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From Offense to Defense: Defending Legal Malpractice Claims

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FROM OFFENSE TO DEFENSE: DEFENDING LEGAL MALPRACTICE CLAIMS

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I. INTRODUCTION

The law does not require that an attorney be infallible and simply because an attorney has made a mistake does not establish negligence or malpractice as a matter of law.[1]

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1. Cianbro Corp. v. Jeffcoat & Martin, 804 F. Supp. 784, 789 (D.S.C. 1992) (citing Myers

"Accountability" is today's buzzword. Not many years ago, attorneys rarely faced malpractice claims. Disgruntled clients have, perhaps, always been with us, but in an era in which accountability is increasingly expected and demanded, those clients are now more likely to pursue claims and lawsuits against their attorneys — regardless of whether the attorneys' errors are real or only imagined by the clients. Accordingly, the number of lawsuits against attorneys has proliferated.

The increase in legal malpractice claims stems from the nature of our adversary system and the public's increased propensity towards litigation. Clients are result-oriented, and an attorney's unsuccessful efforts on behalf of a client can easily form, at least in the client's mind, the basis for a malpractice claim.[2] As lawyering has become increasingly complex, it has also become a business.[3] The shelter of the ivory law tower has been greatly diminished, in part because attorneys are no longer reluctant to sue fellow attorneys.[4] In addition, the increased reliance on professional malpractice insurance has unquestionably provided a deep pocket for plaintiffs' attorneys to target.[5]

This article is not a risk management guide[6] or an attempt at a grand academic analysis of all legal malpractice issues.[7] Instead, this article focuses specifically on the defenses to a legal malpractice claim, with attention to various practical aspects of preparing a legal malpractice defense. This article addresses some pitfalls unique to defending legal malpractice claims and suggests some strategies for handling problems that may arise. Finally, the article discusses the propriety and usefulness of slap back suits and counterclaims.

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v. Beem, 712 P.2d 1092, 1094 (Colo. Ct. App. 1985)), *aff'd*, 10 F.3d 806 (4th Cir. 1993) (table).

2. *See* CHARLES P. KINDREGAN, MALPRACTICE AND THE LAWYER 1, 1 (1981) ("[C]lient's tend to judge a lawyer's effectiveness solely by the results which he produces . . . .").

3. *See* Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741 (1988); Duncan A. MacDonald, *Speculations by a Customer About the Future of Large Law Firms*, 64 IND. L.J. 593 (1989).

4. *See* KINDREGAN, *supra* note 2, at 2 ("If a conspiracy of silence ever existed in the legal profession it may be dying as more lawyers are willing to file complaints or even testify against other attorneys."); *see also* Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, LITIG., Winter 1989, at 13, 13 (stating that the author has not been ostracized or inhibited despite an active practice representing plaintiffs in legal malpractice actions).

5. *See* KINDREGAN, *supra* note 2, at 2.

6. *E.g.*, Duke N. Stern, *Reducing Your Malpractice Risk*, A.B.A.J., June 1, 1986, at 52.

7. *E.g.*, RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE (3d ed. 1989 & Supp. 1993) [hereinafter MALLEN & SMITH].

II. PRACTICAL CONSIDERATIONS: OPPORTUNITIES AND PITFALLS

Defending a legal malpractice claim is similar to defending other civil actions. However, perhaps more than others, it requires a thorough knowledge and understanding of both the defendant-attorney and the underlying case or transaction at issue in the malpractice suit.

The defendant-attorney feels threatened by the potential loss of professional reputation and livelihood, much like a physician or other professional sued for malpractice. Even if the attorney has adequate malpractice insurance that covers each allegation asserted in the complaint, which is by no means assured, the attorney still has a great personal and business interest in clearing his name. The defendant-attorney, who is trained in the legal process and possibly an experienced litigator,[8] is suddenly seated on the wrong side of the desk, relegated to the role of litigant rather than counsel and generally forced to rely on the skills and dedication of a defense counsel who was probably selected by the malpractice insurance carrier. In short, the defendant-attorney may find it difficult to achieve and maintain the level of detachment required to allow defense counsel to maximally defend the malpractice claim.

Furthermore, the defendant-attorney may make a poor witness due to strictly external factors. As evidenced by the current wave of "lawyer bashing," attorneys may not be held in high regard by the jury pool.[9] On the other hand, because of lawyers' educational background and legal experience, a jury may expect the defendant-attorney to be at ease in the witness chair and in full command of the details and nuances of all questions asked. Both juries and judges are likely to hold the defendant-attorney to a higher standard than witnesses with no legal training or experience. These expectations, combined with the public's perceived aversion to lawyers, may place the defendant-

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8. A 1983-85 American Bar Association survey found that the largest percentage of malpractice claims (25.1%) were asserted against plaintiff personal injury attorneys. A.B.A. STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE 30 (1992). The same study revealed that litigation activities accounted for 52.8% of all malpractice claims. *Id.* at 23.

9. *See, e.g.*, Richard D. Bridgman, *Legal Malpractice — A Consideration of the Elements of a Strong Plaintiff's Case*, 30 S.C. L. REV. 213, 214 (1979) (jesting that "[t]he lawyer . . . enjoy[s] community stature somewhere between that of an automobile salesman and an undertaker") (citation omitted).

The English romantic poet Samuel Taylor Coleridge wrote:

He saw a lawyer killing a Viper
On a dunghill hard by his own stable;
And the Devil smiled, for it put him in mind
Of Cain and his brother, Abel.

SAMUEL T. COLERIDGE, *The Devil's Thoughts*, in THE COMPLETE POETICAL WORKS OF SAMUEL TAYLOR COLERIDGE 320 (1912) (quoted in James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1679-80 (1991)).

attorney at a disadvantage before even taking the witness stand.[10]

Further complicating matters, the defendant-attorney may possess a variety of personality or behavioral traits that may help the attorney in his practice, but become an obstacle to the attorney's successful performance as a witness. For instance, an attorney who is gifted and skilled at mastering an array of details and strategies in the practice of law may also have difficulty describing the transaction at issue in terms that a juror can understand. Fostered by years of being the person in control and having the knowledge others pay large sums to tap, the defendant-attorney may have a tendency to assume that he knows the answer to all questions. Likewise, the attorney may be prone to violate the cardinal rule of witness testimony by answering a question that has not yet been asked, due to the attorney's overabundance — real or imagined — of knowledge.[11] The challenge for the attorney's defense counsel is to transform the defendant-attorney from an overly confident and potentially abrasive witness into a confident witness worthy of the jury's trust, without losing any of the substance of the attorney's testimony.

In addition to a thorough understanding and ability to deal with the defendant-attorney, defense counsel must also master the defendant-attorney's area of legal practice in question in the malpractice suit. As litigators, defense counsel are accustomed to becoming experts, in a short period of time, on very narrow issues of an unfamiliar topic. For example, defense attorneys litigate construction defects, valuations of property or businesses, the causes of low back pain, and a variety of other topics in which they have absolutely no background or training. Through independent research and instruction from their clients and witnesses, however, they master the necessary information and use it to their clients' advantage.

Defending a legal malpractice case may require a litigator to go even further. The practice of law routinely involves the application of subjective and reasoned legal judgment to a set of facts. Defense counsel must understand not only the underlying transaction or case,[12] but also the strategies, assumptions, and goals that both the defendant-attorney and the plaintiff-client considered. This may be relatively easy for defense counsel to accomplish when the underlying case involved the conduct and presentation of a trial. However, when the underlying case involves the application of legal judgment to an unfamiliar area of practice, the defense counsel may need assistance from the defendant-attorney and expert witnesses. For example, the legal documents governing a business transaction may have been influenced

10. One commentator refers to this as "a lion's den of high expectation and low regard." Jeffrey M. Smith, *Defending Lawyers' Mistakes*, LITIG., Winter 1989, at 18, 56.

11. *See id.*

12. The underlying transaction or case is often referred to as the "case within the case." *E.g.*, Bridgman, *supra* note 9, at 234.

by timing decisions, relative negotiating positions, economic conditions and projections, and regulatory limitations or requirements. After the deal goes sour, the successful defense of an attorney charged with malpractice in the drafting of the documents may depend on the defense counsel's ability to understand and present the effect of those considerations on the attorney's preparation of the document, as well as the effect of those factors on the transaction as a whole. Getting inside the minds of both the attorney and the client at the time of the transaction or the trial in order to evaluate their motives and goals can be of crucial importance.

A problem unique to legal malpractice defense occurs when an ethics complaint is filed with the applicable disciplinary authority. Because no damages are sought in a disciplinary procedure, the defendant-attorney's insurance may not provide coverage or a defense. This may result in the need for two defense attorneys: one furnished by the insurance carrier to defend the malpractice case, and the other hired by the defendant-attorney to defend the alleged ethical violation. The two defense attorneys may take inconsistent positions or unintentionally interfere with each other's strategy. One commentator advocates seeking a stay of the disciplinary proceedings to avoid a collateral estoppel argument in the event of an adverse ruling.[13] A stay would also eliminate the dual representation problem.

III. DEFENSES TO LEGAL MALPRACTICE

A. General Denial

In most cases, the defendant-attorney's answer will contain a general denial of the plaintiff's allegations of legal malpractice. "Legal malpractice" is not easily defined, because claims against attorneys may be brought under several different theories.[14] "However, a key test for legal malpractice is whether a claim primarily concerns the *quality of legal services*."[15] Although

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13. Smith, *supra* note 10, at 19. Smith also believes a favorable result at the disciplinary proceeding would be of little benefit because the plaintiff, being only a witness — not a party — in the disciplinary proceeding, would not be collaterally estopped from pursuing the malpractice claim. *Id.* In Irby v. Richardson, 278 S.C. 484, 298 S.E.2d 452 (1982), however, the South Carolina Supreme Court listed the grievance committee's dismissal of the plaintiff's charge that the defendant-attorney negligently handled the plaintiff's domestic case as one of several reasons why the plaintiff was collaterally estopped from relitigating the issue of the attorney's negligence in the plaintiff's legal malpractice action. *Id.* at 487, 298 S.E.2d at 454.

14. *See* Ronald E. Mallen, *Recognizing and Defining Legal Malpractice*, 30 S.C. L. REV. 203 *passim* (1979) (discussing both a theoretical and practical definition for legal malpractice); *see also* A.B.A. STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, *supra* note 8, at 6-7 (discussing the expanding definition of legal malpractice).

15. A.B.A. STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, *supra* note 8, at 4. "Conduct on the part of the attorney that is not unique to the legal profession and does not

most legal malpractice suits are based on negligence,[16] some suits are brought under a breach of fiduciary duty theory. Additionally, plaintiffs have brought claims against attorneys for breach of contract, fraud, malicious prosecution, abuse of process, unfair trade practices, and other causes of action.[17] Some complaints allege a breach of an ethical duty as a cause of action, either alone or in combination with other causes of action. However, both the Model Code of Professional Responsibility and the more recent Model Rules of Professional Conduct expressly state that a violation of an ethical rule does not give rise to a private cause of action for the violation.[18]

Regardless of the theory on which the malpractice claim is based, the plaintiff must prove the elements of each cause of action. For example, in a legal malpractice case alleging negligence, the client must establish: (1) the existence of a legal duty on the part of the attorney to protect the client, including the standard of care applicable to a competent attorney acting under similar circumstances; (2) the attorney's breach of that duty; and (3) proximate cause of the injury to the client.[19] In some cases, therefore, the best defense may be to force the plaintiff to prove his case.[20]

Ordinarily, the plaintiff must use expert testimony to establish the standard for the attorney's duty of care and breach of that duty.[21] Defense

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concern the quality of professional services (*e.g.*, fraud) is not considered to be malpractice." *Id.*

16. 1 S.C. JUR. *Attorney and Client* § 58 (1991).

17. *See id.* §§ 59-64 (1991 & Supp. 1993) (discussing the theories of malpractice liability and observing that a violation of a disciplinary rule is not negligence as a matter of law).

18. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1983); MODEL RULES OF PROFESSIONAL CONDUCT Scope (1992). Although standing alone, ethical violations do not give rise to private causes of action, some of the rules coincide with existing common law obligations that, if breached, can be the source of a legal malpractice claim. *See* 1 MALLEN & SMITH, *supra* note 7, § 15.7, at 881. However, the ethical rules should not be used as a substitute for proof of the attorney's separate common law duties to a client because "[t]heir purpose is to regulate and guide the legal profession by defining proper ethical conduct, and 'nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.'" Langford v. State, ___ S.C. ___, 426 S.E.2d 793, 795 (1993) (quoting S.C. APP. CT. R. 407 Scope). An expert witness may consider the ethical rules together with other evidence when forming an opinion concerning whether the attorney met the appropriate standard of care. Defense counsel, however, should be alert to the possibility that an expert in legal ethics who has no special knowledge or training in the legal specialty at issue may attempt to characterize an ethical violation itself as a breach of the standard of care rather than what it really is: a breach of the standard of conduct only, which alone cannot support a claim of negligent conduct.

19. *See* Cianbro Corp. v. Jeffcoat & Martin, 804 F. Supp. 784, 789 (D.S.C. 1992) (citing Shealy v. Walters, 273 S.C. 330, 336, 256 S.E.2d 739, 742 (1979); and South Carolina Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986)), *aff'd*, 10 F.3d 806 (4th Cir. 1993) (table).

20. *See* Frist v. Leatherwood, Walker, Todd & Mann, 433 F.2d 11 (4th Cir. 1970) (holding that the plaintiff's attempt to establish the attorneys' negligence had, in fact, established their due diligence).

21. *Cianbro Corp.*, 804 F. Supp. at 790-91 (citing Mali v. Odom, 295 S.C. 78, 81, 367

counsel should scrutinize the expert witness's qualifications in the particular area of practice at issue. If the expert's qualifications are limited or nonexistent, then defense counsel should use the lack of qualification to disqualify the expert opinion on the standard of care and breach.[22] It is one thing to be well versed in the rules governing ethical conduct, an area in which "legal malpractice experts" abound; however, it is quite another matter to have specialized expertise in the area of law at issue in the case.[23]

Another hurdle a plaintiff must clear is proving proximate cause and damages. In essence, the plaintiff in a legal malpractice case must prove both the malpractice case against the attorney and the underlying case the plaintiff claims was damaged by the attorney's misconduct — the "case within the case."[24] In addition, the evidence and legal theories supporting the plaintiff's claims of vicarious liability against other attorneys affiliated with the defendant-attorney may be problematic for the plaintiff.[25]

S.E.2d 166, 168 (Ct. App. 1988)). *See generally* Michael A. DiSabatino, Annotation, *Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney*, 14 A.L.R.4TH 170 (1982 & Supp. 1993) (discussing the requirement of expert testimony in legal malpractice cases).

22. *But see supra* note 18 ("An expert witness may consider the ethical rules together with other evidence when forming an opinion concerning whether the attorney met the appropriate standard of care.") (citation omitted).

23. This principle is routinely applied in other cases requiring expert testimony to establish negligence. In Perkins v. Volkswagen of America Inc., 596 F.2d 681 (5th Cir. 1979), a products liability case, the court affirmed the trial court's decision permitting the plaintiff's expert, a specialist in mechanical engineering with no experience in designing entire automobiles, to express expert opinions on general mechanical engineering principles, but refused to allow him to testify as an expert in automotive design. As observed by the court in Poland v. Beaird-Poulan, 483 F. Supp. 1256 (W.D. La. 1980), another products liability case: "One cannot testify as an expert in regard to a mechanism if he has not had ample opportunity to practically apply his field of expertise to the mechanism at issue." *Id.* at 1259; *accord* Bellamy v. Payne, 304 S.C. 179, 403 S.E.2d 326 (Ct. App. 1991) (holding that an orthopedic surgeon was not qualified to serve as expert witness regarding the standard of care in a malpractice case against a podiatrist).

24. *See* Manning v. Quinn, 294 S.C. 383, 386, 365 S.E.2d 24, 25 (1988) (holding that clients could not recover in a legal malpractice suit against their attorney because the clients could not show that "further legal action instituted by [the attorney] 'most probably would have been successful.'") (quoting Floyd v. Kosko, 285 S.C. 390, 393, 329 S.E.2d 459, 461 (Ct. App. 1985); *see also* Bridgman, *supra* note 9, at 234-36 (discussing the defendant's advantage in forcing the plaintiff to win the case within a case).

25. *See generally* Stephen E. Kalish, *Lawyer Liability and Incorporation of the Law Firm: A Compromise Model Providing Lawyer-Owners with Limited Liability and Imposing Broad Vicarious Liability on Some Lawyer-Employees*, 29 ARIZ. L. REV. 563 (1987) (addressing the issues of lawyers limiting their liability for the negligent acts of their partners by incorporation); Annotation, *Liability of Professional Corporation of Lawyers, or Individual Members Thereof, for Malpractice or Other Tort of Another Member*, 39 A.L.R.4TH 556 (1985 & Supp. 1993) (discussing cases in which courts have considered whether individual members of an attorney corporation can be held liable for the malpractice of another member).

B. Contributory Negligence, Comparative Negligence, and Assumption of the Risk

Most attorney malpractice actions are based on negligence. The defenses ordinarily available in negligence actions — which include the sole negligence of the plaintiff,[26] contributory or comparative negligence,[27] and assumption of the risk[28] — may be raised to defend a negligence-based legal malpractice claim.

The landmark legal malpractice case addressing contributory negligence is *Theobald v. Byers*.[29] In *Theobald* the plaintiff-clients retained the defendant-attorneys to prepare a note and chattel mortgage for a loan the clients were making to a third party debtor. The attorneys did not inform the clients (the creditors) that the mortgage had to be perfected by filing. The mortgage later failed as a secured claim in the debtor's bankruptcy proceeding, and the clients sued the attorneys for malpractice. The attorneys argued that the clients' failure both to inquire whether the mortgage should be recorded and to actually record the mortgage constituted contributory negligence.[30] After a bench trial, the trial court agreed and granted judgment for the attorneys. The appellate court held that contributory negligence was a valid defense, particularly where the client chooses to disregard the attorney's legal advice;[31] however, the court found the doctrine inapplicable to the facts presented. The court reasoned that it would be unfair to hold the clients contributorily negligent

> solely because of their failure to themselves perform the very acts for which they employed [the attorneys]. Such a result cannot be upheld. Clearly the value of an attorney's services in connection with a transaction of this nature consists largely of his superior knowledge of the necessary legal formalities which must be fulfilled in order for a document to be valid in the eyes of the law.[32]

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26. *See supra* text accompanying note 24 (discussing proof of the underlying case within the case).

27. *See* Bailey v. Martz, 488 N.E.2d 716 (Ind. Ct. App. 1986); United Leasing Corp. v. Miller, 298 S.E.2d 409 (N.C. Ct. App. 1982), *review denied*, 302 S.E.2d 248 (N.C. 1983); Susan L. Thomas, Annotation, *Legal Malpractice: Negligence or Fault of Client as Defense*, 10 A.L.R.5TH 828, 843 (1993). *But see*, 2 MALLEN & SMITH, *supra* note 7, § 17.2, at 4-5 (observing that contributory negligence is not a viable defense under other, non-negligence based theories of legal malpractice, such as breach of contract).

28. *See* Mali v. Odom, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988).

29. 13 Cal. Rptr. 864 (Dist. Ct. App. 1961).

30. *See id.* at 865.

31. *Id.* at 865-66.

32. *Id.* at 866-67.

Theobald's limitation of contributory negligence has been heralded for promoting "the policy of encouraging client reliance underlying the attorney-client relationship . . . ."[33]

Despite the fiduciary nature of the attorney-client relationship,[34] "all courts which have considered the issue have either directly or implicitly held the [contributory negligence] defense available in a legal malpractice action."[35] Thus, either the contributory negligence or comparative fault defenses will most likely be available, depending upon which defense the jurisdiction has adopted.[36] The contributory/comparative negligence defenses are most often raised in one of the following factual situations:

> (1) the failure of the client to supervise, review or inquire concerning the subject of the attorney's representation; (2) the failure of the client to follow the attorney's advice or instructions; (3) the failure of the client to provide essential information; (4) the client's active interference with the attorney's representation or failure to complete certain responsibilities regarding the subject matter; and (5) the failure of the client to pursue remedies to avoid or mitigate the effect of an attorney's negligence.[37]

The analysis of the client's contributory/comparative negligence often intertwines with the client's proof of the attorney's negligence.[38] The attorney's defense counsel should carefully analyze and present evidence relating to the scope of the attorney's duty of care to the client. While a client

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33. Richard S. Novak, Note, *Attorney Malpractice: Restricting the Availability of the Client Contributory Negligence Defense*, 59 B.U. L. REV. 950, 967 (1979). Novak argues that attorneys have a duty to protect their client's legal interest even when the client fails to do so and advocates focusing instead on the scope of the attorneys' duty of care to their clients. *Id.* at 961-62.

34. *See id.* at 961 (arguing in favor of limiting the doctrine's application and stating: "The fiduciary duties of the attorney and the attorney-client evidentiary privilege highlight both the strong policy favoring client reliance on the attorney and the nature of the lawyer's role as the client's alter ego.") (citations omitted).

35. 2 MALLEN & SMITH, *supra* note 7, § 17.2, at 2.

36. *See id.* § 17.2, at 4. *See generally*, F. Patrick Hubbard & Robert L. Felix, *Comparative Negligence in South Carolina: Implementing* Nelson v. Concrete Supply Co., 43 S.C. L. REV. 273 (1992) (addressing South Carolina's adoption of comparative negligence and discussing the doctrine in other jurisdictions, including tables with state-by-state comparisons).

37. 2 MALLEN & SMITH, *supra* note 7, § 17.2, at 5. Mallen and Smith discuss each of these factual situations in depth, including case citations. *Id.* § 17.2, at 5-10.; *see also infra* Part III.F (discussing the client's availability of an alternative remedy to the relief lost by the attorney's misconduct, such as an alternative cause of action, as a defense to the client's legal malpractice claim).

38. *See id.* § 17.2, at 2-3 ("Most of the earlier decisions, which purport to involve contributory negligence, instead concern acts or omissions by the client which demonstrate or explain why the attorney was *not* negligent.").

should not be barred or limited from recovery because the client failed to perform an act that was properly the responsibility of the attorney, neither should the client be allowed to argue that the attorney committed malpractice because the attorney failed in some way outside the realm of legal services. This distinction may sometimes be difficult to make in some circumstances such as when the attorney's activities fall in the gray area of mixed legal and business advice. Nevertheless, the client has some responsibility for his own welfare and should not be allowed to shirk his own duty of care by arguing that the attorney's duty of care was much broader than custom or practice suggests.

The defendant-attorney cannot rely as often upon the related doctrine of assumption of the risk.[39] Under the assumption of the risk doctrine, the plaintiff must comprehend both the nature and extent of the risk and voluntarily assume it,[40] but laymen do not always understand the law and the legal ramifications of their actions.[41] However, in *Mali v. Odom*[42] the South Carolina Court of Appeals implicitly approved the use of the client's assumption of the risk defense in a legal malpractice case.[43] In *Mali* the defendant-attorney contended that he had advised the plaintiff-clients concerning restrictive covenants in a parcel of real property the clients later purchased. Noting that assumption of the risk is ordinarily a question of fact, the court held that a jury question existed regarding whether the attorney had actually informed the clients of the restrictive covenants.[44] Thus, the assumption of the risk doctrine may be a viable defense to some legal malpractice claims.

C. Privity

Most jurisdictions still adhere to the privity doctrine and impose liability only in malpractice cases brought by the attorney's client or those in privity with the client.[45] The trend in a growing number of jurisdictions, however,

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39. *See* HUBBARD & FELIX, *supra* note 36, at 288 ("Most states other than South Carolina have either abolished the doctrine of assumption of risk or included it in the state's comparative fault scheme") (citation omitted).

40. *Id.*; *see also* 2 MALLEN & SMITH, *supra* note 7, § 17.2, at 10 ("The keystone of the [assumption of the risk] defense is both a comprehension and willful assumption of the risk.").

41. *See* 1 S.C. JUR. *Attorney and Client* § 72, at 174 (1991) ("Because few clients have actual knowledge of the law and legal tactics, there are few reported decisions expressly addressing the defense of assumption of risk in a legal malpractice action.").

42. 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988).

43. 295 S.C. at 82, 367 S.E.2d at 169.

44. *Id.* at 80-82, 367 S.E.2d at 168-69.

45. *See, e.g.*, National Sav. Bank v. Ward, 100 U.S. 195, 200 (1879) ("Beyond all doubt, the general rule is that obligation of the attorney is to his client and not to a third party . . . ."); Gaar v. North Myrtle Beach Realty Co., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App.

is to expand the attorney's liability to third persons under proper circumstances.[46] Although a minority approach, third-party recovery in these jurisdictions has been allowed primarily under one of three theories: (1) third-party beneficiary contract theory; (2) negligence or duty in tort theory, where the injury to the third party was foreseeable; and (3) a hybrid theory, usually called the "balancing of factors" theory.[47] A court's decision to relax the privity requirement may often turn on whether the "end and aim" of the transaction is to benefit a person not in privity with the attorney.[48]

A typical area of potential third-party liability involves a beneficiary of a will suing the testator's attorney for negligent drafting of the will.[49] Another area of potential third-party liability arises in real estate closings, when an unrepresented party may claim the attorney's actions foreseeably damaged him.[50] Clearly, the potential for suits by third parties is limited only by the imaginations of plaintiffs' lawyers. The privity battle must remain hard fought or, as the doctrine is chipped away, the potential for attorney liability will greatly increase.[51]

D. Statute of Limitations and Laches

The statute of limitations may bar an attorney malpractice action if the

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1986) ("[A]n attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client."). *See generally* Mark O'Neill, *Privity Defense in Legal Malpractice Cases: The Citadel Still Stands*, 54 DEF. COUNS. J. 511 (1987) (discussing the privity defense to legal malpractice claims).

46. A.B.A. STANDING COMM. ON LAWYERS'S PROFESSIONAL LIABILITY, *supra* note 8, at 137; Tom W. Bell, *Limits on the Privity and Assignment of Legal Malpractice Claims*, 59 U. CHI. L. REV. 1533, 1533-34 (1992) (reciting the following policy goals for the relaxation of the privity doctrine: "providing remedies to victims of legal malpractice, forcing negligent attorneys to bear the costs of their behavior, and deterring further legal malpractice"); Joan Teshima, Annotation, *Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R.4TH 615, 625 (1988 & Supp. 1993).

47. Teshima, *supra* note 46, at 625.

48. A.B.A. STANDING COMM. ON LAWYERS' PROFESSIONAL LIABILITY, *supra* note 8, at 138 (citations omitted).

49. *See, e.g.*, McLane v. Russell, 512 N.E.2d 366 (Ill. App. Ct. 1987) (holding that beneficiaries were proper plaintiffs in a legal malpractice action when the attorney who prepared the will failed to sever a joint tenancy in property, causing the beneficiaries to not receive the one-half interest in real property devised to them), *aff'd*, 546 N.E.2d 499 (Ill. 1989).

50. *See* Fox v. Pollack, 226 Cal. Rptr. 532 (Ct. App. 1986) (holding that in the absence of contrary representations by the attorney, the attorney for one party owes no duty of professional care to an unrepresented party at a real estate closing). Most jurisdictions continue to limit the closing attorney's liability to the party who retained the attorney. *E.g.*, Langeland v. Farmers State Bank, 319 N.W.2d 26 (Minn. 1982).

51. *See* Teshima, *supra* note 46, at 624 ("[A] duty to the general public would impose a huge potential burden of liability . . . .").

client fails to act on the malpractice claim in a timely manner. Several jurisdictions have enacted statutes of limitations that specifically address attorney malpractice. Other jurisdictions have held that the statute of limitations which govern general malpractice actions apply to legal malpractice lawsuits.[52] Other courts determine whether the malpractice claim is a tort, contract or fraud action, then apply the statute of limitations applicable to that type of action.[53]

The statute of limitation begins to run when a cause of action accrues.[54] The general rule in most jurisdictions is that a wrongful act and damages, even mere nominal damages, start the limitations period.[55] The date of accrual, however, may be postponed under the discovery doctrine. Under the discovery doctrine, a cause of action does not accrue, and therefore the limitations period does not begin to run, until the plaintiff "knew or by the exercise of reasonable diligence should have known that he had a cause of action."[56]

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52. *See* Debra T. Landis, Annotation, *What Statute of Limitations Governs Damage Action Against Attorney for Malpractice*, 2 A.L.R.4TH 284, 288-89 (1984 & Supp. 1993).

53. *See id.*; *see also*, Harrison v. Casto, 271 S.E.2d 774, 775 (W. Va. 1980) ("[A] legal malpractice action may sound in tort or in contract."). Because the limitations period for contract actions is generally longer than for tort actions, the *Harrison* court stated: "A complaint that could be construed as being either tort or on contract will be presumed to be on contract whenever the action would be barred by the statute of limitations if construed as being in tort." *Id.* at 776 (quoting Cochran v. Appalachian Power Co., 246 S.E.2d 624, 628 (W.Va. 1978)).

The South Carolina legislature has not specifically established a statute of limitations for attorney malpractice as it has done for doctors, S.C. CODE ANN. § 15-3-545 (Law Co-op. Supp. 1993), architects, professional engineers, and contractors. S.C. CODE ANN. §§ 15-3-630 to -670 (Law. Co-op. 1976 & Supp. 1993). Instead, South Carolina continues to utilize the chameleon approach to defining the statute of limitations for legal malpractice claims. *See* Burgess v. American Cancer Society, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989) (including legal malpractice claims under the general statute of limitations period of section 15-3-530).

54. *See, e.g.*, S.C. CODE ANN. § 15-3-20 (Law. Co-op. 1976).

55. *See* Jankowski v. Taylor, Bishop & Lee, 273 S.E.2d 16 (Ga. 1980). In *Jankowski* the Georgia Supreme Court held that special damages are not required for a legal malpractice claim to accrue and thus start the statute of limitations period. The court stated:

> These cases hold that it is not the special damage or injury resulting from the wrongful act which gives rise to a cause of action, but they also hold that the fact that nominal damages may be recovered is sufficient to create a cause of action and therefore result in the statute of limitation's beginning to run. Even in the jurisdictions which clearly require the sustaining of damage as a triggering device for the statute of limitation, the suffering of damages to the fullest extent is seldom required.

Id. at 18.

56. S.C. CODE ANN. § 15-3-535 (Law. Co-op. Supp. 1993). The discovery rule applies to attorney malpractice actions. Mitchell v. Holler, ___ S.C. ___, 429 S.E.2d 793 (1993); Burgess v. American Cancer Society, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). The South Carolina Supreme Court first applied the discovery rule to legal malpractice actions as "the more equitable and rational view" in Mills v. Killian, 273 S.C. 66, 70, 254 S.E.2d 556, 558 (1979).

The discovery rule is limited in its application. As one commentator has observed: "[I]f the attorney is guilty of obvious error which even a layman should recognize as negligence, the discovery rule should not be allowed to toll the statute . . . . This rule should be applied only when the negligence of the lawyer would be truly obvious to one untrained in law."[57]

The statute of limitations is tolled for some legal malpractice plaintiffs while they are under a disability.[58] The statute may also be tolled if the attorney continues representation of the plaintiff.[59] The attorney may be estopped from asserting the statute of limitations if the attorney misrepresents the facts or fraudulently conceals the cause of action from the client[60] or induces the client to delay filing suit until the statutory period expires.[61] However, the client's filing of a grievance with a local bar association does not toll the statute of limitations.[62]

While the statute of limitations is a viable defense to legal malpractice actions, it may not apply if the client is seeking an equitable remedy.[63] If so, the defense counsel must look to the doctrine of laches.[64] In *Interdonato v.*

As noted by one commentator:

> Essentially, since the attorney-client relationship is one of the highest fiduciary order, it is held that even though the attorney's malpractice may have been committed sufficiently far in the past for the statute of limitations to run, the accrual of the cause of action does not take place for the purpose of the statute's running until the client knows or, in the exercise of reasonable care, should have known of the malpractice.

Bridgman, *supra* note 9, at 238.

57. KINDREGAN, *supra* note 2, at 56.

58. *See* S.C. CODE ANN. § 15-3-40 (Law. Co-op. 1976 & Supp. 1993) (tolling the statute for persons who are: "(1) within the age of eighteen years; (2) insane; or (3) imprisoned on a criminal or civil charge or in execution under the sentence of a criminal court for a less term than his natural life."). *But see Mitchell*, ___ S.C. at ___, 429 S.E.2d at 796 (holding that the plaintiff in a legal malpractice action could not "claim the benefit of section 15-3-40 because she was imprisoned on a life sentence when her cause of action accrued").

59. Murphy v. Smith, 579 N.E.2d 165 (Mass. 1991) (adopting the continuing representation doctrine).

60. *See* Madden v. Palmer, 358 N.E.2d 415, 416 (Mass. 1976).

61. *See* Dillon County Sch. Dist. Number Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 218-19, 332 S.E.2d 555, 561 (Ct. App.), *cert. granted*, 287 S.C. 234, 337 S.E.2d 697 (1985), and *cert. dismissed as improvidently granted*, 288 S.C. 468, 343 S.E.2d 613 (1986); *see also* Interdonato v. Interdonato, 521 A.2d 1124, 1135 (D.C. 1987) (stating in a legal malpractice case that "[a] defendant is estopped from asserting the statute of limitations as a bar to plaintiff's action if he has done anything that would tend to lull the plaintiff into inaction and thereby permit the statutory limitation to run against him") (quoting Property 10-F, Inc. v. Pack & Process, Inc., 265 A.2d 290, 291 (D.C. 1970)).

62. Lewis v. Roselle, 578 N.E.2d 546 (Ohio Ct. App. 1990).

63. *See Interdonato*, 521 A.2d at 1137 (holding that the statute of limitations did not apply to an action for a constructive trust, which is an equitable remedy).

64. *Id.* at 1137 (defining the two elements of the defense of laches as "an unreasonable and unexplained delay by one party, and prejudice to the other party resulting from the delay").

Interdonato[65] the District of Columbia Court of Appeals held the defense of laches barred a claim against an attorney for fraudulent alteration of a will.[66] The court found that the plaintiff knew of the alleged alteration for over thirty years and that the delay prejudiced the defendant because the drafter of the will and at least one witness to the will had died in the interim.[67]

Although the defense of laches was applied in *Interdonato*, in a legal malpractice case the defense of laches usually exists only in theory[68] because in all likelihood, the strong fiduciary nature of the attorney-client relationship will bar use of this equitable defense.[69] Nevertheless, the defense attorney should consider the doctrine of laches when the client brings an equitable action against the attorney.

E. Prematurity and Abatement

The defense of prematurity is based on the concept that "[a] suit is premature if it is brought before the right to enforce it has accrued."[70] The defense, which serves primarily as a stalling tactic,[71] has been raised successfully in legal malpractice actions.[72]

Prematurity defenses often involve the defendant-attorney's failure to bring the underlying suit before the statute of limitations has run. For example, in *Wood v. Anderson*[73] the plaintiff alleged that her attorney filed a malpractice suit against her dentist one day after the statute of limitations expired.[74] The court affirmed the dismissal of the plaintiff's action against her attorney because, under the discovery rule, the plaintiff's suit against the

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65. 521 A.2d 1124, 1138 (D.C. 1987).

66. *Id.* at 1138.

67. *Id.*

68. *See* KINDREGAN, *supra* note 2, at 57 ("Certainly, a court is usually not going to permit a lawyer to rely on an equitable defense when doing so would give legal approval to a breach of trust.").

69. *See Interdonato*, 521 A.2d at 1138 (holding that the defense of laches did not bar other claims against the attorney). In discussing the elements of laches, the *Interdonato* court stated: "In considering the reasonableness of the delay, 'the utmost leniency is manifested by the courts where it appears that the delay is due to the intimate personal relationships existing between the parties and the high degree of confidence reposed by one in another.'" *Id.* at 1137 (quoting Horton v. Horton, 72 F.2d 831, 832 (1934)).

70. Oyefodun v. Spears, 591 So. 2d 1333, 1334 (La. Ct. App. 1991).

71. *See* 2 MALLEN & SMITH, *supra* note 7, § 17.5, at 13 ("The defense [of prematurity] will only temporarily forestall a malpractice suit but the benefit of time may demonstrate either the lack of negligence or injury.").

72. *Id.* § 17.5, at 13-15.

73. 3 S.E.2d 788 (Ga. Ct. App. 1939).

74. *Id.* at 789-90.

dentist might not have been barred by the statute of limitations.[75] The court noted that the statute of limitations could be waived or tolled by fraud or concealment and stated:

> The bar by the statute of limitations being a personal plea, it may be that on the trial of the case the defendant would not plead the statute or insist upon it. There is no evidence whatsoever in the case now before the court that the plaintiff suffered any damage on the ground that her suit when filed by her attorney, the defendant, had become barred by the statute of limitations.[76]

Other jurisdictions have taken a less rigid approach, holding that a client need not first sue the defendant in the client's underlying suit and wait until the defendant raises the statute of limitations before the client can sue the attorney for allowing the statute to run.[77] However, when questions exist about the application of the statute of limitations to the underlying suit, as in a suit involving the discovery rule, defense counsel should raise the prematurity defense even in jurisdictions that follow this less rigid approach to application of the defense.[78]

The statute of limitations in the underlying suit is not always the problem; instead, the statute of limitations applicable to legal malpractice claims sometimes causes the premature filing of a malpractice action. The underlying cause of action may still be pending and its results unknown while the statute of limitations for filing a malpractice suit against the attorney is running. The client then faces the quandary of either bringing a malpractice suit in which damages are speculative and remote or risking the statute of limitations. In these situations, the court may apply the remedy of abatement, which delays the malpractice suit until the underlying suit is resolved and tolls the statute of limitations on the malpractice suit.

This result is illustrated by *K.J.B., Inc. v. Drakulich*,[79] in which the court tolled the statute of limitations in a legal malpractice action pending the resolution of the underlying suit.[80] The court relied upon a recent abatement

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75. *Id.* at 790-91.

76. *Id.*

77. Hege v. Worthington, Park & Worthington, 26 Cal. Rptr. 132, 135 (Ct. App. 1962); Roberts v. Heilgeist, 465 N.E.2d 658, 661 (Ill. App. Ct. 1984); *see also* Oyefodun v. Spears, 591 So. 2d 1333 (La. Ct. App. 1991) (addressing attorney's prematurity defense when the attorney allegedly failed to meet a statutory requirement that a medical malpractice suit be filed within ninety days of a medical review panel decision).

78. *See* 2 MALLEN & SMITH, *supra* note 7, § 17.5, at 14 (observing that some courts have held that a legal malpractice claim is premature when the underlying suit is still pending, even though the underlying suit appears barred by the statute of limitations).

79. 811 P.2d 1305 (Nev. 1991) (per curiam).

80. *Id.* at 1306. In Outboard Marine Corp. v. Liberty Mut. Ins. Co., 536 F.2d 730 (7th Cir.

case, *Semenza v. Nevada Medical Liability Insurance Co.*,[81] to reach its decision.[82] *Semenza* involved a legal malpractice action that was brought during the appeal of an adverse judgment in the underlying suit. The *Semenza* court held that any damages caused by the attorney's alleged malpractice were speculative and remote because the underlying suit had not been fully adjudicated, and as such, the malpractice action was premature.[83]

Though the defenses of prematurity and abatement often overlap, abatement concerns the pendency of another action and is intended to prevent a multiplicity of suits.[84] "Abatement may be an appropriate remedy where the malpractice claim is merely an alternative to the client's basic right."[85]

F. Availability of Another Remedy

On occasion, an attorney's negligence or other wrongful act may eliminate one or more theories, remedies, defenses, or defendants otherwise available to his client, yet still leave the client with other avenues of relief. In this situation, the client has a duty to mitigate his losses by pursuing those alternative remedies still available. If the client prevails and thereby suffers no loss, the attorney obviously has no liability to him for the error. Even if the client is only partially successful on the alternative remedies, the attorney's conduct resulted in only a portion of the loss that would have otherwise been sustained.[86]

1976), the court similarly resolved this issue by holding that the legal malpractice suit may be maintained even though all the damages are not yet ascertainable. If the [underlying suit's] judgment is not yet final when the [malpractice] case is reached for trial, the District Court will have a wide discretion in deciding how best to proceed and may consider, *inter alia*, postponing the trial or entering a conditional judgment.

Id. at 734.

81. 765 P.2d 184 (Nev. 1988) (per curiam).

82. *K.J.B., Inc.*, 811 P.2d at 1306.

83. *Semenza*, 765 P.2d at 186.

84. *See generally* Sarratt v. Wilkins, 104 S.C. 276, 278, 88 S.E. 647, 648 (1916) (discussing the general policy for abatement - preventing multiplicity of suits); 2 MALLEN & SMITH, *supra* note 7, § 17.5, at 14-15 n.7 (noting Delesdernier v. Miazza, 151 So. 2d 372, 376 (La. Ct. App. 1963) (Trial court ruled that the legal malpractice suit was premature when the plaintiff's underlying substantive cases had yet to conclude, thereby leaving undecided the issue of whether the defendant-attorney's alleged malpractice prejudiced the client.), *superseded by statute as stated in* B. Swirsky & Co. v. Bott, 598 So. 2d 1281 (La. Ct. App. 1992)).

85. 2 MALLEN & SMITH, *supra* note 7, § 17.5, at 15 (citing Ginsberg v. Chastain, 501 So.2d 27 (Fla. Dist. Ct. App. 1986)); *see* Coe v. Burrell, 136 S.C. 410, 420, 134 S.E. 373, 375 (1926) (setting forth the general rule that for a suit to be abated, it must be in the same jurisdiction, between the same parties, and for the same cause of action and relief as another pending action).

86. *See* Swanson v. Sheppard, 445 N.W.2d 654, 658 (N.D. 1989) (citing 2 MALLEN & SMITH, *supra* note 7, § 17.6, at 16) ("If an attorney's negligent conduct in representing a client

In order for the availability of an alternative remedy to operate as a complete or partial defense, it must be both viable and equivalent.[87] In *Andrews v. McDougal*[88] the court addressed the viability of a proposed alternative remedy argued by the defendant.[89] In *Andrews* the defendant-attorney allowed the statute of limitations to run against a shooting victim's cause of action for battery. The defendant-attorney argued that because his client had filed suit for trespass, arguably a viable alternative remedy, he was not liable to his client for damages. The court rejected the defendant's argument noting that in Arkansas, courts are required to "look to the gist of [the] case" in determining the applicability of the statute of limitations.[90] The court held that the barred action was for battery, not for trespass, and the client did not have a viable alternative cause of action.[91]

However, in *Swanson v. Sheppard*[92] the Supreme Court of North Dakota directed the trial court to abate a malpractice action while an injured client was given an opportunity to pursue a possible alternative remedy to mitigate his damages.[93] In *Swanson* the attorney aided his client in filing a Chapter 7 bankruptcy. The client's student loans could not be discharged in a Chapter 7 filing, but may have been dischargeable under a Chapter 13 plan. The trial court awarded damages equivalent to the amount of the student loans, but the appellate court reversed upon the premise that the client may be able to mitigate his damages by petitioning to have his Chapter 7 case reopened in the hopes of proceeding with a successful Chapter 13 petition.[94]

The court in *Winter v. Brown*[95] addressed the equivalency requirement. The defendant-attorney in the underlying medical malpractice action allowed the claim against the hospital to become unenforceable by failing to give the required statutory notice. The attorney argued that the plaintiff could still sue the hospital employees and physicians, but the court held that this remedy was not equivalent. The court noted that in an action against the hospital, the plaintiffs could have applied theories of negligence which were not available against the other defendants.[96] Further, the court felt that as a practical

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leaves the client with an alternative remedy or remedies which are both viable and equivalent, the result may be that the client suffers no loss or a reduced loss as the proximate cause of the attorney's negligent conduct.").

87. *Id.*
88. 731 S.W.2d 779 (Ark. 1987).
89. *Id.* at 780.
90. *Id.*
91. *Id.*
92. 445 N.W.2d 654 (N.D. 1989).
93. *Id.* at 658.
94. *Id.* at 658-59.
95. 365 A.2d 381 (D.C. 1976).
96. *Id.* at 384-85.

matter some theories still available against the individual defendants, such as negligent supervision, would fare better against the hospital than the individual defendants.[97] Therefore, the court found that the alternative remedies available to the plaintiffs were not equivalent to that lost by their attorney's negligence,[98] and their malpractice action against their attorney was not barred.[99]

G. Release and Disclaimer

Lawyers may attempt to shield themselves from professional liability through the use of a release or disclaimer. The Model Rules of Professional Conduct (Rules) strictly limit an attorney's use of these devices as follows:

> A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.[100]

Failure to obey this rule may lead to stiff disciplinary penalties, perhaps even disbarment.[101] "This reflects a public policy against lawyers using their superior positions to exact 'hold harmless' provisions in legal employment contracts."[102]

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97. *Id.* at 385.

98. *Id.* at 386 (holding that plaintiff did not have to exhaust all possible defendants in the underlying medical malpractice case before seeking a remedy against the defendant-attorney). *But see* Bartholomew v. Crockett, 475 N.E.2d 1035, 1041-42 (Ill. App. Ct. 1985) (holding plaintiff's claim for defendant-attorney's alleged malpractice had not yet accrued and therefore was non-existent); Evans v. Detweiler, 466 So. 2d 800, 803 (La. Ct. App. 1985) (holding plaintiff's failure to allege that defendant-attorney's alleged malpractice left plaintiffs without a remedy under state law or no equivalent under federal law warranted a finding that plaintiff's petition failed to state a cause of action).

99. *Id.* at 384.

100. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1992); *accord* S.C. APP. CT. R. 407, § 1.8 (h).

101. *See In re* Hanna, 301 S.C. 310, 312-13, 391 S.E.2d 728, 728-29 (1990) (disbarring attorney for, among other things, his attempt to use hold-harmless clause); ROBERT M. WILCOX, SOUTH CAROLINA LEGAL ETHICS § 5.1.3 (1992) (citing *In re* Hanna, 294 S.C. 56, 362 S.E.2d 632 (1987); *In re* Amick, 288 S.C. 486, 343 S.E.2d 623 (1986); *In re* Clarke, 278 S.C. 627, 300 S.E.2d 595 (1983)).

102. KINDREGAN, *supra* note 2, at 58. *See* S.C. Adv. Op. # 85-30. According to this ethics advisory opinion, in-house counsel may not enter into an agreement with their employer limiting their liability to the corporation. The company, however, may agree to indemnify counsel from liability to third parties. This opinion was decided under the prior Code of Professional

For this reason and because of the fiduciary nature of an attorney-client relationship,[103] courts have also strictly limited the release defense in malpractice actions. A defense based upon a boiler-plate release in a retainer agreement has rarely been upheld.[104] Similarly, a release entered into during the course of representation is also suspect.[105] However, a release may form a successful defense if it results from the settlement of a malpractice claim.[106] The release must be fairly and knowingly made and supported by consideration.[107] Under the Rules, an attorney must advise the client in writing that independent representation is appropriate before settlement.[108] In *Donnelly v. Ayer*,[109] a release agreement was upheld in a malpractice action even though the client was unrepresented. However, the client had previously consulted several other attorneys.[110] Releases may be attacked as a product of duress[111] or as contrary to public policy.[112] Further, because of the fiduciary obligations owed by an attorney to his client, a release of liability is presumptively void, and the attorney bears the burden of proving that the agreement was fair and reasonable.[113]

Responsibility.

103. Ames v. Putz, 495 S.W.2d 581, 583 (Tex. Civ. App. 1973) (stating the relationship between attorney and client is highly fiduciary, and a release executed between them will be presumed to be unfair or invalid).

104. 2 MALLEN & SMITH, *supra* note 7, § 17.10, at 42-43 (addressing release attempt prior to client's discovery of attorney's error).

105. *See Ames*, 495 S.W.2d at 582-83.

106. Donnelly v. Ayer, 228 Cal. Rptr. 764, 767-83 (1986) (holding that a release executed by the client after receiving one thousand dollars as well as attorney's agreement not to seek collection of advancements was a complete defense); McElmurry v. Nine, 279 N.W.2d 301, 302 (Mich. Ct. App. 1979) (emphasizing that "[t]he release referred specifically to the instant litigation."). *But see* Adell v. Sommers, Schwartz, Silver and Schwartz, P.C., 428 N.W.2d 26, 28 (Mich. Ct. App. 1988) (addressing the issue of the scope of the release and holding that the release of the tax claims did not bar action based upon the partnership's improper formation); Arana v. Koerner, 735 S.W.2d 729 (Mo. Ct. App. 1987) (noting that when plaintiff expressed a clear and specific intent not to release attorneys, subsequent release of joint tort-feasor did not release attorneys).

107. *McElmurry*, 279 N.W.2d at 302 (settlement of disputed claims satisfies consideration requirement to uphold a release).

108. S.C. APP. CT. R. 407, Rule 1.8(h); *see* Marshall v. Higginson, 813 P.2d 1275, 1277 (Wash. Ct. App. 1991) (holding that an attorney's only duty under Rule 1.8(h) of Washington's Rules of Professional Conduct was to advise the client "that advice from independent counsel was appropriate before he signed the release").

109. 228 Cal. Rptr. 764 (Cal. Ct. App. 1986).

110. *Id.* at 767.

111. *See generally* Interdonato v. Interdonato, 521 A.2d 1124, 1134 (D.C. 1987) (discussing invalidation of a release for duress).

112. *Marshall*, 813 P.2d at 1278 (noting release agreement violated public policy and was invalid when attorney misled client into believing that she would not testify in a separate proceeding if the client did not sign the release).

113. Ames v. Putz, 495 S.W.2d 581, 583 (Tex. Civ. App. 1973); *see* 2 MALLEN & SMITH,

The underlying policy controlling the use of releases is also applicable to liability disclaimers.[114] In *Owen v. Neely*[115] the court expressly acknowledged an attorney's right to protect himself by noting reservations and disclaimers in a certificate of title under some circumstances.[116] The disclaimer stated that the certificate of title was "subject to any information that would be revealed by an accurate survey of the real estate and subject to any information that would be revealed by a personal inspection of the premises . . . ."[117] The court limited the attorney's ability to disclaim to situations when the attorney "has no reasonable grounds to suspect the actual existence of defects not mentioned."[118]

H. Waiver and Ratification

"A waiver is an intentional relinquishment of a known right."[119] Often, defense counsel cannot successfully use a waiver defense because of the fiduciary relationship that exists between the defendant-attorney and the client.[120] However, in *Mauldin v. Weinstock*[121] the Georgia Court of Appeals held that the plaintiff waived his rights in the underlying transaction, and thereby waived any claim based upon legal malpractice.[122] The plaintiff was terminated from his job with Eastern Air Lines. When the plaintiff appealed the termination, Eastern rejected his appeal because it was filed late. His attorney advised him to commence a suit challenging Eastern's contention, but the plaintiff did not authorize the attorney to initiate such a suit.[123] The appellate court upheld the trial court's application of "the rule of waiver by conduct" and affirmed the grant of summary judgment for the attorney.[124]

Ratification is another difficult escape passage for an attorney. In *L.F.S.*

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supra note 7, § 17.10, at 44 (noting that failure to sustain this burden is often accompanied by a finding of fraud or coercion).

114. 2 MALLEN & SMITH, *supra* note 7, § 17.10, at 44.

115. 471 S.W.2d 705 (Ky. 1971).

116. *Id.* at 708.

117. *Id.* at 707 (quoting the actual disclaimer).

118. *Id.* at 708.

119. Stovall Bldg. Supplies, Inc. v. Mottet, 305 S.C. 28, 35, n.3, 406 S.E.2d 176, 180 n.3 (Ct. App. 1990), *cert. denied*, 305 S.C. 28, 406 S.E.2d 176 (1991); *see* 2 MALLEN & SMITH, *supra* note 7, § 17.11, at 46 (also using the term "abandonment").

120. KINDREGAN, *supra* note 2, at 61 (noting the scarcity of case law on the subject).

121. 411 S.E.2d 370 (Ga. Ct. App. 1991).

122. *Id.* at 374.

123. *Id.* at 371, 374 (noting that legitimate grounds existed to challenge Eastern's contention and that plaintiff's failure to act "in effect" prevented his attorney from proving the timeliness of the filing).

124. *Id.* at 374-75.

Corp. v. Kennedy[125] a law firm successfully defended a malpractice suit arguing ratification as a defense.[126] The plaintiff-corporation alleged that the law firm did not follow settlement instructions and permitted summary judgment based upon an unauthorized agreement. However, prior to filing the malpractice action, the company accepted financial benefits extended under the order and sought advice concerning enforcement of the order. The appellate court found these acts to be "clear, unequivocal actions of ratification."[127]

I. Compromise with Third Party

Accepting a settlement in an underlying action does not bar a client from bringing a malpractice suit.[128] However, settlement may affect the extent of damages recoverable against the defendant-attorney.[129] The plaintiff is not entitled to a double recovery.[130]

In *Katzenberger v. Bryan*[131] the alleged malpractice involved a negligent title examination.[132] The court pointed out that the underlying suit against the sellers (for breach of warranty in the deed) was in contract, and the malpractice action was in tort.[133] Because both the nature and measure of

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125. 287 S.C. 162, 337 S.E.2d 209 (1985).

126. *Id.* at 163, 337 S.E.2d at 210. *But see* 2 MALLEN & SMITH, *supra* note 7, § 17.11, at 47 n.4 (addressing the difficulties of proving ratification by stating:

> [A] ratification, made in ignorance of material facts, cannot give validity to the acts of an attorney in the conduct of a suit, or repel the imputation of fraud. To give any effect, therefore, to any expressions of this nature, the previous foundation must be laid, that there has been a full disclosure of facts on the part of the attorney, and that the ratification is the result of a judgment acting upon knowledge, and not upon a blind personal confidence in the general integrity of the agent.

(quoting Williams v. Reed, 29 F. Cas. 1386, 1391 (C.C.D. Me. 1824) (No. 17733)).

127. *L.F.S. Corp.*, 287 S.C. at 164, 337 S.E.2d at 210; *see also* Schmid v. National Bank of Greece, 622 F. Supp. 704, 713 (D.C. Mass. 1985), *aff'd*, 802 F.2d 439 (1st Cir. 1986) (table) (illustrating a ratified execution of release when a party accepts an unsecured promissory note).

128. Wolcott v. Ginsburg, 746 F. Supp. 1113, 1117 (D.D.C. 1990) (holding that plaintiffs could still pursue a malpractice action against their attorneys even though they had accepted a settlement in the underlying matter, because their settlement was less than what they could have recovered but for the attorneys' malpractice); Keramati v. Schackow, 553 So. 2d 741, 745 (Fla. Dist. Ct. App. 1989) (noting settlement of underlying medical malpractice action did not bar attorney malpractice action, but may contribute to mitigation of damages against attorney); King v. Cranford, Whitaker & Dickens, 385 S.E.2d 357, 360 (N.C. Ct. App. 1989) (holding that will proponents did not elect their remedy by subsequently agreeing to a settlement in the underlying probate claim and therefore were entitled to pursue malpractice claim), *review denied by*, 389 S.E.2d 813 (N.C. 1980).

129. Katzenberger v. Bryan, 141 S.E.2d 671, 676 (Va. 1965); *see* 2 MALLEN & SMITH, *supra* note 7, § 17.15, at 58-59.

130. *Katzenberger*, 141 S.E.2d at 676.

131. 141 S.E.2d 671 (Va. 1965).

132. *Id.* at 674.

133. *Id.* at 675-76 (holding that accord and satisfaction took place in the contract action, but

damages were different, the acceptance of a settlement with the sellers of the contract claim did not act as an accord and satisfaction of the malpractice claim. However, the court did limit recovery of damages in the malpractice claim to prevent double recovery.[134]

J. Res Judicata, Collateral Estoppel, and Equitable Estoppel

After a court decides that a defendant-attorney's actions were valid and not malpractice, the issue may not be relitigated. The defendant may rely upon the doctrines of res judicata and collateral estoppel to prevent relitigation of the issue of the propriety of the defendant-attorney's actions. Similarly, once a party takes a stance in an underlying matter, equitable estoppel may prevent the party from changing his or her position in a later legal malpractice action. Equitable estoppel does not require a judgment to have been rendered on the disputed issue as a prerequisite to its invocation.

When a lawyer's degree of skill in handling a matter has been adjudicated in another suit, and the issue was decided in his favor, the issue is res judicata,[135] or settled, and may not be litigated again.[136] Res judicata will not appear as a viable defense in most legal malpractice cases, simply because the attorney rarely will have been a party or in privity with a party in a prior suit.[137] Nevertheless, the prior litigation may decide the propriety of the attorney's actions in connection with an allegation of conspiracy or other joint action with a party, and thus dispose of the issue.[138]

The issue in question need not actually be litigated in order for res judicata to apply. If the issue could have been litigated in a previous action between the parties, the judgment has res judicata effect.[139] In *Compusort v. Goldberg*[140] res judicata barred a negligence claim against an attorney, because the plaintiff could have raised the issue of attorney's negligence in a prior action by the defendant-attorney to collect legal fees.[141]

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not in the tort action).

134. *Id.* at 676; *see* 2 MALLEN & SMITH, *supra* note 7, § 17.15, at 59 (citing *Katzenberger*, for the proposition "A recovery from the third party may be considered in mitigation where the payment involves substantially the same damages.").

135. Res judicata provides that a final judgment on the merits of a case bars a subsequent action between the same parties or their privies over the same cause of action.

136. *See* Davis & Cox v. Summa Corp., 751 F.2d 1507, 1518 (9th Cir. 1985), *superseded by statute on other grounds as stated in* Northrop Corp. v. Triad Int'l Mktg., S.A., 842 F.2d 1154 (9th Cir. 1988); Interdonato v. Interdonato, 521 A.2d 1124, 1131 n.11 (D.C. 1987) (observing that a final judgment on the merits is the crucial element of res judicata).

137. 2 MALLEN & SMITH, *supra* note 7, § 17.12, at 49.

138. *See* Eadon v. Reuler, 361 P.2d 445, 449 (Colo. 1961).

139. Compusort, Inc. v. Goldberg, 606 F. Supp. 456, 457 (S.D.N.Y. 1985).

140. 606 F. Supp. 456 (S.D.N.Y. 1985).

141. *Id.* at 457-58.

Res judicata may apply to a plaintiff, barring a subsequent action, even though the plaintiff had no opportunity to participate in the underlying action if the plaintiff was in privity with a party in the underlying case.[142] Privity, for purposes of res judicata, requires a legal connection or identity of interest between the parties—similar interest in the outcome of litigation is not enough.[143] In *Schonberger v. Serchuk*[144] the New York District Court held that a legal malpractice plaintiff was bound by his son's decision to drop a counterclaim against the attorneys in an underlying mortgage foreclosure action.[145] Privity, for purposes of res judicata, was not based on the father/son relationship, but rather upon the father's relationship as a guarantor for his son's debt.[146] The father and son stood in the same position vis-a-vis the subject matter and were affected equally by their actions.[147]

Like res judicata, collateral estoppel, also known as judicial estoppel, assumes that an issue was decided by prior litigation. Therefore, the same issue may not be litigated again.[148] However, collateral estoppel will by nature be a better defense in a legal malpractice action than res judicata, because privity is not always required.[149]

In *Irby v. Richardson*[150] the South Carolina Supreme Court applied collateral estoppel in a legal malpractice action.[151] In *Irby* a father apparently consented to his former wife assuming custody of the couple's children during a divorce proceeding. The court noted that the father had voluntarily waived his right to contest custody in the underlying case. The father then brought a legal malpractice action against his attorney some five years later, alleging that the attorney willfully failed to prepare his case and forced him to settle the divorce proceeding with the wife having custody of the children. The court held that the issues of the father's consent as to custody, as well as the other essential issues involved in the malpractice claim, had been decided in the underlying family court proceedings. Therefore, the court precluded the

142. Schonberger v. Serchuk, 742 F. Supp. 108, 115-16 (S.D.N.Y. 1990) (quoting Rutgers Casualty Ins. Co. v. Dickerson, 521 A.2d 373, 376 (N.J. Super. Ct. App. Div. 1987)).

143. *See*, Rutgers Casualty Ins. Co. v. Dickerson, 521 A.2d 373, 376 (N.J. Super. Ct. App. Div. 1987).

144. 742 F. Supp. 108 (S.D.N.Y. 1990).

145. *Id.* at 116.

146. *Id.*

147. *See id.*

148. 2 MALLEN & SMITH, *supra* note 7, § 17.13, at 50 (describing collateral estoppel as a refinement of res judicata, and noting the frequent confusion between the two).

149. *Id.* (noting that "[e]ven where complete privity is still required, however, some courts limit the use of the doctrine to preclude relitigation of those facts which are common to alternative legal theories").

150. 278 S.C. 484, 298 S.E.2d 452 (1982).

151. 278 S.C. at 487, 298 S.E.2d at 454.

plaintiff from relitigating those issues.[152]

Some courts have adopted the following four-factor test[153] to determine whether collateral estoppel is a viable defense: (1) whether the issues in the two cases are identical;[154] (2) whether there was a final judgment on the merits;[155] (3) whether the party against whom the defense is asserted is a party or in privity with a party to the prior adjudication; and (4) whether a failure to apply the defense will work an injustice.[156] The party asserting collateral estoppel bears the burden of pleading and proving that the relevant issues were decided in his favor in the previous action.[157]

In some jurisdictions, the privity requirement has been relaxed in that the party asserting the defense does not have to be a party or privy to the underlying action.[158] Traditionally, the scope of collateral estoppel has been limited by the doctrine of mutuality. Under this doctrine, neither a party nor their privies could use a prior judgment as an estoppel against the opposing party unless both parties or their privies were bound by the judgment. The use of collateral estoppel, whether offensively or defensively, is no longer predicated on mutuality of interest.[159] Thus, if an issue in a prior case has been litigated and was essential to the prior judgment, nonmutual collateral estoppel may preclude relitigation of the issue in the subsequent case, even though one of the parties disputing the issue was not bound by the prior judgement.[160]

The issue of malpractice or attorney negligence need not be the only issue considered in the underlying action in order for collateral estoppel to apply.

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152. *Id.*

153. 2 MALLEN & SMITH, *supra* note 7, § 17.13, at 51.

154. Beckwith v. Llewellyn, 391 S.E.2d 189, 191-92 (N.C. 1990) (holding that the issue of a court's approval of a settlement in the underlying case did not collaterally estop the client from asserting a malpractice claim since the two issues were not identical).

155. *See* 47 AM. JUR. 2D *Judgments* § 1198 (1969 & Supp. 1994).

156. *See* Connelly v. Wolf, Block, Schorr and Solis-Cohen, 463 F. Supp. 914, 918 (E.D. Pa. 1978) (holding that a corporate president was collaterally estopped from asserting that a malpractice claim was assigned to him by the corporation when a prior decision in another jurisdiction held that no assignment of the malpractice actions had taken place).

157. Davis & Cox v. Summa Corp., 751 F.2d 1507, 1518 (9th Cir. 1985) (citing *e.g.*, Hernandez v. City of Los Angles, 624 F.2d 935, 937 (9th Cir. 1980)), *superseded by statute on other grounds as stated in* Northrop Corp. v. Triad Int'l Mktg., S.A., 842 F.2d 1154 (9th Cir. 1988).

158. Brock v. Owens, 532 A.2d 1168, 1172 (Pa. Super. Ct. 1987) (citing Thompson v. Karastan Rug Mills, 323 A.2d 341, 344 (Pa. Super. Ct. 1974)).

159. *See* Blonder-Tongue Lab. Inc. v. University of Illinois Found., 402 U.S. 313, 349-50 (1971); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32 (1979), *limited by* United States v. Mendoza, 464 U.S. 154 (1984); Beall v. Doe, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984).

160. *Beall*, 281 S.C. at 370, 315 S.E.2d at 190-91 (adopting RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982) as a guideline).

The doctrine may be invoked even if the issue in question was only one of several grounds on which the original decision was based.[161] In fact, the doctrine applies to each point as if it was the only issue litigated. In addition, "[a]bsent a statute to the contrary, a pending appeal does not destroy the finality of the judgment for purposes of collateral estoppel."[162] Even if the underlying judgment on which collateral estoppel is based is erroneous, the client is generally precluded from attacking the judgment and relitigating the issue.[163]

Collateral estoppel is frequently raised in malpractice actions arising out of the defense of criminal cases[164] and in actions concerning the validity of documents drafted by the lawyer.[165]

The defense of equitable estoppel, unlike res judicata or collateral estoppel, does not depend upon a prior judgment that precludes a party from relitigating an issue. Estoppel is a bar that prevents a party from alleging or denying facts which are inconsistent with prior statements, allegations, or conduct.[166] Estoppel's applicability is not limited to the context of a litigation.

In *Bankers Trust v. Bruce*[167] the debtors in an appeal of a foreclosure action alleged that the amount of deficiency judgment against them was negatively affected by their attorney's malpractice and conflict of interest in the underlying foreclosure action.[168] However, the debtors had consented to the attorney's representation of them after the attorney had disclosed his firm's pre-existing relationship with the foreclosing financial institution.[169] Furthermore, the court noted that the debtors had instructed their attorney of the specific tactic to be used in the foreclosure action. The attorney was to avoid delaying the foreclosure so that the property could be sold quickly and the interest rate thereby reduced from the contract rate to the statutory

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161. 2 MALLEN & SMITH, *supra* note 7, § 17.13, at 52 (citing *e.g.*, Roberts v. Flanagan, 410 N.W.2d 884 (Minn. Ct. App. 1987)).

162. Connelly v. Wolf, Block, Schorr and Solis-Cohen, 463 F. Supp. 914, 918 n.3 (E.D. Pa. 1978) (citing RESTATEMENT OF THE LAW, JUDGEMENTS § 41 cmt. d; § 69, cmt. e).

163. Mazer v. Security Ins. Group, 507 F.2d 1338, 1342 (3d Cir. 1975).

164. Walker v. Kruse, 484 F.2d 802, 804 (7th Cir. 1973) (holding that a convicted murderer plaintiff was collaterally estopped from charging his court-appointed attorney with negligence when the Illinois Supreme Court had found a "clear want of merit" in the plaintiff's contentions against the defendant-attorney).

165. Falconer v. Meehan, 804 F.2d 72 (7th Cir. 1985) (holding that a client could not relitigate an issue in a legal malpractice action when his attorney had explained the terms of a partnership dissolution agreement to him because a bankruptcy court had determined the attorney's conduct was proper).

166. 2 MALLEN & SMITH, *supra* note 7, § 17.14, at 55.

167. 283 S.C. 408, 323 S.E.2d 523 (Ct. App. 1984).

168. *Id.* at 415, 323 S.E.2d at 527.

169. *Id.* at 419-20, 323 S.E.2d at 530.

rate.[170] The debtors would then attempt to further reduce the deficiency under the appraisal process.[171] This strategy failed, and the debtors attempted to reopen the deficiency judgment by alleging that the attorney had a conflict of interest that affected his zeal in representing them. The court rejected this argument holding that the client-debtors were estopped from claiming their attorney failed to raise other defenses in the foreclosure action because of their specific instructions to him.[172]

Estoppel is commonly used to prevent a client from taking a position contrary to that previously urged in a document.[173] This is particularly true when the document was prepared by someone other than the attorney being sued. If the basis of estoppel is a pleading prepared by the defendant-attorney, the defense is only available if the client knowingly assented to statements in the document.[174]

Estoppel may not be available when the client's position involves a legal rather than a factual matter. If the client was incapable of understanding the effect of an approved document, he may not be precluded from changing his position and arguing against it in a subsequent malpractice action.[175] Although estoppel bars a client from deviating from prior positions or testimony in alleging attorney malpractice, it does not prevent a client from claiming that a settlement to which he agreed was inadequate because of his lawyer's negligence.[176]

K. Immunity

Attorneys may be sued for malpractice they commit while performing public duties. However, governmental immunity from suits for damages has been repeatedly extended to such public officials as judges and legislators.[177] Solicitors or prosecutors acting "within the scope of [their] duties in initiating

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170. *Id.* at 421-22, 323 S.E.2d at 531-32.

171. *Id.* at 422, 343 S.E.2d at 531-32.

172. Bankers Trust v. Bruce, 283 S.C. 408, 422, 323 S.E.2d 523, 532 (Ct. App. 1984).

173. Hurd v. DiMento & Sullivan, 440 F.2d 1322 (1st Cir.) (holding plaintiff was estopped from asserting that the defendant-attorney claimed to represent her when she admitted in a pleading that the defendant was unable to represent her "because of other commitments"), *cert. denied*, 404 U.S. 862 (1971).

174. 2 MALLEN & SMITH, *supra* note 7, § 17.14, at 58.

175. *Id.*

176. *See* Oakes & Kanatz v. Schmidt, 391 N.W.2d 51 (Minn. Ct. App. 1986).

177. Harlow v. Fitzgerald, 457 U.S. 800 (1982). "[P]ublic officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Id.* at 806. The immunity granted can either be absolute or qualified. Generally, officials performing special functions, such as legislators and judges, are entitled to absolute immunity, which provides complete protection from suit. Conversely, executive officials are only entitled to qualified immunity.

and pursuing a criminal prosecution"[178] are entitled to absolute immunity from suit.[179] An immunity issue may also arise in a malpractice case brought by a criminal defendant against his court-appointed attorney.

Historically, court-appointed defense attorneys and public defenders enjoyed the same immunity as prosecutors and judges, especially in civil rights actions involving claims of wrongful acts under color of state law.[180] However, recent Supreme Court decisions have recognized that court-appointed attorneys and public defenders are not immune from malpractice claims arising from the representation of indigent clients, even when the state assigns them as defense counsel and pays for their services.[181]

The Supreme Court in *Tower v. Glover*[182] and *Ferri v. Ackerman*[183] reasoned that appointed counsel[184] and public defenders[185] are not entitled to absolute immunity, because they do not represent the public as a whole; rather, they are paid by the state to represent the individual in the same manner as privately retained counsel. The policy reasons that support granting of immunity to prosecutors and judges are not applicable to public defenders and appointed counsel, because they do not represent the public.[186] Also, if appointed counsel and public defenders are afforded absolute immunity, indigent clients would not have the same remedies for inadequate legal service as paying clients.[187]

While absolute immunity has been expressly denied to appointed counsel and public defenders, the availability of qualified immunity is not so clear. Recent cases have upheld qualified immunity for both public defenders,[188] and for appointed special counsel,[189] as long as the attorney's behavior does

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178. Imbler v. Pachtman, 424 U.S. 409 (1976).

179. *Id.* at 410.

180. 2 MALLEN & SMITH, *supra* note 7, § 17.7, at 17-20; *see* Annotation, *Public Defender's Immunity From Liability for Malpractice*, 6 A.L.R.4TH 774 (1981 & Supp. 1993).

181. Tower v. Glover, 467 U.S. 914 (1984) (noting appointed counsel was not immune from malpractice liability for allegedly conspiring with state officials to deprive client of his constitutional rights); Ferri v. Ackerman, 444 U.S. 193 (1979) (noting that an appointed attorney is not entitled to absolute immunity against an indigent client's claim in a malpractice action); *see also* Sullivan v. Freeman, 944 F.2d 334 (7th Cir. 1991) (finding public defenders do not enjoy absolute immunity under Illinois law).

182. 467 U.S. 914 (1984).

183. 444 U.S. 193 (1979).

184. *Ferri*, 444 U.S. at 205.

185. *See Tower*, 467 U.S. at 921-23 (noting that 42 U.S.C. § 1983 on its face does not provide for immunities for public defenders).

186. *See* 2 MALLEN & SMITH, *supra* note 7, § 17.7, at 21.

187. *See id.* (citing Ronald E. Mallen, *The Court-Appointed Lawyer and Legal Malpractice — Liability or Immunity*, 14 AM. CRIM. L. REV. 59, 69 (1976)).

188. Keating v. Martin, 638 F.2d 1121, 1122 (8th Cir. 1980) (per curiam); Dodson v. Polk County, 628 F.2d 1104, 1108 (8th Cir. 1980), *rev'd on other grounds*, 454 U.S. 312 (1981).

189. Canadian Javelin, Ltd. v. Lawler, Kent & Eisenberg, 478 F. Supp. 448, 450 (D.D.C.

not disqualify him for protection under qualified immunity.[190]

L. Misconduct in the Underlying Transaction

A plaintiff's misconduct can form a defense for legal malpractice. "[C]ourts should not lend their aid to one who founds a cause of action on an immoral or illegal act."[191] In *Goldstein v. Lustig*[192] a dentist was fired after he committed insurance fraud.[193] The dentist sought recovery of his lost resignation benefits from the attorney who advised him to wait to be terminated before suing his employer. The Illinois Supreme Court held that even if the dentist had resigned, he would not have been entitled to his resignation benefits because of his illegal acts. The dentist's misconduct, not the soundness of the attorney's advice, was the cause of his loss.[194]

Misconduct by the plaintiff may also bar suit when the plaintiff alleges immoral or illegal conduct by counsel. In *Pantely v. Garris, Garris and Garris,*[195] the plaintiff perjured herself in the underlying domestic relations action, allegedly on the advice of her attorneys.[196] When the judgment of divorce was set aside based upon this issue, the plaintiff sued her attorneys for malpractice.[197] The court relied upon the doctrine of *in pari delicto*[198] and held that the perjury barred the malpractice claim.[199] The plaintiff argued unsuccessfully that her suit should not be barred because her degree of fault was far less than that of her attorneys,[200] and because public policy requires errant members of the bar to be disciplined.[201] The court held that plaintiff

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1979).

190. *Dodson*, 628 F.2d at 1108 (citing Wood v. Strickland, 420 U.S. 308, 322 (1975) for the proposition that qualified immunity can be lost if "[t]he defender oversteps the immunity boundary, however, if he acts in a manner which he knows or reasonably should know will violate the constitutional rights of his client, or if he acts with the malicious intention to injure his client").

191. Pantely v. Garris, Garris & Garris, P.C., 447 N.W.2d 864, 867 (Mich. Ct. App. 1989).

192. 507 N.E.2d 164 (Ill. App. Ct. 1987).

193. *Id.* at 166-67.

194. *Id.* at 168.

195. 447 N.W.2d 864 (Mich. Ct. App. 1989).

196. *Id.* at 865-66.

197. *Id.*

198. The court explains that this common law doctrine derives from the maxim, "*in pari delicto potior est conditio defendentis*," which means that "in cases of equal fault, the position of the defendant is stronger." *Id.* at 867.

199. *Id.* at 869.

200. *Id.* at 868 (admitting that circumstances may exist which would support such an exception, but holding that one does not need a law degree to understand that perjury is immoral and illegal).

201. *Pantely*, 447 N.W.2d at 868.

and her attorneys were equally at fault, and the attorneys' misconduct could be punished by other means which would not directly benefit the perjuring client.[202]

The same principles that underlie *in pari delicto* support the defense of unclean hands,[203] although this doctrine does not require the party with unclean hands to be at least equally culpable.[204] An attorney cannot be held liable for disclosing a client's misconduct.[205]

M. Indemnity and Contribution, Unjust Enrichment, and Mitigation of Damages

Once a case appears headed to trial, the defense counsel should look for opportunities to shift, spread, or reduce the defendant-attorney's liability. Defense counsel may start with the doctrines of indemnity and contribution.[206] In *Roberts v. Heilgeist*,[207] a defendant-attorney in a malpractice action sought contribution from his former client's subsequent attorneys who were hired to bring the malpractice action.[208] The defendant-attorney advanced two theories under which he believed he should recover contribution from his former client's present attorneys: (1) the present attorneys knew that the statute of limitations was not a bar, but an affirmative defense to be pleaded by the tortfeasor, and therefore were negligent in failing to bring suit because the tortfeasor may not have raised the defense at trial; and (2) the present attorneys negligently failed to collect a judgement they obtained against another defendant sued within the limitations period, contributing to the plaintiff's failure to recover from any tortfeasor.[209] The court denied contribution on the first theory, holding that the present attorneys had no duty to bring suit against the tortfeasor once the statute of limitations had run.[210]

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202. *Id.* at 868-89 (noting that misconduct by the attorneys could be addressed with disciplinary actions, contempt of court proceedings, and criminal prosecution).

203. *See id.* at 867.

204. *See* 2 MALLEN & SMITH, *supra* note 7, § 17.4, at 12 (citing Pond v. Insurance Co. of North America, 198 Cal. Rptr. 517 (1984) (applying unclean hands to a malicious prosecution action)).

205. 2 MALLEN & SMITH, *supra* note 7, § 17.4, at 11.

206. Vitauts M. Gulbis, Annotation, *Legal Malpractice: Defendant's Right to Contribution or Indemnity from Original Tortfeasor*, 20 A.L.R.4TH 338 (1983 & Supp. 1993). *See generally*, Robert H. Brunson, *Contribution in South Carolina - Venturing into Uncharted Waters*, 41 S.C. L. REV. 533 (1990) (discussing the law of contribution in South Carolina); James C. Gray, Jr. & Lisa D. Catt, *The Law of Indemnity in South Carolina*, 41 S.C. L. REV. 603 (1990) (discussing South Carolina indemnity law).

207. 465 N.E.2d 658 (Ill. App. Ct. 1984).

208. *Id.* at 659-60.

209. *Id.* at 660.

210. *Id.* at 661.

The court then held that the defendant-attorney was not entitled to contribution under his second theory, because his liability and the liability of the present attorneys did not arise from the same injury.[211] However, if the causes of action against a defendant-attorney and another tortfeasor do arise from the same injury, the attorney may be entitled to contribution.[212]

A defendant-attorney may attempt to recover under the theory of unjust enrichment when their actions benefit a third-party, such as the plaintiff's adversary in the underlying action.[213] Although little case law exists on this subject, an unjust enrichment argument has succeeded in a few cases.[214]

The defense counsel may also argue that mitigation of damages is a factor to be considered.[215] "In all actions where a plaintiff is seeking to recover damages, the plaintiff has a duty to minimize or mitigate damage and may not recover for damage which could have been avoided by reasonable efforts under the existing circumstances."[216] If the client is cooperative, the attorney may attempt to repair the earlier damage and thus, avoid a malpractice lawsuit.[217]

N. Mental Disability

Mental disability of the attorney cannot serve as a defense in actions brought under negligence theories.[218] However, it may serve to negate the necessary element of wrongful intent in cases involving fraud, criminal activity, and intentional torts.[219]

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211. *Id.* at 662 (finding merit in other courts' decisions holding that "suits by a former lawyer against a current or succeeding lawyer contravene public policy").

212. 2 MALLEN & SMITH, *supra* note 7, § 17.16, at 63 (citing Crawford v. Gray and Assocs., 493 So. 2d 734 (La. Ct. App.) (involving land surveyor who also erred), *writ denied*, 497 So. 2d 1012 (La.), and *writ denied*, 497 So. 2d 1013 (La. 1986).

213. 2 MALLEN & SMITH, *supra* note 7, § 17.17 at 63-64.

214. Marine Midland Bank Cent. v. Auburn Inn, Inc., 486 N.Y.S.2d 494 (N.Y. App. Div. 1985) (finding legal malpractice insurer would be entitled to subrogation based on unjust enrichment). *But see* Succession of Killingsworth (Tuttle v. Schlater), 270 So. 2d 196 (La. Ct. App. 1972) (rejecting an unjust enrichment argument in a case arising out of a defectively drawn will, because the beneficiary of the will was completely innocent), *aff'd in part, rev'd in part*, 292 So. 2d 536 (La. 1974).

215. *See* text accompanying notes 81-91 (discussing the plaintiff's duty to pursue other available remedies); text accompanying notes 117-122 (discussing the effect of the plaintiff's compromise settlement with a third party).

216. Swanson v. Sheppard, 445 N.W.2d 654, 658 (N.D. 1989) (citing Smith v. Watson, 406 N.W.2d 685 (N.D. 1987)).

217. 2 MALLEN & SMITH, *supra* note 7, § 17.18, at 64 (citing Joe Holloway, *The Claim Repair System*, 52 FLA. B.J. 94 (1978)).

218. Schumann v. Crofoot, 602 P.2d 298 (Or. Ct. App. 1979) (holding that insanity was not a defense for an attorney alleged to have negligently lost his client's money).

219. *See* Michael J. Davidson, *"Aces Over Eights" - Pathological Gambling as a Criminal*

IV. SLAP BACK SUITS AND COUNTERCLAIMS

When allegations of malpractice are brought against an attorney, the attorney may initially want to strike back with a counterclaim or a subsequent suit motivated by a desire to "slap back." If he prevails in the legal malpractice case, he may consider bringing an action for malicious prosecution.[220] A defendant-attorney can also assert counterclaims to the malpractice action, such as for defamation,[221] abuse of process, or outrage. Caution and reasoned judgment are advised.

In *Swanson v. Sheppard*[222] the appellate court remanded the action for a determination of whether Rule 11 sanctions should be imposed against the defendant, who had filed a counterclaim seeking damages for defamation.[223] The trial court had found that the defendant counterclaimed "'simply to discourage the plaintiff from continuing with his cause of action.'"[224] Public policy does not support these means of discouraging litigants from seeking redress from the courts.[225] However, such tactics may be justifiable under particular circumstances. In fact, the suit brought against the attorney may itself be frivolous and fall under the sanctions of Rule 11 or other statute or rule designed to inhibit frivolous cases.

An attorney likewise should exercise caution in initiating a lawsuit against a client to collect fees.[226] Such a suit may be met with a counterclaim for malpractice.[227] However, once a client has brought a malpractice claim, a

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Defense, ARMY LAWYER, Nov. 1989, at 11, 13; Jack S. Nordby, *The Burdened Privilege: Defending Lawyers in Disciplinary Proceedings*, 30 S.C. L. REV. 363, 438 (1979) (noting that "[a]lcoholism is doubtless the most common medical affliction of lawyers, almost, as reputedly with poets, an occupational hazard").

220. *See* Ronald E. Mallen, *An Attorney's Liability for Malicious Prosecution, A Misunderstood Tort*, INS. COUNSEL J. 407, 407 (1979) (remarking on such suits brought by "irate physicians seeking revenge for an unsuccessful medical malpractice action or pursuing the belief that suing lawyers will deter future medical malpractice suits").

221. *See* Debra T. Landis, *Criticism or Disparagement of Attorney's Character, Competence, or Conduct as Defamation*, 46 A.L.R.4TH 326 (1986 & Supp. 1993).

222. 445 N.W.2d 654 (N.D. 1989).

223. *Id.* at 659. The court assumed that the trial court "found [the defendant] violated the rule but refused to impose sanctions because [the plaintiff] incurred no additional expense"; the court held that such action would constitute error because sanctions were mandatory if a violation had, in fact occurred. *Id.*

224. *Id.* (quoting the trial court).

225. KINDREGAN, *supra* note 2, at 63 (advising attorneys generally not to pursue such counterclaims and stating: "Courts have consistently rejected such counterclaims, and it would be indeed unseemly for an officer of the court to use tactics designed to discourage people from using the courts to adjudicate their grievances.").

226. *Id.* (noting that if an attorney loses a fee collection suit, it may be seen as an invitation to bring a malpractice claim).

227. *Id.*

counterclaim for fees may enhance the possibility of a settlement. Further, since the malpractice suit will probably determine the issue of the attorney's skill in representing the plaintiff, the defendant's right to collect fees will also be determined.[228]

V. CONCLUSION

Legal malpractice cases may serve the laudable purposes of reinforcing attorneys' resolve to provide good, competent legal services to their clients and of policing the profession by meting out punishment and compensation for injuries done to members of the public by members of the profession. Unchecked by vigorous and effective defenses and advocacy on behalf of the accused attorneys, however, legal malpractice cases have the potential to impair the effectiveness of our judicial system by forcing attorneys to practice in a defensive, reactive fashion rather than a more beneficial, proactive manner.

Although it is by no means exhaustive,[229] this article has attempted to summarize and survey some of the defenses and strategies available to defendants in legal malpractice cases. The authors hope that it will prove useful and helpful in the efforts by the bar to improve the quality of legal services available to all clients, including that of our own colleagues in the legal profession.

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228. *Id.*

229. *See e.g.*, Dave R. Bonelli, Annotation, *In Personam Jurisdiction, Under Long-Arm Statute, Over Nonresident Attorney in Legal Malpractice Action*, 23 A.L.R.4TH 1044, 1048-52 (1983 & Supp. 1993) (presenting cases in which the attorney was not subject to in personam jurisdiction); Annotation, *Abatement or Survival of Action for Attorney's Malpractice or Negligence upon Death of Either Party*, 65 A.L.R.2D 1211 (1959 & Supp. 1984, 1994) (discussing the effect of an attorney's death on a malpractice action against the attorney).