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**Legal Malpractice Law Update**  
**February 29, 2016**

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**Colorado Supreme Court**  
**Standing Strict Priority Rule:** Beneficiaries of an estate do not have standing to bring legal malpractice or contract claims against an attorney who drafted testator's estate planning documents in jurisdiction where the strict priority prevails and none of the rule's exceptions apply.

**Supreme Court of Rhode Island**  
**Stable of Limitations:** Clients' legal malpractice and fraud claims were barred by the three-year statute of limitations; the client's claims were not saved by the discovery rule because the client repeatedly questioned the attorney about the adequacy of his representation during the course of the representation or the continuing representation doctrine (because the doctrine has not been adopted in Rhode Island).

**Court of Appeals of Wisconsin**  
**Discovery Rule:** Summary judgment on legal malpractice claim under a statute of limitations argument is not proper unless there is an objective basis in the record to support when the plaintiff discovered, or should have discovered, both his or her injury and the cause of the injury.

**Court of Appeals of Washington, Division 1**  
**Judicial Estoppel:** Appellate holder was properly estopped from bringing legal malpractice and consumer protection claims against his former attorney when he had knowledge of the potential claims and failed to disclose them on bankruptcy schedules prior to discharge.

**Superior Court of New Jersey, Appellate Division**  
**Mitigation (Use of Proceeds):** An affidavit of merit is not required to support plaintiff's malpractice use of process claim against defendant attorney who provided counsel to plaintiff's adversary because malpractice use of process is an intentional tort and does not depend on proof of a deviation from a standard of care.

**Court of Appeals Ohio**  
**Legal Malpractice Damages:** In a malpractice action in which the defendant attorney admitted legal malpractice for dismissing and then bringing to refile a personal injury auto accident suit, the appellate court affirmed the lower court's dismissal in favor of attorney on all claims other than legal malpractice, and affirmed jury law malpractice damages award.

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**Colorado Supreme Court**  
**Standing Strict Priority Rule:** Beneficiaries of an estate do not have standing to bring legal malpractice or contract claims against an attorney who drafted testator's estate planning documents in jurisdiction where the strict priority rule prevails and none of the rule's exceptions apply.

**Baker & Wood, Re & Hames, P.C.**  
**2016 WL 229762 (Colo. 1/19/2016)**

Two beneficiaries alleged that they each received only 15% of an estate's assets, while a third beneficiary received 70%, because legal malpractice by the testator's attorney prevented the testator's surviving wife to execute the estate plan after the testator's death. The trial court granted the attorney's motion to dismiss for failure to state claim on the basis that the beneficiaries failed standing to sue because they were not in strict priority with the attorney and even if they had standing, the beneficiary third plaintiff, requested could not be granted from the trial court appeal. The beneficiaries asked the appellate court to recognize an exception to the strict priority rule for third party beneficiaries of a will. The appellate court affirmed the dismissal, concluding the beneficiaries had not assert sufficiently particular facts to state a claim under an exception to the strict priority rule for fraud or misrepresentation. The beneficiaries petitioned the Colorado Supreme Court for certiorari, which affirmed the lower court result. The strict priority rule precludes attorney liability to non-clients absent fraud, malicious conduct, or negligent misrepresentation. The Court reaffirmed Colorado's recognition of the strict priority rule because it strikes the necessary of the attorney-client relationship better than other rules and strikes the appropriate balance between important interests of clients on the one hand and non-clients claiming to be injured by attorney's conduct on the other hand. Specifically, the Court reasoned that the strict priority rule protects the attorney's duty of loyalty to the client and promotes effective advocacy by minimizing an attorney's concern with potential third party negligence claims. The rule also limits the occurrence of adversarial relationships between an attorney and third parties which, in an estate planning context, could give rise to a conflict of interest if an attorney should be sued for alleged malpractice which existed pursuant to testator's instructions after receiving advice of counsel. Furthermore, the rule limits the circumstances in which an attorney would be required to reveal confidences of the testator. Finally, enforcing an attorney's duty of care to third parties could make attorney liable to an unforeseen and unlimited number of people. The beneficiaries asked the Court to adopt the California Test, a balancing test weighing the interests which plaintiff suffered injury to the closeness of connection between defendant attorney's conduct and the injury and the policy of preventing future harm. The Court declined on the basis that the California Test was inconsistent with enforcing public policy protection of the attorney-client relationship, which serves strict priority. Moreover, even under the California Test, the petitioners' claims would fail because they received precisely what the testator's Will intended. The Court also declined to adopt the Florida law Rule, which would extend third party beneficiary theory of contract liability to allow petitioners to bring essentially a malpractice claim against the attorney. The court reasoned that, as with the California Test, the Florida law Rule was contrary to the public underlying the strict priority rule, and moreover, the beneficiaries' claims would still fail under the Florida law Rule because they received exactly what the Will intended.

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**Supreme Court of Rhode Island**  
**Stable of Limitations:** Clients' legal malpractice and fraud claims were barred by the three-year statute of limitations; the client's claims were not saved by the discovery rule because the client repeatedly questioned the attorney about the adequacy of his representation during the course of the representation or the continuing representation doctrine (because the doctrine has not been adopted in Rhode Island).

**Behravi v. Kishchenbaum**  
**2016 WL 123168 (R.I. 1/12/2016)**

As a result of her former attorney for legal malpractice, negligence, fraud and breach of fiduciary duty. The attorney had represented the client in post-judgment discovery proceedings to recover attorney's overcharges. The trial court granted summary judgment for the defendant attorney on grounds that the client represented to the court, pro se, that she did not intend to engage an expert and that expert was needed to succeed on the malpractice claim, the malpractice claim was barred by the three-year statute of limitations, and the client's fraud and misrepresentation claims failed because the allegedly fraudulent statements were made to the Court and not the client. The client appealed, arguing that the statute of limitations was tolled by the discovery rule and/or the doctrine of continuing representation, expert testimony was not necessary to support her malpractice claim, venue was improperly transferred, and the trial court erred in denying the client's pro se motion for summary judgment in response to a discovery request by the attorney. Reversing the trial court's decision de novo, the Rhode Island Supreme Court affirmed the trial court's holding that the malpractice claim was barred by the three-year statute of limitations. The Court further held that the client's fraud claim was subject to the three-year statute of limitations applicable to malpractice claims because the fraud claim arose out of the professional relationship between the client and the lawyer. Next, the Court determined that the discovery rule, which required that the client be aware of both the injury and the responsible person on notice that a potential claim existed, did not save the client's claims because the client continuously questioned the attorney about the adequacy of his representation during the course of the representation, including the attorney's calculation of attorney's fee to the client. The Court did not address the continuing representation doctrine, noting that the doctrine has not been adopted in Rhode Island and was not asked because it was not presented to the trial court. Finally, the Court held that, although expert testimony was required in a malpractice case where the malpractice is so obvious that a lay of fact can resolve the issue as a matter of common knowledge, expert testimony is required to establish the standard of care in the family law context. The Court concluded by noting that the client's remaining claims were without merit because venue had not been transferred and the trial court granted the client's summary judgment motion in favor of the attorney.

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**Court of Appeals of Wisconsin**  
**Discovery Rule:** Summary judgment on legal malpractice claim under a statute of limitations argument is not proper unless there is an objective basis in the record to support when the plaintiff discovered, or should have discovered, both his or her injury and the cause of the injury.

**Bourne v. McIlwain, S.C.**  
**2016 WL 123170 (Wis. Ct. App. 1/14/2016)**

This legal malpractice action arose out of defendant attorney's representation of plaintiff in the negotiation and drafting of a settlement agreement to resolve a dispute between plaintiff and three other members of an LLC. Plaintiff alleged that she entered into a settlement agreement based upon representations by defendant attorney that the three other members of the LLC were planning on voting plaintiff out of the company. Approximately four months after entering into the settlement agreement, on November 3, 2003, a meeting was held with plaintiff, defendant, and another member of the LLC where plaintiff was told by the LLC member that the LLC member would not have voted against plaintiff if a vote with the other members. Plaintiff also received a document dated that meeting from April 2003 supporting the LLC member's statement. Plaintiff filed a legal malpractice action against defendant on December 17, 2009, alleging negligence in defendant's negotiation, drafting, and approval of the settlement. Defendant moved for summary judgment relying on the applicable statute of limitations, arguing that plaintiff's claim accrued by November 3, 2003 and, therefore, the statute of limitations expired on November 3, 2006. Summary judgment was initially denied by the circuit court but then granted on reconsideration. Plaintiff appealed. The Court of Appeals applied Wisconsin's discovery rule under which a claim does not accrue until a plaintiff discovers, or with reasonable diligence should have discovered, the injury and the probable cause of the injury. Discovery accrues when a plaintiff has information supporting an objective basis to sue the injury and its cause. A plaintiff's subjective belief of the cause of an injury is not sufficient to state the statute of limitations running. Defendant's argument rested on the April 2003 document and plaintiff's testimony regarding the meeting on November 3, 2003, an event which plaintiff claim accrued. However, plaintiff's testimony established that plaintiff did not discuss with defendant the bankruptcy schedules and listed the claims against the defendant on December 17, 2009, the date plaintiff filed her complaint against defendant. Although the complaint specifically reserved the right to substitute the bankruptcy trustee as the real party in interest, the debtor never did so. The defendant successfully moved for summary judgment on the basis of judicial estoppel. On appeal, the debtor argued that his claims should not have been dismissed since he moved to substitute the trustee and later that the bankruptcy trustee was the true party in interest. The Court of Appeals held that the trial court's application of judicial estoppel was not an abuse of discretion and confirmed the established precedent. "Wisconsin provides that judicial estoppel is appropriate in summary judgment where: (1) the estoppel party has taken a contrary position in separate proceedings; (2) the court's acceptance of the second and contrary position would create the impression that one fact was proved and (3) where the party adopted the contrary position would receive an unfair advantage in the subsequent case. Relying upon this doctrine, Wisconsin courts have consistently held that a debtor's failure to disclose a potential claim or asset in bankruptcy bars the subsequent recovery of that claim. Debtors are similarly estopped from asserting claims when they have disclosed in bankruptcy but listed as unsecured. The debtor in the instant case was unable to overcome judicial estoppel since his initial failure was not "wholly" under Wisconsin law. Furthermore, requires a demonstration that the debtor lacked knowledge of the undisclosed claim or had no motive for concealing the claim. The trial court's determination that the debtor knew about the potential claims before filing her bankruptcy and had motive to conceal them was affirmed. The Court of Appeals also was unpersuaded that the debtor established the trustee as the true party in interest, or that such argument was sufficient to overcome judicial estoppel. Although both the trustee and the debtor made representations with regard to the trustee's presentation of the claim, the trustee was never added as a party in interest and never filed a motion to intervene. The trial court's award of summary judgment was therefore affirmed.

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**Superior Court of New Jersey, Appellate Division**  
**Mitigation (Use of Proceeds):** An affidavit of merit is not required to support plaintiff's malpractice use of process claim against defendant attorney who provided counsel to plaintiff's adversary because malpractice use of process is an intentional tort and does not depend on proof of a deviation from a standard of care.

**Rams v. Zemel, LLC and Nash Law Firm, LLC**  
**2016 WL 968183 (N.J. App. Div. 1/26/2016)**

The Superior Court of New Jersey Appellate Division, affirmed a trial court's denial of defendant attorney's motion to dismiss. In the underlying matter, the plaintiff moved for judgment on the merits of the defendant's legal fee claim during a public hearing on the matter. The restaurant had retained the defendant law firm to be a Strategic Litigation Against Public Participation (SLAPP) suit against the plaintiff, alleging defamation. The Appellate Court affirmed the dismissal of the suit finding plaintiff's statements at the municipal hearing to be protected by the litigation privilege and thus non-actionable. Following the decision, plaintiff filed a SLAPP-back suit against the restaurant for malicious use of process. The restaurant moved to dismiss the complaint, claiming that plaintiff had failed to state a cause of action because the defamation allegations were privileged since they were based on the advice of the restaurant's counsel. Plaintiff moved for leave to amend his complaint to name the law firm and the individual attorney as defendants in the malicious use of process claim. The trial court granted the restaurant's motion to dismiss, finding that the plaintiff failed to meet the required elements that the restaurant's defamation complaint lacked probable cause. The lower court also denied plaintiff's cross-motion to amend the complaint. The appellate court reversed both decisions and remanded the case. On remand, the defendant law firm moved to dismiss the case, alleging that plaintiff failed to provide an affidavit of merit pursuant to New Jersey's amended Act 2012-27. That statute requires malpractice plaintiffs to provide an expert's affidavit to make a threshold showing that the claim is not meretricious. Failure to provide such an affidavit results in dismissal. After the denial of the attorney's motion to dismiss, the Appellate Division granted the attorney's leave to appeal. The Appellate Division affirmed the trial court's denial after reviewing New Jersey case law and the purpose of the New Jersey Affidavit of Merit Statute. The Court first substantiated the long-standing reluctance to permit non-client to sue an attorney's attorney but recognized the SLAPP-back suit afforded a very limited circumstance in which a non-client can do so. Defendants argued that the drafting and filing of a defamation complaint in connection with their representation of the restaurant was a professional service, and therefore plaintiff was required to establish through expert testimony the applicable standard of care and the deviations from it. The plaintiff countered that its complaint against the attorney arose from the attorney's intentional actions and malice and was not grounded in negligence. After reviewing the elements for malicious use of process, the Court found the plaintiff at least met the requirement that the defamation action be motivated by malice. The Court believed that the legal inquiry was not whether the defendant law firm performed their work in accordance with the applicable standard of care but whether it proceeded with and filed the claim with a malicious intent. The Court concluded that because the analysis of the motive of the attorney in the client's assertion of a cause of counsel defense to a SLAPP-back suit does not depend on proof of a deviation from a standard of care, the plaintiff was not required to file an affidavit of merit. The Court added that because a plaintiff in a SLAPP-back suit only learns of an act of counsel defense upon the filing of a responsive pleading, it would be inequitable to require the plaintiff to have any information to admit to an expert to include in an affidavit of merit at the time suit is filed, and therefore the plaintiff's claim lies beyond the purpose of the affidavit of merit statute.

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**Court of Appeals Ohio**  
**Legal Malpractice Damages:** In a malpractice action in which the defendant attorney admitted legal malpractice for dismissing and then bringing to refile a personal injury auto accident suit, the appellate court affirmed the lower court's dismissal in favor of attorney on all claims other than legal malpractice, and affirmed jury law malpractice damages award.

**Remick v. Dethner**  
**2016 WL 116152 (Ohio App. 1/11/2016)**

Defendant-attorney represented a client in a car accident lawsuit. The attorney filed the complaint but failed to comply with discovery requirements, as well as a court order. Instead, the attorney intentionally dismissed the action, without prejudice, unbeknownst to his client. While planning to refile the complaint at a later time, the attorney began to die. During the time period, the attorney was under significant medical stress while attending to issues related to his senior parent's health. Once the attorney realized he had to bring refile the suit, he delayed informing his client because he was "embarrassed" and "shamed." After the client learned that his case was no longer viable, he sued the attorney. The trial court granted the attorney's motion for summary judgment with regard to the client's fraud, fraudulent concealment, punitive damages and attorney fee claims, leaving only the malpractice counts to be tried. At trial, because the attorney had admitted legal malpractice, the jury deliberated only on damages. The jury awarded only \$1,192 in damages, and nothing for plaintiff's appointment of counsel claim. On appeal, the former client argued that the lower court erred in dismissing the non-malpractice counts, and that she should have been permitted to introduce evidence to the jury that he believed would have increased the damages award. Regarding dismissal of the fraud and fraudulent concealment counts, plaintiff argued that some of the attorney's conduct fell outside the scope of the attorney-client relationship, that separate damages related to the use of the judgment they would have recovered in the car accident lawsuit arose from the conduct, and therefore these counts should not have been dismissed. Plaintiff also argued the lower court erred in dismissing the punitive damages and attorney fee claims. Finally, the plaintiff contended that the jury should have been permitted to hear additional evidence, barred by the trial court, indicating from the attorney whom plaintiff sought to call as a witness, the attorney's allegedly fraudulent emails, and testimony of an expert witness about the attorney's misconduct and the value of plaintiff's underlying case. In affirming the lower court's ruling and the jury's damages award, the Court of Appeals first ruled that, regardless of whether the fraud claims were distinct from malpractice, plaintiff could not show that the alleged fraud caused any additional or additional damages, beyond those damages already caused by the malpractice. Explaining that damages must be "various" the Court rejected the plaintiff's "test treatment opportunity" damages, and "only damages," deeming that they were too speculative. Concluding that plaintiff could not establish clear damages, apart from those damages that might derive from the legal malpractice claim, the Court ruled that the trial court was correct in dismissing the other claims. Second, regarding punitive damages, the Court explained that because plaintiff sought summary judgment on the fraud claims (not for the malpractice claims) and where there was compensatory damage recoverable for those claims, it is impermissible to award punitive damages. The lower court was correct in dismissing the punitive damages demand. Third, regarding attorney fees, the Court found there is no separate set of rules for attorney absent a punitive damages award. Fourth, the trial court's refusal to allow expert testimony about the underlying claim's resolution was upheld because it would have confused the jury where the client had already declined to settle for that amount. Finally, the Court concluded that the trial court had not abused its discretion in its evidentiary rulings prohibiting introduction of all of the attorney's alleged intentional wrongdoing, patterns of misconduct, and ethical violations, because such evidence was relevant to malpractice, and the attorney had already admitted liability.

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