Litigating a legal malpractice case is generally more complex than a simple tort action but, at its core, is governed by many of the same principles. The starting point is to simply examine the elements of any negligence claim—duty, breach, causation, and damages.

Duty

Like any negligence claim, an action sounding in legal malpractice begins with the question of whether the attorney owed the plaintiff a duty of care. This element is critical in two ways – establishing the presence of a relationship with the client; and establishing the lack of a relationship with others.

Typically, attorneys have entered into a retainer agreement with their clients. However, the execution of a formal retainer agreement is not a prerequisite to establish duty as courts will look to the words and actions of the parties to determine the existence of a relationship.1 Additionally, payment of a fee is not a requirement to establish the
existence of an attorney-client relationship sufficient to create a duty of care. As such, the fact that no retainer was signed and/or the fact that no fee was paid does not necessarily insulate an attorney from a legal malpractice claim.

The duty/privity requirement ensures that an attorney’s obligations toward his client are unaffected by worrying about the impact of his representation to others. It also serves as protection for attorneys from defamation suits brought by adversaries or others as statements made in the course of litigation are entitled to absolute privilege.\(^2\) Attorneys are afforded absolute protection with regard to relevant statements made in judicial or quasi-judicial proceedings so that they may speak freely and zealously represent their clients without fear of reprisal or financial hazard. It should be noted, however, that privity does not provide an absolute shield for an attorney from all liability from others. For example, an attorney may be liable to a non-client if he perpetrated a fraud or assisted his client in committing a fraud.\(^3\)

Absent a duty, there can be no breach of duty, and therefore no negligence and no malpractice. Accordingly, the duty requirement is a critical starting point when evaluating any legal malpractice claim.

Despite the nuance of the duty element, typically legal malpractice claims arise out of an attorney-client relationship that is undisputed in the underlying case. Therefore, the remaining elements of a legal malpractice claim come into play. Once privity or a relationship sufficiently approaching privity can be established, plaintiff must prove the remaining elements of a legal malpractice claim: (1) breach of the standard of care; (2) proximate causation; and (3) damages suffered as a result of the malpractice.\(^4\)

**Breach**

An attorney has breached the standard of care if he failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession.\(^5\) This standard does not require an attorney to be infallible and does not impose liability for an honest mistake of judgment where the proper course is open to reasonable doubt.\(^6\) This duty is not breached by an error in judgment or electing to proceed in one manner as opposed to another when there were several reasonable strategies.\(^7\) Proving this element typically requires expert testimony unless the conduct is so blatantly improper that a juror could easily determine that it fell below any acceptable standard (e.g., failing to timely file suit in violation of the statute of limitations).\(^8\)

**Proximate Causation**

To establish this element of legal malpractice, a plaintiff must prove that but for the attorney's malpractice, he would have prevailed in the underlying case. It essentially requires plaintiff to prove a case within a case. Therefore, even blatant negligence such as failing to file suit in violation of the statute of limitations is not necessarily fatal to an
attorney's malpractice action if plaintiff cannot establish that he would have prevailed had it been timely commenced.

Defending against proximate causation can place the attorney in the precarious situation of downplaying the merits of the case he had initially taken in or even litigated to its conclusion. However, this is a heavy burden for plaintiff to meet and often provides the best defense to a legal malpractice claim. Speculation or conjecture will not suffice to establish proximate causation.\(^9\)

**Damages**

Finally, even if a plaintiff has established that the attorney owed him a duty, breached that duty by failing to exercise the ordinary skill and knowledge possessed by a member of the legal profession, and that but for the attorney's negligence he would have prevailed in the underlying case, a plaintiff must also prove that he has suffered economic damages as a result of this negligence. A plaintiff cannot recover for any emotional distress allegedly sustained from losing his case due to legal malpractice. Damages are based upon plaintiff's proof of the amount of money he would have been awarded by a fact finder in his underlying action had he prevailed.\(^10\) Essentially, a jury would need to evaluate the amount in damages another jury (from the underlying matter) would have awarded.\(^11\)

However, the amount of money a jury would have awarded in the underlying matter does not end the inquiry. Critical to the calculation of damages in a legal malpractice action is the issue of collectability. This draws an important distinction between the amount of money that could potentially have been awarded and the amount of money which could or would have been recovered by the plaintiff. While all New York courts agree that collectability is an essential question as it pertains to damages, the appellate departments disagree as to which side should bear the burden of proving collectability. New York's Second and Fourth Departments require the plaintiff to prove collectability while the First Department places this burden on the defendant.\(^12\)

**Defenses**

As discussed above, defenses to legal malpractice claims include the lack of privity/duty with the plaintiff, establishing that the attorney exercised reasonable skill and judgment, the fact that plaintiff would not have prevailed in the underlying case, and the fact that the damages sought were not collectable in the first place.

In addition to attacking a plaintiff's failure to adequately establish the above-referenced elements, there are several other defenses to a legal malpractice action. The first question to ask when confronted with a legal malpractice action is whether the claim is timely. Regardless, whether a malpractice claim is based in tort (negligence) or contract (breach of retainer), it is still subject to a three-year statute of limitations which accrues when the malpractice is committed (not when it was discovered).\(^13\) It is also worth noting that while the accrual of the statute of limitations can be tolled by an attorney's
continuous representation of his client, this continuous representation must be in connection with the same matter from which the malpractice allegedly arose.\textsuperscript{14}

Preservation of this defense is greatly aided by diligent documentation of the terms and scope of the attorney-client relationship. Detailed engagement letters and disengagement letters can help confirm the precise date that the attorney-client relationship concluded and provide the court with a clear starting point for calculation of the statute of limitations.

As alluded to above, the attorney judgment rule provides another strong defense to a legal malpractice claim. This defense attacks the "breach" element of plaintiff's legal malpractice claim. An error in judgment in the "selection of one among several reasonable courses of action does not constitute malpractice."\textsuperscript{15} The attorney judgment rule provides a powerful defense; however it does not provide blanket protection. The attorney must still offer a reasonable strategic explanation for his decision.\textsuperscript{16}

The successor attorney rule provides another defense. In a situation where an error is made by Attorney #1 and the case is transferred to Attorney #2, if it can be shown that the successor attorney had sufficient opportunity to protect plaintiff's rights by pursuing any remedies it deemed appropriate on their behalf, the action/errors of Attorney #1 can no longer be said to have proximately caused the plaintiff's damages.\textsuperscript{17}

Settlement of the underlying case could give rise to a legal malpractice claim if the settlement was compelled by the mistakes of the attorney. However, allocation at settlement where the client testifies that he was satisfied with the representation provides a strong defense.\textsuperscript{18}

Finally, in 2014, the Court of Appeals appears to have created a new rule and a new defense for attorneys defending legal malpractice case. In \textit{Grace v. Law}, the Court of Appeals held that "prior to commencing a legal malpractice action, a party who is likely to succeed on appeal of the underlying action should be required to press an appeal. However, if the client is not likely to succeed, he or she may bring a legal malpractice action without first pursuing an appeal of the underlying action."\textsuperscript{19} Therefore, the failure to press an appeal in certain circumstances could be fatal to a plaintiff's legal malpractice claim.

In some ways, litigating a legal malpractice case is no different from handling any other negligence claim. However, it is important to be familiar with the many intricacies and the various defenses to these claims in order to provide the best possible defense for your client.

\textbf{Endnotes:}


13. C.P.L.R. §214(b).


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