

## RECENT LEGAL MALPRACTICE CASES OF SIGNIFICANCE

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This Article is part of *The Journal of the Legal Profession's* annual survey of recent legal malpractice opinions and cases. The survey is designed to organize the latest noteworthy decisions concerning legal malpractice. The article covers the 2008 and 2009 calendar years.

### I. INSURANCE COVERAGE

*Blum v. Travelers Indem. Co.*, 2008 U.S. Dist. LEXIS 48037  
(D.N.J. June 23, 2008)

In early 2003, Plaintiff submitted to defendant a Lawyers Professional Liability Insurance Application which asked if he knew of any incident, act, error or omission that could result in a claim or suit. Plaintiff answered yes and was directed to a Supplemental Claim Form wherein he described a potential claim that a client may bring against him. The Supplemental Claim Form stated: "any claims or incidents disclosed in the application or to which any member of the Firm has knowledge prior to the effective date of this application, will not be afforded coverage under any policy which may subsequently be issued by Gulf Insurance." Defendant issued a policy to plaintiff with a policy period of April 1, 2003 to April 1, 2004, which was renewed twice. The policy stated: "this insurance does not apply to claims arising out of any error, omission, negligent act, or personal injury occurring prior to the inception date of this policy if any insured prior to the inception date knew or could have reasonably foreseen that such error, omission, negligent act or personal injury might be expected to be the basis of a claim or suit."

On October 31, 2005, Plaintiff informed defendant that the client threatened to file a legal malpractice claim against him, and defendant informed plaintiff that it would neither indemnify nor defend him. Plaintiff brought a declaratory judgment action, and defendant moved for summary judgment, based on the above policy language. Plaintiff objected, claiming that 1) defendant cannot rely on information disclosed in the Application to decline coverage because the Application was not incorporated as part of the Policy; and 2) a certain section of the policy was inapplicable because the legal malpractice "claim" was "filed" after the policy's

retroactive effective date. The court held that the legal malpractice “suit” was a direct outgrowth of the potential claim described by plaintiff in the Supplemental Claim Form and thus coverage cannot be established. The court also found that the Form stated that “if a policy is issued, this application and any supplements will be attached to and made a part of the policy” and that “the information submitted herein becomes a part of the Applicant's Lawyers Professional Liability Insurance Application or Renewal Application and is subject to the same representations and conditions.” The court granted defendant summary judgment.

## II. JUDGMENT RULE

*General Nutrition Corp. v. Gardere Wynne Sewell, LLP*, 2008 U.S. Dist. LEXIS 72266 (W.D. Pa. Sept. 23, 2008)

Plaintiff sued defendant for providing improper legal advice. Defendant moved to dismiss, claiming, *inter alia*, that the action is barred by the “judgment rule,” which provides that lawyers are not required to be infallible in their predictions of how a court will decide a matter. The court denied the motion, and defendant moved to reconsider, which the court also denied, ruling that in order to prevail on the “judgment rule,” defendant must prove that it enabled plaintiff to make an informed judgment based on defendant having conducted sufficient research, properly scrutinized the contract in question, and was familiar with the applicable legal principles, including, in this case, whether the contract involved a sale of goods and/or services. The complaint alleged the breach of this standard by assigning labor and employment attorneys to a contract case and by conducting inadequate factual and legal research. The court also rejected defendant’s claim that the complaint fails to plead causation because plaintiff settled the underlying lawsuit after it hired new counsel, and that the settlement renders the harm too speculative and amounts to second-guessing of counsel. The court reasoned that malpractice actions are not barred (1) if the attorney sued did not settle the case; (2) if the malpractice plaintiff was forced to settle because of the attorney's negligence; or (3) if the malpractice plaintiff does not try to question, retrospectively, the amount of the settlement the attorney negotiated. It also reasoned that a claim is actionable where the attorney's negligence deprives his client of an opportunity to settle a case on terms far more favorable than those later available in the circumstances in which the client was placed by the attorney's conduct, which is what plaintiff claimed.

*Doumit v. McGlamery*, 2008 Cal. App. Unpub. LEXIS 8983  
(Ct. App. Oct. 23, 2008)

Plaintiff won a state employee whistle blower verdict, but the trial judge granted judgment notwithstanding the verdict and a partial new trial because of insufficient evidence, which was affirmed on the alternative ground, *inter alia*, that plaintiff failed to exhaust administrative remedies before the State Personnel Board (SPB). Plaintiff sued defendant for failing to advise him of the remedies. Defendant filed a demurrer on various grounds, and the trial judge ruled that whether a state employee had to tender whistle blower claims to the SPB was unsettled law, and therefore, defendants could not be liable under the Judgmental Immunity Rule, which immunizes attorneys from liability resulting when he/she proves 1) an honest error of an informed judgment concerning a doubtful, debatable or unsettled point of law 2) which requires a showing of reasonable research to determine the relevant legal principles in order to make an informed decision based upon an intelligent assessment of the issue. Plaintiff appealed, and the court reversed, ruling, *inter alia*, that while the law in question was unsettled, defendant provided no evidence of his research and, therefore, could not prove that his judgment was informed.

*Messenger v. Heos*, 2008 Mich. App. LEXIS 2428 (Ct. App. Dec. 9, 2008)

Plaintiffs hired a previous law firm to bring a complaint which sounded in medical malpractice and a claim for wrongful resuscitation. Plaintiffs then hired the defendant law firm. The underlying case went to a jury trial, and near the end of the jury trial, defendants abandoned the wrongful resuscitation claim. The verdict was for the underlying defendants. Plaintiffs brought a malpractice action against defendants, which moved for summary judgment based on, *inter alia*, the attorney judgment rule. The trial court granted summary judgment, and plaintiff appealed. Plaintiff argued that defendants advanced a theory of wrongful resuscitation consistently throughout the litigation and trial, but defendants unexpectedly withdrew it just before the end of trial. Plaintiffs also alleged that defendants failed to consult with plaintiffs before taking such a drastic step and wrongfully compromised their case without specific authority. Defendants argued that it was plaintiffs' prior attorney who pled wrongful resuscitation, and they believed it to be neither legally nor factually viable and a possible impediment for the remaining causes of action before the jury. The appellate court ruled that where an attorney acts in good faith regarding litigation strategy and trial tactic and in an honest belief that his/her acts are well founded in law and are in the best interest of the client, the attorney is not answerable for errors in professional judgment. The court held that defendants' choice to abandon the wrongful resuscitation claim was a strategic decision and an exercise of professional judgment in good faith 1) to excise an issue from the jury's consideration that defendants felt was both legally and factually implausible and in fact a

detriment to the case as a whole, and 2) to refocus the case on those claims on which defendants believed they could prevail. Therefore, the alleged acts of malpractice fall within the attorney judgment rule, and the court affirmed the trial court's summary judgment.

### III. JURISDICTION

*Singh v. Duane Morris LLP*, 538 F.3d 334 (5th Cir. 2008)

Plaintiff sued defendant in state court for malpractice allegedly committed during their representation of plaintiff in a federal trademark lawsuit and claimed that defendant failed at trial to introduce available evidence that would have successfully established secondary meaning. Defendant removed to federal court, claiming that the malpractice case depended on resolving questions of federal trademark law. Plaintiff filed a motion for remand, which the District Court denied, holding that it had subject matter jurisdiction under 23 U.S.C. § 1331 and 1338(a) (which grants federal courts subject matter jurisdiction over trademark actions) and the All Writs Act, 28 U.S.C. § 1651. The court granted in part defendant's motion for summary judgment and dismissed the malpractice claims, holding that collateral estoppel bars them, and the claims are precluded by plaintiff's failure to file a Fed. R. Civ. P. 60(b) motion with additional secondary meaning evidence after the trademark trial had been concluded. The appellate court reasoned that legal malpractice has traditionally been the domain of state law, that federal law rarely interferes with the power of state authorities to regulate the practice of law, and that federal trademark law does not evince any substantial federal interest in regulating attorney malpractice. The court held that a state malpractice action does not arise under federal law merely because the alleged malpractice occurred in a prior federal trademark suit, and plaintiff's claim does not confer federal subject matter jurisdiction. It also held that the All Writs Act did not apply.

*Yessenow v. Neal, Gerber, Eisenberg, LLP*, 2008 U.S. Dist. LEXIS 79395 (N.D. Ind. Oct. 7, 2008)

Plaintiff sued defendant law firm for malpractice. Plaintiff invoked the federal court's diversity jurisdiction, and defendants moved to dismiss because the parties' engagement letter requires that all disputes be arbitrated in Chicago, Illinois. Plaintiff moved to stay the proceedings while it considered arbitration, to which defendant objected. The court found that because plaintiff was not refusing to arbitrate his claims against defendant, an order compelling arbitration may not be necessary. However, the Court for the Northern District of Indiana ruled that it has no power to

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order arbitration in Chicago which is outside its jurisdiction. It held that the issue should be decided by a court with the authority to compel arbitration in Chicago, and it dismissed the action.

*LaBelle v. McGonagle*, 2008 U.S. Dist. LEXIS 63117  
(D. Mass. Aug. 15, 2008)

Plaintiffs sued defendant for legal malpractice in state court, and defendant removed the action to U.S. District Court because it would necessarily depend on patent law issues. Plaintiffs moved to remand because their allegations arose under state law. Federal court jurisdiction over patent law issues is provided by 28 U.S.C. § 138(a) and extends only to those cases in which the complaint establishes either that federal patent law created the cause of action or that the plaintiff's right to relief necessarily depended on resolution of a substantial question of federal patent law, such that patent law was a necessary element of one of the claims. Defendant argued that to prove that they suffered a compensable loss for which defendant's negligence was the proximate cause, plaintiffs must demonstrate that but for his negligence they would have received a valid patent with consequent economic benefit. To do so, the plaintiffs would need to establish the patentability of their claimed invention. The court agreed, holding that federal subject matter jurisdiction exists because the complaint necessarily depends on the resolution of a substantial question of federal patent law.

*Hertz v. Hillyer*, 2008 U.S. Dist. LEXIS 73106 (E.D. Mich. Sept. 19, 2008)

Plaintiff's Federal Tort Claims Act (FTCA) action was dismissed because it was filed after the statute of limitations expired. Plaintiff sued defendant for malpractice in federal court, and defendant moved for dismissal for lack of subject matter jurisdiction. The court held that although the FTCA action is a factual allegation in plaintiff's action, and although FTCA actions are brought in federal court, the FTCA claim is not the legal claim being made in the legal malpractice action. Since there were no federal questions and because the parties lacked diversity for the purposes of subject matter jurisdiction, the court did not have subject matter jurisdiction.

*Adam v. Hensley*, 2008 U.S. Dist. LEXIS 40717 (D.N.H. 2008)

A New Hampshire plaintiff sued his Massachusetts attorney regarding his legal representation of plaintiff in Hawaii litigation. The defendant moved to dismiss, claiming lack of federal court jurisdiction and venue. Whenever plaintiff met with defendant away from Hawaii, it always oc-

curred in Massachusetts and not in New Hampshire. Plaintiff cited two letters from defendant to plaintiff as specific instances of contact between defendant and New Hampshire; and that defendant had been admitted to the New Hampshire bar *pro hac vice* in one unrelated matter in 1995. None of these contacts related to plaintiff's claim that defendant committed malpractice. The malpractice, if any, occurred in Hawaii, and possibly Massachusetts. Defendant's conduct in New Hampshire did not reflect a voluntary decision to do business in the state, but simply that defendant had to communicate with a client who lived in New Hampshire. The Court did not exercise jurisdiction in the case. Regarding venue, the underlying action was litigated in Hawaii, during which the alleged legal malpractice occurred. Thus, venue in New Hampshire was not properly grounded on 28 U.S.C. § 1391(a)(1-3), which would call for venue in the District of Hawaii or the District of Massachusetts.

#### IV. RETAINER AGREEMENT

*Ginter v. Belcher*, 536 F.3d 439 (5th Cir. 2008)

Plaintiffs hired defendant to assist them in an adoption. The retainer agreement contained a choice of law clause (Louisiana law) and a choice of forum clause (Louisiana state court). Plaintiffs later sued defendant in federal court which held the choice of forum clause unenforceable because defendant had a professional obligation to advise plaintiffs that they should seek independent counsel regarding the clause, and, therefore, the clause was the result of overreaching. The 5th Circuit reversed, holding that plaintiffs had no reason to believe that defendant was using its professional judgment to zealously protect plaintiffs' interests in the very agreement that memorialized their relationship. Plaintiffs also argued that the clause was against public policy because it forced plaintiffs to litigate in a forum favorable to defendant. The court held that such a provision is not a limitation on malpractice liability unless the selected forum has rules expressly limiting liability or if litigating in that forum would be so unfair as to be a practical limitation on liability, which was not the case.

*Lok Prakahasan, Ltd. v. Berman*, 2008 U.S. Dist. LEXIS 101756  
(S.D.N.Y. Dec. 12, 2008)

Plaintiff sued defendants for malpractice for failing to offer an exhibit at trial. Defendants represented themselves *pro se*, filed a counterclaim for unpaid attorney fees, and moved for summary judgment on the complaint and the counterclaim, which the court granted. Defendants then sought attorney fees for the malpractice action based on the retainer agreement which stated: "If it is necessary to institute litigation to collect our fee or

preserve any lien securing the payment of our fee, you will be responsible for all costs and legal fees associated with such actions.” The court denied attorney fees for defending the malpractice action as the retainer agreement language did not include it.

*Deblasis v. Cohen & Lord*, 2008 Cal. App. Unpub. LEXIS 4166  
(Ct. App. May 21, 2008)

Plaintiffs signed the defendant’s retainer agreement regarding his representation of plaintiffs in a lawsuit in which plaintiffs were sued by Mr. Estess. Thereafter, defendant represented plaintiffs in a second lawsuit they brought against the attorney (Hann) who previously represented them in the Estess action. No retainer agreement was signed by the plaintiffs for the legal malpractice lawsuit. Later, plaintiffs brought two lawsuits against defendant, claiming legal malpractice in both lawsuits. The defendant filed a motion for arbitration. Plaintiffs objected, arguing that (1) the arbitration provision was ambiguous; (2) the retainer agreement was a contract of adhesion; and (3) they were unaware of the ramifications of signing a retainer agreement that contained an arbitration clause. The trial court denied the motion. The appellate court ruled that the retainer agreement provided that “additional matters that we agree to undertake will be under the same terms as stated in this letter unless otherwise agreed in writing.” Therefore, the retainer agreement covered all matters in which defendant represented plaintiffs, including the Hahn action. The arbitration was not unconscionable as there was no evidence of an inequality of bargaining power. There also is no legal requirement that an attorney provide a potential client with notice that he or she has the power to negotiate terms of the retainer agreement.

*Default Proof Credit Card Sys. v. Friedlander*, 992 So.2d 442  
(Fla. Dist. Ct. App. 2008)

Plaintiffs entered into an agreement with defendant Florida attorney Niro and his Chicago law firm to represent them in the licensing and enforcement of certain patents. The agreement provided that it would be construed under Illinois law and that any malpractice claim would be resolved in Chicago through arbitration. Niro hired a Florida law firm to file an action in Florida to enforce the patents, which was dismissed because of defects in the description of the inventions. Plaintiffs sued defendants, which moved to stay and compel arbitration in Chicago, which was granted. Plaintiffs appealed, and the court affirmed, holding that Florida courts do not have the authority to require arbitration where the arbitration agreement requires the application of the law of another state, but with one exception. Federal law mandates that agreements and contracts which

involve interstate commerce and which contain arbitration provisions fall within the scope of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1, 2 (2008). The court held that since the agreement involves interstate commerce (patents), it is governed by the FAA. Its provision for arbitration is valid and enforceable by Florida courts.

*Neighbors v. Ellis*, 2008 Ohio 2110 (Ct. App. 2008)

While using a saw on two sawhorses, one sawhorse collapsed and plaintiff suffered an injury to his arm. He requested that defendant represent him. Although there was no engagement letter or contract, the attorney allegedly twice indicated that he would take care of the matter, the parties allegedly agreed on a contingency fee, the client brought the sawhorse to the attorney's office, and his medical bills were forwarded to the office. The attorney previously represented plaintiff, for which a signed contract was not always obtained. The attorney did not bring suit, and the client's *pro se* action was dismissed as untimely. The client filed suit against the attorney, and the trial court granted summary judgment to the attorney. On appeal, the court found that the lack of a writing did not preclude the relationship, based on their conduct. The court reversed the judgment of the trial court and remanded the matter for further proceedings.

#### V. SETTLEMENT OF THE UNDERLYING ACTION

*Hernandez v. Baugh*, 951 A.2d 1095 (N.J. App. Div. 2008)

Plaintiff sued his attorney, alleging that he failed to act to protect his interest in a business and, as a result, he received less in the settlement of an action regarding the business than he was otherwise entitled to. Defendant moved for summary judgment, contending that plaintiff, having acknowledged that the settlement was fair and reasonable, was precluded from suing defendant. The trial court agreed, and plaintiff appealed, claiming he was compelled to settle his action because the negligence of defendant deprived him of the proofs he needed to prevail in the action and he considered the settlement reasonable in light of the attorney created weaknesses in his case, and not that the settlement amount was a fair and reasonable estimate of his damages. The appellate court agreed, reversing and remanding for further proceedings.

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## VI. SHAREHOLDER LIABILITY

*Schnabel v. Sullivan*, 2008 U.S. Dist. LEXIS 79048  
(E.D.N.Y. Sept. 29, 2008)

Plaintiff sued his attorneys for personal losses regarding the purchase of a restaurant business. Defendants moved for partial summary judgment, claiming that plaintiff lacked standing to assert certain damages which, if suffered, were suffered only by plaintiff's corporate entity, not personally by plaintiff. While the court agreed that a sole or majority stockholder has no independent right of action to recover personally for wrongs to the corporation, the court found undisputed evidence of an independent duty owed by defendants personally to plaintiff as the individual who retained defendants. The Court also found sufficient evidence that plaintiff incurred personal damages as 1) he issued personal financial guarantees in connection with the restaurant, 2) he injected his own money to cover operating costs, 3) he had been sued directly in the restaurant seller's action, and 4) in settling the seller's lawsuit, he was forced to surrender his right to recover those funds in that action.

## VII. STATUTE OF LIMITATIONS

*Bleck v. Power*, 955 A.2d 712 (D.C. Cir. 2008)

Defendant attorney brought an action on plaintiff's behalf, which was dismissed on July 29, 2003 because he failed to bring it within the applicable time period. Plaintiff hired new counsel and filed a motion to reconsider, which the court treated as a Fed. R. Civ. P. 59(e) motion to alter or amend judgment, and denied it on January 7, 2004. Plaintiff then sued defendant on January 5, 2007, and the court granted defendant's motion to dismiss because the action was brought more than three years after the statute of limitations commenced. Plaintiff had argued that the statute of limitations commenced on January 7, 2004, when the court ruled on the motion to reconsider. The D.C. Circuit ruled that plaintiff was injured by defendant's negligence when he missed the applicable time period for bringing an action against the underlying defendant, and it specifically refused to follow an exhaustion of appeals analysis.

*McGuire v. Mosley Rogers Title Co.*, 997 So. 2d 23 (La. Ct. App. 2008)

Plaintiffs sued defendants on July 11, 2005 for failing to prepare a promissory note with personal guarantees regarding the financing of a real estate transaction. Defendants filed an "exception of prescription," claiming that under La. R.S. 9:5605, the prescriptive periods for actions for

legal malpractice was a year from when plaintiff discovered or should have discovered the alleged legal malpractice. The trial court agreed and the appellate court affirmed, finding that plaintiff failed to open and re-view the closing documents when they received them on March 20, 2003. Therefore, plaintiffs should have known of the alleged malpractice at that time, and their claim against the lawyer was prescribed by the time they filed suit over two years later.

*Cleary v. Wolfe*, 2008 WL 4927435 (Ohio App. 10th 2008)

In this case, defendant represented plaintiff in a personal injury action which was dismissed without prejudice on June 8, 2006 after several of plaintiff's witnesses, including his expert, were excluded from testifying. Plaintiff filed a malpractice action on September 7. The trial court granted defendant's motion for summary judgment, holding that the action was untimely under the one year statute of limitations, Ohio R.C. 2305.11(A). The appellate court affirmed, ruling that plaintiff's action accrued on June 8, 2008 when his action was dismissed and when he was aware of the facts that formed the basis of his malpractice action.

#### VIII. MISCELLANEOUS CASES

*Jacobs v. Tapscott*, 277 F. App'x 483 (5th Cir. 2008)

Plaintiffs brought an action against their attorney for negligence and breach of fiduciary duty, including improper use of powers of attorney and lying in their representation of the heirs in asbestos-related litigation. As a result of bankruptcy proceedings of asbestos manufacturers and other problems, the heirs collected only a portion of a settlement sum. In the legal malpractice action, the district court granted summary judgment as to all claims except two breach of fiduciary duty claims because 1) the heirs failed to demonstrate that they were damaged from defendants' negligence and misrepresentation and 2) the breach of contract claim was what the court called an "impermissibly fractured" malpractice claim. A jury rejected one fiduciary duty claim, and the district court rendered judgment for defendants on the second fiduciary duty claim. The appellate court affirmed, holding that the evidence was legally insufficient to prove that the attorney deliberately lied to the heirs.

*Urim Corp. v. Krongold*, 280 F. App'x 924 (11th Cir. 2009)

Plaintiff claimed that the defendant lawyers agreed to an unauthorized settlement of its claim in a civil action. The trial court granted summary judgment because collateral estoppel barred plaintiff's claim that defen-

dants lacked the "special authority" Georgia law requires lawyers to have in order to settle a client's claims. The 11<sup>th</sup> Circuit held that Georgia attorney rules require actual authority plus the power, given by the client, to settle on the basis of the specific terms, including the amount of money that the lawyers accepted. The court could not say that Georgia's "special authority" rule was decided below and vacated the judgment and remanded the case for further proceeding.

*Namoury v. Tibbetts*, 2008 U.S. Dist. LEXIS 85541 (D. Conn. 2008)

Defendant represented plaintiff in a real estate sale but did not search the title history to determine whether there were any liens, judgments or other encumbrances. Defendant claimed that plaintiff specifically told him not to do a title search. Plaintiff brought an action against defendant, alleging breach of contract, breach of fiduciary duty, and malpractice because of a defective title. Defendant moved for summary judgment, and the court held that while there was a contract between the parties, it granted summary judgment on the contract count because plaintiff failed to establish that it included the obligation to search the title history. The court also granted summary judgment on the breach of fiduciary count because such claims generally are limited to cases involving only fraud, self-dealing or conflict of interest, which were not present on the facts. The court denied summary judgment on the malpractice count because there were competing expert opinions regarding defendant's alleged negligence.

*Scott v. Koch*, 2008 U.S. Dist. LEXIS 58379 (E.D. Ky. 2008)

Plaintiff sued his attorney and law firm, who represented him in a personal injury lawsuit, for failing to disclose the attorney's wife's drug addiction and illegal drug arrest. By not disclosing the information, plaintiff claimed that he was placed in an untenable position during settlement negotiations and had to settle for an amount less than he would have, otherwise. Had the information been disclosed sooner, he theorizes that he might have proceeded differently and obtained a more favorable settlement. Defendants moved for summary judgment. The court granted summary judgment, ruling that plaintiff produced no evidence that he was strong-armed into a settlement because of the wife's arrest, and defendants did not deny plaintiff a forum of competent jurisdiction, foreclose any cause of action he might have had or otherwise limited his ability to present evidence at trial or in the course of negotiating a settlement.

*Suter v. Goedert*, 396 B.R. 535 (D. Nev. 2008)

Plaintiffs sued defendant for malpractice and then filed bankruptcy, listing the action as a bankruptcy asset but not claiming an exemption for it. Defendant offered to settle the claim with the bankruptcy trustee, who accepted and which the Bankruptcy Court approved. Plaintiff appealed to the U.S. District Court, claiming abuse of discretion and violation of public policy. The court held that the malpractice action was an asset of the bankruptcy, and it was not exempt because it was not “spawned” from an underlying personal injury action to the debtors. Therefore, the settlement was not against public policy, and the Bankruptcy Court did not abuse its discretion.

*Wood v. Jamison*, 83 Cal. Rptr. 3d 877 (Cal. App. 2d 2008)

Plaintiff, the successor trustee of a decedent's trust and executor of her estate, sued decedent's attorney for legal malpractice, breach of fiduciary duty, and financial abuse of an elder. In addition to representing decedent, defendant represented a client who falsely claimed to be decedent's nephew. The client obtained a loan secured by decedent's residence. Decedent could not afford the loan and defaulted on the first payment, after which foreclosure proceedings were initiated. After a bench trial, the court entered judgment against defendant. The appellate court affirmed, concluding that defendant failed to advise decedent of his conflict of interest, failed to advise decedent that the investment was not appropriate, failed to refer her to an independent investment advisor, and he obtained an undisclosed finder's fee from the transaction. The evidence was sufficient to support an award of costs and attorney fees for violation of the Elder Abuse Act (Welf. & Inst. Code, § 15600 et seq.).

*Whalen v. Degraff, Foy, Conway, Holt Harris & Mealey*,  
11 N.Y.3d 885 (N.Y. 2008)

Plaintiff retained defendant to recover an interest in a partnership and to secure a judgment against Gerzof, who then died in Florida. Defendant hired a Florida law firm (Bailey) to file any claims required with respect to the judgment against the estate, but a notice of claim was not filed within the required time period. Plaintiff sued defendant, claiming it was vicariously liable for Bailey's negligence and for failing to supervise it; and moved for summary judgment. Defendant also moved for summary judgment, claiming it was entitled to rely on Bailey to perform the requisite acts. The trial court denied both summary judgments. The appellate court held that while a firm is not ordinarily liable for the acts or omissions of a lawyer outside the firm who is working as co-counsel or in a

similar arrangement, as such a lawyer is usually an independent agent of the client (*Restatement [Third] of Law Governing Lawyers* § 58, Comment e), defendant solicited Bailey and obtained its assistance without plaintiff's knowledge. Although plaintiff later was advised that Bailey had been retained, she had no contact with Bailey and did not enter into a retainer agreement with it. Therefore, defendant assumed responsibility for filing the estate claim, Bailey became its subagent, and it had a duty to supervise Bailey's actions. Furthermore, while plaintiff ordinarily would be required to submit an expert affidavit setting forth the applicable standard of care in her favor, no affidavit was necessary because defendant knew of the deadline and took no steps to inquire as to the status of the filing. Thus, plaintiff's motion for summary judgment should have been granted, awarding her judgment as a matter of law.

*Rosenstrauss v. Jacobs & Jacobs*, 866 N.Y.S.2d 757 (N.Y. App. Div. 2008)

Plaintiff sued several attorneys for malpractice. Some of the defendant attorneys moved for summary judgment because, *inter alia*, they only referred plaintiff to the other defendant attorneys. The trial court denied summary judgment, and the court affirmed because, *inter alia*, the attorneys agreed to participate in any contingency fee in the underlying action.

*Marte v. Graber*, 867 N.Y.S.2d 71 (N.Y. App. Div. 2008)

Plaintiff sued his attorney who had died three months before the suit was filed. The trial court granted plaintiff's motion, pursuant to CPLR 305 and CPLR 1021, to amend the summons and substitute defendant, a voluntary administrator, for the attorney. Defendant appealed, and the court reversed, holding that since the summons and complaint were filed after the attorney died, the client had not properly commenced an action against the attorney. Thus, there was no party for whom substitution could be effected as process was never served on the attorney.

*York v. Landa*, 870 N.Y.S.2d 459 (N.Y. App. Div. 2008)

Plaintiff-client and defendant-attorney entered into an agreement wherein the client agreed to pay \$ 75,000 in full satisfaction of all outstanding legal fees regardless of the outcome of an underlying matrimonial action. Defendant was awarded a \$ 75,000 money judgment against plaintiff in the matrimonial action, and plaintiff then sued defendant for malpractice. Defendant moved to dismiss the action because of collateral estoppel, arguing that the prior action confirmed that he was entitled to an award of an attorney's fee, thereby necessarily deciding that he had not committed legal malpractice. The trial court denied the motion and the

Appellate Division affirmed, holding that because the issue of whether the attorney committed legal malpractice was not necessarily decided in the collection action, the client was not precluded from raising that issue.

*Williams v. Barrick*, 2008 Ohio 4592 (Ohio Ct. App. 2008)

Plaintiff lost custody of his child due to his failure to provide her with proper medical care for her disease. The trial court in the custody proceeding appointed a guardian *ad litem* (“GAL”). The child died while in the agency's custody. Plaintiff brought a malpractice action against the GAL based on alleged indifference towards the child's medical needs and the GAL's alleged delay of court proceedings in order to prevent the father from regaining custody. The trial court granted and the appellate court affirmed the GAL's motion to dismiss based on the immunity provided by Ohio R.C. 2744.03(A)(6) (a guardian *ad litem* enjoys absolute immunity from actions arising out of his or her services in that role).

*Wythe v. Harrell*, 197 P.3d 601 (Or. Ct. App. 2008)

Plaintiff and his then wife showed defendant-attorney a divorce property division agreement they prepared. Defendant said that the agreement was adequate and referred plaintiff to a paralegal, who did not work for defendant, to prepare a formal agreement. The paralegal prepared the agreement, and plaintiff discussed the agreement with defendant, who did not object to its terms. Because plaintiff's pension was not listed in the agreement, his ex-wife, as opposed to any future spouse, would continue to have an interest in the pension. Plaintiff brought a malpractice action against defendant, who moved for summary judgment because plaintiff testified at his deposition that he did not want an attorney to represent him in his divorce, and he only wanted the services of the paralegal. The trial court granted summary judgment, and the appellate court reversed, holding that there was competing evidence whether plaintiff sought defendant's advice as to whether he should even use a paralegal and whether he relied on that advice.

## IX. ATTORNEY-CLIENT RELATIONSHIP

*Bloom v. Hensel*, 872 N.Y.S.2d 776 (N.Y. App. Div. 2009)

Plaintiffs sued defendant for malpractice, and defendant moved for summary judgment, arguing that he did not have an attorney-client relationship with plaintiffs and had no fee-sharing agreement with a second attorney. The trial court granted summary judgment, and plaintiff appealed. The court reversed, ruling that defendant referred plaintiffs to the

second attorney, plaintiffs met with both attorneys, both attorneys' names were on some of the pleadings, and there was an oral agreement to split the fee.

#### X. CASE WITHIN A CASE

*Bonner v. Lyons, Pipes & Cook, P.C.*, 2009 Ala. LEXIS 64 (Ala. 2009)

Plaintiff, a franchisee, was sued by the franchisor because the franchise's renewal notice expired and the franchisee had not paid the franchisor the franchise fee. Plaintiff sued defendant, its attorney, for failing to timely send the renewal notice. During the trial, defendant moved for judgment as a matter of law, because even if defendant had timely sent the renewal notice, the franchise would not have been renewed because of plaintiff's failure to pay the franchise fee. The trial court granted judgment to defendant, and plaintiff appealed. The Alabama Supreme Court affirmed, holding that plaintiff's attempt to renew the franchise agreement without paying fifty percent of the initial franchise fee at the time of renewal, as specified in the renewal-option provision, would have been ineffective to form a binding renewal contract, even had the notice of renewal been timely. Therefore, plaintiff could not prevail on the malpractice claim for failing to timely provide notice of renewal.

#### XI. CONTINUOUS REPRESENTATION RULE

*Byron Chem. Co. v. Groman*, 877 N.Y.S.2d 457  
(N.Y. App. Div. 2009)

In 1993, defendant drafted a bonus provision in an employment agreement. On a date not identified in the decision, plaintiff was found liable for money owed to an employee for calculating the bonus provision based on net profits rather than gross profits. In 2006, plaintiff brought a malpractice action against defendants because the wording of the bonus provision was ambiguous as to whether the bonus was to be calculated on net or gross profits. The complaint also alleged that defendants continued to act as corporate counsel to the plaintiffs between 1993 and 2003. Defendants moved to dismiss because the complaint was not brought within three years of the alleged malpractice in 1993. The trial court granted the motion, and plaintiff appealed. The court ruled that a legal malpractice cause of action accrues on the date the malpractice was committed, not when it was discovered, citing *Shumsky v Eisenstein*, 96 NY2d 164, 166, 750 N.E.2d 67, 69, 726 N.Y.S.2d 365 367 (N.Y. App. 2001). The court also ruled that the statute of limitations was not tolled by the continuous representation doctrine because defendants' subsequent representation in

matters unrelated to the specific matter that gave rise to the alleged malpractice was insufficient to toll the statute of limitations.

*Vickery v. Damon Key Leong Kupchak Hastert, 2009 Haw. App. LEXIS 56 (Haw. App. 2009)*

Defendant entered into a retainer agreement whereby it agreed to assist plaintiff in an immigration matter. The agreement contained an arbitration provision. Plaintiff thereafter sued defendant for malpractice, and defendant moved to compel arbitration, which the trial court granted. Plaintiff appealed, arguing, *inter alia*, that the arbitration provision was ambiguous, which the court denied because the provision clearly stated that any dispute would result in "friendly" and "amicable" dispute resolution and, if such negotiations failed, the dispute would be submitted to mandatory binding arbitration. Plaintiff also argued that the provision was not the result of bilateral consideration as it did not state that defendants agreed to the provision, only plaintiff. The court rejected this argument, finding no case law for the proposition that an arbitration provision must involve its own separate, mutual exchange of consideration. Plaintiff also argued that the provision was an adhesion contract, which the court rejected because the provision was not (1) the result of coercive bargaining between parties of unequal bargaining strength; and (2) did not favor defendant. Plaintiff also argued that the provision violated Hawai'i Rules of Professional Conduct Rule 1.8(h), which states that "[a] lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice." The court rejected the argument, holding that the provision did not prospectively limit defendant's liability to plaintiff, but merely exchanged one forum for another in the case of a dispute that could not amicably be resolved.

*Taylor v. Babin, 13 So. 3d 633 (La.App. 1 Cir. 2009)*

The Louisiana appellate court addressed the "res nova" issue of the assignability of legal malpractice claims in Louisiana. Plaintiffs argued, *inter alia*, that legal malpractice claims are assignable under La. C.C. Art. 2642 which provides: "All rights may be assigned, with the exception of those pertaining to obligations that are strictly personal. The assignee is subrogated to the rights of the assignor against the debtor." Plaintiffs also asserted that actions for the recovery of tort damages are not strictly personal; and since the action lies in tort, as it is a claim for loss of money occasioned by legal malpractice, it is assignable. Defendants argued that legal malpractice claims should not be assignable due to public policy considerations. The court ruled that the mere threat of a malpractice claim being assigned would be detrimental to an attorney's duty of loyalty and

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confidentiality to his client, would promote collusion, and would increase a lawyer's reluctance to represent an underinsured or insolvent client. Therefore, the court held, *inter alia*, that legal malpractice claims are not assignable.

*Bloom v. Hensel*, 59 A.D.3d 1026 (N.Y. App. Div. 2009)

Plaintiffs sued defendant for malpractice, and defendant moved for summary judgment, arguing that he did not have an attorney-client relationship with plaintiffs and had no fee-sharing agreement with a second attorney. The trial court granted summary judgment, and plaintiff appealed. The court reversed, ruling that defendant referred plaintiffs to the second attorney, plaintiffs met with both attorneys, both attorneys' names were on some of the pleadings, and there was an oral agreement to split the fee.

*Hartford Ins. Co. of the Midwest v. Koepfel*, 629 F. Supp. 2d 1293  
(M.D. Fl. 2009)

Hartford issued a motor vehicle insurance policy to Davis, whose motor vehicle collided with Oliveri. Hartford offered its policy limits, which Oliveri declined. Hartford informed Davis that Oliveri's damages exceeded the policy limit, that he was exposed to potential liability for a judgment in excess of the policy limit, and advised Davis to retain personal legal counsel, which he did. Oliveri then issued a time sensitive demand letter to Hartford, offering to settle Oliveri's claim for the policy limit and a mutual general release. Hartford retained defendant to properly accept the demand letter, including drafting and delivering the release. Defendant allegedly negligently responded to the demand letter, resulting in Oliveri pursuing a lawsuit against Davis, which Hartford settled for an amount in excess of the policy limit. Hartford filed a malpractice action against defendant, who moved to dismiss because Hartford lacked standing to assert its claim as 1) there was no attorney-client relationship between Hartford and defendant and 2) an attorney's liability for negligence is limited to clients with whom the attorney shares privity of contract. The court concluded that Hartford retained defendant only to represent itself and not Davis, and it was in privity of contract with defendant. The court cited Rule 4-1.7(e) of the Rules Regulating the Florida Bar which states that "the same attorney may often ethically represent both the insured and the insurer," provided their interests are not adverse.

*Estate of Saul Schneider v. Finmann*, 60 A.D.3d 892 (N.Y. App. Div. 2009)

Decedent transferred ownership of a life insurance policy on his own life from a limited liability partnership, which he controlled, to himself. He allegedly acted on the advice of defendant. Decedent died, and the transfer of ownership of the policy allegedly resulted in increased estate tax liability. Decedent's estate sued defendant for malpractice. Defendant moved to dismiss, and the trial court and appellate court affirmed, holding that inasmuch as the estate was not in privity with defendant, and there is no allegation that one of the exceptions to the privity requirement was applicable, the estate could not maintain a malpractice action in its own right. Since decedent did not have a claim during his lifetime against defendant for malpractice, as the only alleged damage suffered from the alleged malpractice was the increase in estate tax liability, which could not have been incurred while decedent was alive, the estate could not maintain the action under EPTL 11-3.2(b).

*Brenner v. Miller*, 2009 U.S. Dist. LEXIS 45530 (S.D. Fl. 2009)

Defendants moved to dismiss plaintiff's breach of fiduciary duty and breach of contract claims as duplicative of the legal malpractice claim. Plaintiff responded that Florida law permits claims for breaches of fiduciary duty as distinct and independent from a claim for legal malpractice; and that a claim for breach of contract is not duplicative of a malpractice claim where the retainer agreement contains express promises which plaintiff alleges were breached. The court ruled that while there may be overlap between a claim for breach of fiduciary duty and a claim for legal malpractice, Florida law permits both claims when the plaintiff claims the attorneys neglected both their fiduciary duty to their client and their reasonable duty as attorneys. With respect to the breach of contract claim, the court ruled that while there is some overlap in the facts relevant to that claim and the legal malpractice claim, plaintiff was permitted to plead both claims under Florida law. Defendants also argued that the claim for breach of contract against an individual attorney should be dismissed because he signed the retainer agreement in his representative capacity. The court ruled that while there is no signature by the attorney and there is no explicit language binding him, the agreement stated that the attorney was specifically retained, and this weighed toward a finding that he be individually bound.

*Rice v. McCann*, 598 F. Supp. 2d 162 (Mass. 2009)

Alleging violations of 42 USC §§ 1981, 1983, 1985, and 1988, plaintiff sued his court appointed criminal defense attorney in his habeas corpus

relief petition for, *inter alia*, conflict of interest. The Petition alleged ineffective assistance of counsel by his original attorney. Plaintiff claimed that defendant was related to an employee of the Mass. Dept. of Correction whom plaintiff sued in another action; and was friends with plaintiff's original attorney. Defendant moved for summary judgment because the court lacked subject matter jurisdiction. The court granted the motion, holding that 42 USC § 1983 did not apply because public defenders do not act under color of state law in representing an indigent client. While the same rule does not apply to 42 USC § 1981 and 42 USC § 1985 actions, 42 USC § 1981 proscribes only intentional discrimination based on race, and 42 USC § 1985 prohibits conspiracies to obstruct judicial proceedings or to deprive any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, none of which was present on the facts. 42 USC § 1988 also did not apply, because it depends on defendant's liability under the other asserted civil rights claims.

*In re Smith*, 400 B.R. 370 (E.D. N.Y. 2009)

Plaintiffs, a former debtor, his wife, and his sister moved to reopen the debtor's Chapter 7 bankruptcy case for the purpose of pursuing a legal malpractice action against the Chapter 7 trustee and his bond holders. They claimed that the trustee committed malpractice, breach of fiduciary duty, and negligence. The only assets in the debtor's estate were the debtor's derivative claims against a corporation. Plaintiff contended that the trustee committed malpractice when he failed to pursue these claims. The court ruled, *inter alia*, that while the trustee had a fiduciary duty to the estate to liquidate assets, a bankruptcy trustee is immune from suit for personal liability for acts taken as a matter of business judgment in acting in accordance with statutory or other duty or pursuant to court order. Although a trustee is subject to personal liability for negligent violations of duties imposed upon him by law, a trustee is not liable in any manner for mistake of judgment where discretion is allowed. The court held that the trustee was within his discretion under the business judgment rule to not pursue the alleged derivative claims, and he was immune from suit for personal liability for acts taken as a matter of business judgment.

*Walker v. Dwoskin*, 2009 U.S. Dist. LEXIS 10720 (W.D. Va. 2009)

Defendant represented plaintiff in three Title VII 42 USCS § 2000e cases which were dismissed for failure to serve the proper defendant. Plaintiff brought a malpractice action against defendant in state court, and defendant removed the action to federal court, alleging federal question jurisdiction because the malpractice claim would involve adjudication of

the Title VII claim. The court held that adjudication of the malpractice claim did not necessarily require adjudication of the underlying Title VII claim. Therefore, there was no federal question on which the Court might base jurisdiction. Even if the action required adjudication of the Title VII claim, this was not sufficient to give rise to subject matter jurisdiction, as similar breach of contract or legal malpractice claims properly belong in state court, even where the underlying case involved claims arising under federal law. Defendant's reference to legal malpractice cases that were removed because of patent law issues was distinguished by the court, because federal district courts have exclusive jurisdiction over federal patent cases. 28 U.S.C. § 1338(a).

*Bixby v. Somerville*, 62 A.D.3d 1137 (N.Y. App. Div. 2009)

Plaintiffs represented defendant in child custody and support proceedings in Family Court and in a matrimonial action in Supreme Court. The Family Court awarded defendant and the mother a shared custody arrangement and, on appeal, the Court modified the award. Prior to final resolution of those matters, defendant reported that he was dissatisfied with plaintiffs' services and stopped paying their legal fees. Plaintiffs commenced an action seeking to collect unpaid counsel fees, and defendant raised three counterclaims sounding in malpractice. Defendant proceeded *pro se* in Family Court and was represented by new counsel in Supreme Court. Ultimately, sole custody of the child was awarded to the mother, and defendant was ordered to pay \$ 19,631.06 annually in child support. Plaintiff successfully moved for summary judgment on defendant's malpractice counterclaims, and defendant appealed. First, defendant claimed that plaintiffs breached their duties by assigning a certain attorney to represent him rather than another member of the firm. The court found that defendant signed a retainer agreement with plaintiffs that expressly stated that plaintiffs reserved the right to assign work to any member of the firm. Second, defendant challenged some strategic choices and cited alleged missteps by plaintiffs during the course of their representation. The court ruled that where allegations involve errors in the exercise of an attorney's professional judgment regarding strategy and the selection of appropriate evidence or argument, they are not actionable as malpractice. The court determined that plaintiffs' representation did not fall below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession. It was significant that, after defendant's second opportunity, with a new attorney, to prove his entitlement to sole custody, the court denied him that relief and also negated the joint custody determination. Third, defendant alleged plaintiff's improper advice with regard to his preparation of a financial disclosure affidavit, the veracity of which was later questioned by Family Court. The court held that even if plaintiff

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negligently approved the affidavit, the record contains no evidence to establish that defendant would have prevailed, but for the inaccurate affidavit, on the issues of child support and custody.