 937 n. 1 (Pa. Super.1994) ("holding that because the litigants did not have an attorney-client relationship, the plaintiff could not recover for legal malpractice based on negligence"). The requirement that an attorney-client relationship exist as a prerequisite to a legal malpractice claim extends to and includes claims based upon the drafting, execution and/or administration of a will. *Hess*, 925 A.2d at 806.

An attorney-client relationship can be implied. The following criteria must exist to establish an implied attorney-client relationship: "...1) the purported client sought advice or assistance from the attorney; 2) the advice sought was within the attorney's professional competence; 3) the attorney expressly or impliedly agreed to render such assistance; and 4) it is reasonable for the putative client to believe the attorney was representing him." *Atkinson v. Haug*, 622 A.2d 983, 986 (Pa. Super. 1993) (no attorney client relationship existed); *citing Sheinkopf v. Stone*, 927 F.2d 1259 (1st Cir.1991); *Kirschner v. K&L Gates, LLP*, 46 A.3d 737 (Pa. Super. 2012) (an attorney-client relationship existed between the law firm and the corporation based on the retention letter which identified an implied attorney-client relationship between the corporation