

American Bar Association
Spring 2015 National Legal Malpractice Conference

CASE LAW DEVELOPMENTS

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I. ATTORNEY-CLIENT PRIVILEGE

Alfieri v. Solomon, 329 P.3d 26

June 11, 2014; Court of Appeals of Oregon

FACTS: The defendant attorney was engaged to represent the plaintiff in an employment claim against the plaintiff's former employer. The case progressed to a mediation, but the case did not settle. Sixteen days after the mediation, and after further communications between the parties and between the defendant attorney and the plaintiff, the case was settled and a confidential settlement agreement was entered into between the parties. The plaintiff alleged that the underlying defendant did not comply with the terms of the settlement agreement by not paying the settlement amount timely, but the defendant lawyer advised the plaintiff that the settlement was nonetheless enforceable. The defendant lawyer moved to dismiss the complaint arguing that the communications regarding the settlement were inadmissible under Oregon statute.

PROCEDURAL POSTURE: Legal malpractice claim was dismissed by trial court for failure to state a cause of action. The plaintiff appealed the dismissal.

ISSUE No. 1: Are communications regarding the settlement agreement between the defendant lawyer and the plaintiff confidential?

HOLDING No. 1: Yes. The settlement agreement and the settlement amount are confidential and are not subject to disclosure. The court rejected the plaintiff's argument that the settlement agreement was unenforceable because the enforceability of the agreement was not at issue in this legal malpractice case.

ISSUE No. 2: Are the communications that occurred during the post-mediation conference period between the defendant lawyer and the plaintiff confidential?

HOLDING No. 2: Yes. Because the communications are between a party to the mediation they are confidential.

ISSUE No. 3: Are the communications between during the post-mediation conference period the mediator and the parties in the underlying case and their counsel confidential?

HOLDING No. 3: Yes. The statute covers communications during the course of or in connection with the mediation process and because those communications fit that definition, those communications are confidential.

ISSUE No. 4: Are the communications after the settlement agreement was signed confidential?

HOLDING No. 4: No. The mediation process ended when the settlement agreement was entered into by the parties.

Anten v. Superior Court, 2015 Cal. App. LEXIS 96

January 30, 2015; California Court of Appeal

(exception to privilege – joint client exception)

FACTS: Three clients jointly retained a law firm to represent them on a matter of common interest. Subsequently, only one of the three clients sued the firm for legal malpractice. The plaintiff client sought disclosure of communications between the firm and the other two clients. The firm objected based on attorney-client privilege, arguing that because the other two clients had not sued, the privilege had not been waived by those clients.

PROCEDURAL POSTURE: The plaintiff client appealed through a writ procedure after the trial court upheld the law firm's privilege objection to communications with joint clients who had not sued the firm.

ISSUE: Whether a legal malpractice suit by one joint client waives the attorney-client privilege between the law firm and all joint clients, even those who did not sue?

HOLDING: Yes. Although California Evidence Code section 958 only waives the privilege between the lawyer and the client filing suit, where the client suing is one of several joint clients who retained the firm on a matter of common interest, the privilege is waived between the firm and all joint clients because the communications between the firm and one joint client were not confidential to the others during the representation.

Chubb & Son v. Superior Court, 228 Cal. App. 4th 1094

August 4, 2014; California Court of Appeal

(disclosure to own attorney)

FACTS: Plaintiff, an attorney, sued her former law firm and an insurance company that retained the law firm to represent its insured for wrongful termination. In response to a request for documents related to the attorney's job performance, the insurance company withheld certain relevant documents from cases the attorney worked on, claiming that the attorney-client privilege prohibited the company from providing those documents to even its own attorneys.

PROCEDURAL POSTURE: The trial court ordered the insurance company to produce the privileged documents to its own attorneys to ascertain whether the documents were privileged and comply with discovery orders. The court of appeal affirmed.

ISSUE: Whether a party can disclose confidential attorney-client communications to their own attorney for purposes of preparing the case and litigating privilege issues.

HOLDING: Yes. The prohibition against disclosure of attorney-client communications does not prohibit an attorney from disclosing client communications to the attorney's own lawyer to the extent necessary for preparing the case or litigating privilege issues without violating the rule of confidentiality.

Crimson Trace Corp. v. Davis Wright Tremaine LLP, 326 P.3d 1181

November 4, 2013; Oregon Supreme Court

(In-house counsel)

FACTS: A corporation sued its former patent and litigation attorneys for legal malpractice and breach of contract arising from alleged negligent advice and conflicts of interest the law firm had in representing the corporation in a suit that involved alleged infringement of a patent the firm improperly obtained.

PROCEDURAL POSTURE: The client corporation sought to compel production of communications between the defendant attorneys and their firm's in-house counsel regarding potential or actual conflicts of interest, which the firm claimed were attorney-client privileged.

ISSUE: Whether a law firm's internal communications with in-house counsel are protected by the attorney-client privilege?

HOLDING: Yes. Communications between a law firm's attorneys and the firm's in-house counsel are privileged from discovery in a malpractice action even if they concern the firm's potential liability to a current client. In-house counsel served as the firm's lawyer, and the defendant attorneys were seeking legal advice regarding the conflicts issue. Oregon, which has a statutory privilege scheme setting out five specific exceptions to attorney-client privilege, does not recognize a fiduciary exception to attorney-client privilege.

Edwards Wildman Palmer v. Superior Court, 231 Cal. App. 4th 1214

November 25, 2014; California Court of Appeal

(in-house counsel)

FACTS: Client in legal malpractice action moved to compel attorney defendant to produce and testify about communications with other lawyers in the firm about client's case. The law firm objected based on attorney-client privilege and refused to disclose communications between the attorney defendant and another partner in the case as well as communications with in house counsel.

PROCEDURAL POSTURE: After the trial court ordered the firm to produce the communications, the Court of Appeal reversed in part, and granted in part.

ISSUE: Whether communications between an attorney and other lawyers in the attorney's firm in which the attorney seeks advice about alleged malpractice are privileged.

HOLDING: Yes and no. Although California does not recognize a fiduciary exception to attorney-client privilege, and communications with designated in-house counsel will be privileged if they involve legal advice and the in-house counsel did not perform work on the client's case, communications with other partners in the firm or an in-house counsel who worked on the case will not be privileged.

Exxon Mobil Corp. v. Hill, 751 F.3d 379 (5th Cir. 2014)

May 6, 2014; Fifth Circuit Court of Appeals

(in-house counsel)

FACTS: After Exxon Mobil inadvertently produced several privileged communications in a toxic tort case and demanded their return, the documents were returned without objection. However, the plaintiff's attorney in that case kept a copy of an internal memorandum drafted by Exxon Mobil's in-house counsel and shared it with other plaintiff's attorneys, including the plaintiff's attorney in the *Hill* case. Exxon Mobil intervened in *Hill* to assert the attorney-client privilege over the memorandum and have it stricken from the record.

PROCEDURAL POSTURE: The federal district court denied Exxon Mobil's motion to strike the memorandum from the record.

ISSUE: Whether an internal memorandum drafted by in house counsel regarding what data Exxon should disclose in response to a request from an adversary during contract negotiations constitutes legal advice that is protected by the attorney-client privilege.

HOLDING: Yes. Under Louisiana law, the attorney-client privilege protects an internal memorandum written by a corporation's in-house counsel about what data the company should disclose during contract negotiations.

Libertarian Party of Ohio v. Husted, Case No. 2:13-cv-953., 2014 BL 223949

August 12, 2014; Southern District of Ohio

(identity of bill payer)

FACTS: Where petitioner in suit protesting the nominating petitions of a candidate for governor was not paying his own fees to litigate the action, the opposing party sought discovery identifying the name of the fee payer.

PROCEDURAL POSTURE: The opposing party sought discovery of the identity of the party paying the petitioner's legal fees, and moved to compel a response after the petitioner claimed not to know the identity of the payer.

ISSUE: Must a law firm disclose the identity of its clients, including the identity of the client paying fees on behalf of another client?

HOLDING: Yes. A client whose legal bills are being footed by one of his counsel's other clients is entitled to have his attorneys tell him the identity of that other client and give his informed consent to the arrangement—and that client must then disclose that information to his litigation opponents, because the identity of a client is not privileged.

Stock v. Schnader Harrison Segal & Lewis, 2014 NY Slip Op 33171

December 5, 2014; Supreme Court, New York County

(in-house counsel)

FACTS: Client in legal malpractice suit sought disclosure of communications between attorneys in the law firm and other attorneys in the firm which were withheld based on claims of attorney-client privilege.

PROCEDURAL POSTURE: Plaintiff moved to compel production of written communications between attorneys at the defendant firm. The trial court granted the motion to compel.

ISSUE: Whether internal communications between the firm's attorneys regarding potential conflicts of interest were privileged.

HOLDING: No. The communications were made in the course of representing the client and were not privileged under the current client exception. Although one of the attorneys testified that she was not seeking legal advice when she communicated with other members of her firm, the court noted that even communications with in-house counsel seeking legal advice would not be privileged in New York, because New York recognized a fiduciary exception to attorney-client privilege.

Zook v. Pesce, 438 Md. 232 (2014)

March 11, 2014; Maryland Court of Appeals

(testamentary exception)

FACTS: Sibling challenged a 2008 living trust executed by her elderly father weeks before her death and sought discovery relating to a 2007 instrument. The attorney for the decedent refused to produce the 2007 trust, claiming it was an attorney-client communication. The trial court sustained the privilege objection and did not allow discovery or admission of evidence on the 2007 instrument.

PROCEDURAL POSTURE: The petitioner appealed the judgment after the trial court found that the decedent was of sound mind when the 2008 living trust was executed.

ISSUE: Whether the testamentary exception to the attorney-client privilege required disclosure of the 2007 living trust.

HOLDING: Yes. The testamentary exception to the attorney-client privilege has “existed in Maryland for close to a century, despite never been formally named. Thus, the attorney-client privilege between a testator and the testator’s attorney on matters relating to the preparation of testamentary wills and trusts does not apply after the testator’s death in a dispute between heirs who claim under the deceased client. However, here, the error was harmless because the 2008 instrument was held to be valid and there was no evidence of undue influence surrounding the creation of the 2008 living trust, such that the 2007 instrument was irrelevant.

II. ATTORNEY JUDGMENT RULE

Clark County Fire District No. 5 v. Bullivant Houser Bailey PC, 324 P.3d 743

April 24, 2014; Court of Appeals of Washington

FACTS: The underlying plaintiffs alleged that a supervisor had committed gender discrimination and sexual harassment. The plaintiff's insurer engaged the defendant law firm to represent the plaintiff and the supervisor. A mediation proceeded at which the plaintiff demanded \$8.5 million and the insurer, based upon the defendant law firm's evaluation that the case was worth about \$370,000 had only \$400,000 in authority and did not make an offer. The underlying matter proceeded to trial and judgment was entered in favor of the plaintiffs for nearly \$4 million. The plaintiff and its insurer filed an action against the defendant law firm for negligence in evaluating the case for settlement purposes, improper handling of certain pre-trial matters, and failing to object to inappropriate comments made by the underlying plaintiff during closing arguments.

PROCEDURAL POSTURE: The trial court dismissed the insurer's claim based upon lack of standing to sue and the granted summary judgment on the plaintiffs' claims on the basis that the attorney judgment rule insulated the defendant law firm from liability.

ISSUE No. 1: Did the plaintiff's insurer have standing to sue the defendant law firm?

HOLDING No. 1: No. The insurer was not the defendant law firm's client, the insured was. Despite the existence of the tripartite relationship, the relationship was not for the benefit of the insurer.

ISSUE No. 2: Is the defendant law firm protected by the attorney judgment rule?

HOLDING No. 2: Only partially. While declining to apply the doctrine of judgmental immunity, the court did adopt the attorney judgment rule. The Court held that application of the attorney judgment rule is a matter of law because it attempts to determine whether the attorney breached the standard of care, which is generally a question of fact. The Court held that there are two ways for a plaintiff to avoid summary judgment based upon the attorney judgment rule: 1) the attorney's judgment was not within the reasonable range of choices or 2) the attorney breached the standard of care in making the judgment decision. The Court held that there was a question of fact that precluded summary judgment being entered on two of the claims. The Court held that based upon the expert opinions submitted by the plaintiff there were questions of fact regarding the adequacy of the pre-mediation evaluation and handling of the pre-trial matters by the defendant law firm. However, the Court held that summary judgment was properly entered with respect to the alleged failure of the defendant law firm to object to statement by counsel for the underlying plaintiffs, but found that there was a question of fact as to whether the defendant law firm had been negligent in failing to preserve the issue for appeal.

Burds v. Hipes, 763 S.E.2d 887

September 23, 2014; Court of Appeals of Georgia

FACTS: The plaintiff engaged the defendant attorney to represent him in a dispute regarding whether the plaintiff's former employer had properly classified him as an independent contractor instead of an employee. The plaintiff alleged that the defendant attorney had committed fraud in not informing him that there was not law to support the defendant attorney's contention that the case was worth \$448,725.

PROCEDURAL POSTURE: Summary judgment granted in favor of the defendant attorney and plaintiff appeals.

ISSUE No. 1: Did the defendant attorney commit fraud in advising the plaintiff of the value of the case without having sufficient legal support for the evaluation.

HOLDING No. 1: No. The defendant attorney did not commit fraud because her statements were not statements of fact, but rather couched in terms of what "may be able" to be recovered, that they "probably could" require the employer to do things, that they "might be able" to obtain other damages, and the like.

ISSUE No. 2: Did the defendant attorney breach her fiduciary duty by not informing the plaintiff that there was little chance of settling the case because there was no legal support for the claim?

HOLDING No. 2: No. The defendant attorney informed the plaintiff that the case was a difficult and one that "many, maybe most lawyers" would not take. This did not establish that the defendant attorney breached her fiduciary duty to the plaintiff.

III. DAMAGES/FEEES

Albunio v. City of New York, 23 N.Y.3d 65 [2014 N.Y. LEXIS 663]

April 3 2014; Court of Appeals of New York

FACTS: Plaintiffs, former NYPD, retained non-party respondent Dornan to represent them in a lawsuit against the City of New York and the NYPD, alleging violations of the NYC Human Rights Law (NYCHRL). Plaintiffs and their attorney entered into three separate retainer agreements, with provisions for Dornan's contingency fees. Under the NYCHRL, a court may award reasonable counsel fees to the prevailing party. A jury awarded plaintiffs \$986,000 in damages; while appeal was pending, the Supreme Court awarded Dornan \$296,000 in statutory compensation payable by defendants, which was upheld on appeal. The Supreme Court later awarded Dornan \$234,000 in fees for her appellate work.

PROCEDURAL POSTURE: Dornan filed for declaratory judgment after a dispute with her clients; the Supreme Court granted her motion, and the Appellate Division affirmed. The Court of appeals granted leave to plaintiffs to appeal.

ISSUE: Does a statutory award of counsel fees affect a contingency fee, when the retainer agreement is silent on the issue?

HOLDING: A majority of federal case law and other instructive decisions follows the rule that, absent an explicit agreement to the contrary, an attorney who prevails under a fee-shifting statute is entitled to "either the contingent fee calculated on the amount of the damage recovery exclusive of any court-awarded fees, or the amount of the court-awarded fee, whichever is greater."

Cincinnati Bar Ass'n v. Alsfelder, 6 N.E.3d 1162

March 13, 2014; Supreme Court of Ohio

(duty to provide accounting)

FACTS: Ohio State Bar charged attorney with failing to provide an accounting to a client who paid over \$150,000 in fees. However, it was undisputed that the client never requested an accounting. The state bar claimed that *it* had requested an accounting from the attorney, but he had failed to provide one.

PROCEDURAL POSTURE: The Ohio State Bar appealed a decision that dismissed its count for failing to provide an accounting, among other issues. The attorney appealed disciplinary action for other conduct.

ISSUE: Whether the state bar is a “third party” entitled to demand an accounting from an attorney under Ohio ethical rules.

HOLDING: A lawyer's duty to provide an accounting when holding funds in which a “third person” has an “interest” does not extend to the bar's request for financial records when investigating a grievance. The bar does not have interest in the funds, and thus is not a “third party” entitled to demand an accounting.

Goldfine v. Barack, Ferrazano, Kirschbaum & Perlman, 18 N.E. 3d 884 [2014 Ill. LEXIS 1299]

October 2, 2014; Illinois Supreme Court

FACTS: Plaintiffs owned stock in an investment company that filed for bankruptcy. Plaintiffs retained the defendant law firm to represent them in connection with their purchases of the company's stock. However, the defendant firm failed to preserve plaintiff's cause of action under the Illinois Securities Law by failing to serve the necessary rescission notice. Plaintiffs later filed a malpractice action against the firm to recover damages plaintiffs would have recovered had the firm properly preserved their claim.

PROCEDURAL POSTURE: After an eight week bench trial, the court found that the defendant firm breached its duties to plaintiffs by failing to preserve their Illinois Securities Law claim. The trial court calculated plaintiffs' damages in the following manner: plaintiffs' \$3.2m settlement would be deducted from what they paid for the stock, then 10% interest would be added. Ultimately, the trial court awarded plaintiffs a total of \$5.9m, which included attorneys fees and costs. Plaintiffs appealed, arguing that the court did not calculate their damages according to section 13(A) of the Illinois Securities Law. Defendants cross-appealed, arguing that section 13(A) is punitive and is thus barred by statute in legal malpractice actions, and that plaintiffs failed to prove their underlying Illinois Securities Law claim. The appellate court found that plaintiffs proved their underlying claim, but that the court failed to apply the correct damages formula, remanding to the trial court to recalculate damages and fees.

ISSUE: Are the civil remedies provided by the Illinois Securities law allowed in a legal malpractice action?

HOLDING: The Illinois Supreme Court upheld the award of damages, including interest, under section 13(A) of the Illinois Securities Law, noting that the law "simply establishes plaintiffs' actual damages resulting from defendants' legal malpractice." The court held as an issue of first impression that the civil remedies provided by the Illinois Securities Law are not punitive, but rather are provided to compensate plaintiffs for their actual monetary loss. "The plain language of section 13(A) indicates the rate is intended to be compensatory, not punitive." The court did, however, remand to the trial court to recalculate the award of interest.

Kuchinsky v. Va. State Bar ex rel. Third Dist. Comm., 756 S.E.2d 475
[2014 Va. LEXIS 66]

April 17, 2014; Supreme Court of Virginia

FACTS: Dillwyn Person hired Kuchinsky to represent him in connection with his claim for part of his father's estate. After filing a partition suit on behalf of Person against his siblings, Kuchinsky drafted a quitclaim deed, executed by his client, granting him a 25% interest in any right, title and interest Person may possess in the land subject to the partition suit filed against Person's siblings. The Special Commissioner appointed in the partition suit executed a deed conveying to Kuchinsky a 25% interest and to Person a 75% interest in two particular properties. After the deed was recorded, Kuchinsky filed two actions against Person, his client: a warrant in debt, which resulted in a \$10,000 judgment of principal and fees against Person; and a suit against Person to partition the jointly owned properties. Person then filed a complaint with the VSB, claiming Kuchinsky took advantage of him. The VSB ultimately issued a public reprimand against Kuchinsky for violating several rules of professional conduct.

PROCEDURAL POSTURE: The District Court found that Kuchinsky violated the Rules of Professional Conduct by his "continued ownership interest in [his client's] property and his pursuit of a partition of the property . . . and through his failure to formally terminate his representation prior to filing suit against [his client]." Kuchinsky appealed from a three judge panel's Order, holding that there was substantial evidence to support the District Court's decision.

ISSUE: Can a lawyer point to a client's lack of funds to pay for legal assistance as justification for the lawyer's improper acquisition of part of a client's expected inheritance?

HOLDING: The court found that Kuchinsky knowingly acquired an interest in his client's property for purposes of the Rules of Professional Conduct; that his client's inability to pay an attorney in advance does not provide an exception to the rule; and that Person was still Kuchinsky's client when Kuchinsky filed the partition suit against Person. The court upheld the three judge panel's order, affirming the finding that Kuchinsky violated the Rules of Professional Conduct.

Rowlett v. Fagan, 327 P. 3d 1, 2014 Ore. App. LEXIS 672

May 14, 2014, Court of Appeals of Oregon

FACTS: Plaintiff real estate developer formed an LLC with other investors to purchase and develop properties. The LLC faced some financial issues and had internal disagreements about membership, and eventually allowed other members to join, without plaintiff's consent or signature. Plaintiffs (Rowlett and his two companies) hired defendant law firm to represent him in a case against the LLC. The firm assigned defendant Fagan, an associate with three to four years experience, to the case. Fagan failed to promptly pursue the requisite arbitration and neglected to include key claims and parties when he did eventually file the arbitration statement. He did not obtain or review substantive documents, and eventually left the firm two years later. The firm's new attorney in charge of plaintiffs' case filed an amended arbitration statement sometime later; the circuit court, however, granted the LLC's motion to dismiss for want of prosecution. The firm then filed a second complaint against the LLC and its members, with some additional allegations. Plaintiffs eventually accepted a settlement offer from the LLC principals, which essentially covered the attorney fees paid to the defendant law firm. A couple of years later, plaintiffs filed suit against the instant defendants, alleging they had committed malpractice in the underlying litigation and had caused plaintiffs to settle for lower than they should have had the case been properly litigated.

PROCEDURAL POSTURE: A jury found that all defendants were negligent in their representation of plaintiffs, but that their negligence was not a "cause of damage to plaintiffs." Plaintiffs appealed.

ISSUE: Can a client recover fees paid to the client's lawyer in a professional negligence action?

HOLDING: The Oregon Court of Appeals held, in a matter of first impression, that a client cannot recover fees paid to the client's lawyer in a professional negligence action. In order to recover the fees paid to the defendant firm, plaintiffs would have to establish that they wouldn't have paid the fees but for defendants' negligence. This was not the case here, as plaintiffs would still have paid defendants their fees if they had performed in accordance with the standard of care.

IV. DUTIES TO THIRD PARTIES

Abrams v. McGuirewoods, 518 B.R. 491 [2014 U.S. Dist. LEXIS 101634]

July 25, 2014; United States District Court for the Northern District of Indiana

FACTS: Private Equity Firm bought Parent Company of Hospital. Hospital ultimately declared bankruptcy and bankruptcy trustee claimed that Private Equity Firm breached its fiduciary duty to subsidiary Hospital by looting its assets via a sale-leaseback of Hospital property. Bankruptcy trustee sued law firm that represented Parent in the buyout and “performed the legal work necessary to structure the deal between Parent and Private Equity Firm” for malpractice and aiding and abetting Parent’s breach of fiduciary duty.

PROCEDURAL POSTURE: District Court initially dismissed legal malpractice claim because there was no attorney-client relationship between law firm and Hospital/Bankruptcy Trustee. As an aside, in a separate case, another judge dismissed a claim by Hospital against its own attorneys for failing to give Hospital proper business advice, holding that Indiana recognizes no such actionable offense. Law firm moved to dismiss second amended complaint alleging aiding and abetting Parent Company’s breach of fiduciary duty.

ISSUE: Would Indiana recognize aiding and abetting breach of fiduciary duty as a cause of action and did Hospital/Bankruptcy Trustee adequately plead such a cause of action against law firm in this case?

HOLDING: Yes, Indiana would recognize a cause of action for aiding and abetting a breach of fiduciary duty but second amended complaint failed to allege such a cause of action here. First, the second amended complaint did not allege a breach of fiduciary duty against Parent Company and its directors, so there could be no aiding and abetting. Hospital was a wholly-owned subsidiary of Parent Company and “it is settled law that a parent corporation does not owe fiduciary duties to its wholly-owned subsidiaries. . . . Nor does a manager or director of a wholly-owned subsidiary owe a fiduciary duty to the subsidiary.” Indiana has expressly rejected the “zone of insolvency” or “trust fund” exception to this principle. Second, the complaint did not allege that law firm did anything more than provide routine legal services and therefore, did not allege the necessary active and direct “substantial assistance” necessary to sustain an aiding and abetting cause of action. “If the law were otherwise, it would be nearly impossible for an attorney, no matter how scrupulous, to avoid liability for a client’s misdeeds.”

Bookman v. Davidson, 136 So. 3d 1276 [2014 Fla. App. LEXIS 6472]

May 5, 2014; Court of Appeal of Florida, First District

FACTS: First Personal Representative of Estate hired attorney to assist with administration of the estate. First Personal Representative resigned and Second Personal Representative sued First Personal Representative and attorney for improperly disclaiming estate assets that could have been used to pay the estate's creditors. First Personal Representative then cross-claimed against attorney for legal malpractice.

PROCEDURAL POSTURE: Trial court granted attorney's motion for summary judgment holding that Second Personal Representative lacked privity with attorney and, therefore, had no standing to sue. Second Personal Representative appealed.

ISSUE: Does a successor personal representative of an estate have standing to bring a legal malpractice action against an attorney hired by predecessor personal representative?

HOLDING: Yes. Florida statute, §733.614, expressly states that a successor personal representative "has the same power and duty as the original personal representative to complete the administration of the estate." Since the first personal representative had the power to hire the attorney, the second personal representative inherited the same power and stepped into the shoes of the first representative. The court did not engage in any analysis of common law privity concepts.

December 1, 2014; United States District Court for the Western District of Missouri

FACTS: Bond underwriter's counsel stated in its opinion, which was included in offering documents, that "no facts have come to our attention which lead us to believe that the Official Statement contains" misrepresentations or omitted materials. In fact, a non-lawyer agent of the law firm knew that the Chinese facility discussed in the Official Statement was not operational and could not operate because it did not meet local zoning requirements. The Official Statement, however, said that the plant was operational. Plaintiff bond purchaser sued law firm for legal malpractice and negligent misrepresentation.

PROCEDURAL POSTURE: District court had granted law firm partial summary judgment dismissing claims for both legal malpractice and negligent misrepresentation. Plaintiff bond purchaser moved to vacate the partial summary judgment because the court misapplied Missouri law.

ISSUE: May a bond purchaser who was not a client of bond underwriter's counsel maintain an action for negligent misrepresentation against bond underwriter's counsel despite the lack of any attorney-client relationship?

HOLDING: Yes. The court affirmed that the non-client bond purchaser could not sue law firm for legal malpractice because the purchaser had no attorney-client relationship with the law firm and purchaser could not prove that law firm specifically intended its services to benefit the bond purchaser. The court rejected bond purchaser's argument that specific intent was unnecessary if law firm actually knew that statements in its offering documents were false or misleading. But the court held that Missouri would recognize a cause of action for negligent misrepresentation by the purchaser against the law firm. Following Restatement (Second) of Torts §552, which Missouri had previously followed in other circumstances, and the national trend, the court predicted that Missouri would recognize such a claim if the non-client purchaser can establish that the law firm supplied false information for the guidance of others in their business transaction and failed to exercise reasonable care or competence in obtaining or communicating the information. Under §552, liability is limited to loss suffered by a person for whose benefit and guidance the law firm intends to supply the information or knows that the recipient intends to supply the information and when such person justifiably relies on the information. Importantly, the court imputed the knowledge of the non-lawyer agent to the entire law firm even though there was no evidence that the lawyers representing the underwriter knew such information, and rejected law firm's argument that the duty of confidentiality prevented the sharing of information within the firm, because the information was publicly available.

Fabian v. Lindsay, 765 S.E.2d 132 [2014 S.C. LEXIS 470]

October 29, 2014; Supreme Court of South Carolina

FACTS: Plaintiff's uncle executed a trust agreement drafted by defendant attorney. The intent of the agreement was that after the uncle died and his wife died, if the uncle's brother was not still alive, plaintiff and her cousin would share one-half of the trust's assets. Defendant attorney, however, drafted the trust agreement so that uncle's brother only had to survive the uncle, not the uncle and his wife. Uncle's brother survived the uncle, but not his wife, so the trust agreement erroneously provided that uncle's brother's estate was entitled to the trust assets on wife's death. Instead of sharing the assets equally with her cousin, plaintiff would get nothing and the cousin would get the entire estate. Plaintiff therefore sued attorney for malpractice and breach of contract.

PROCEDURAL POSTURE: State trial court granted attorney's Rule 12(b)(6) motion, holding that a trust beneficiary was not in privity with the drafting attorney and, therefore had no cause of action. The plaintiff beneficiary then appealed to the Supreme Court of South Carolina.

ISSUE: May a beneficiary of a trust agreement or will sue the drafting attorney in tort or contract for negligently preparing the instrument?

HOLDING: Yes. The court balanced all of the factors and reasoned that allowing such an action was necessary to effect the intent of the attorney's client (the testator or trust donor) and that without the availability of such an action the attorney would effectively be immune from liability for his mistakes. The court therefore recognized a cause of action in both tort and contract by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. But plaintiff in such an action must be named or otherwise identified in the estate planning document.

June 19, 2014; Supreme Court of Illinois

FACTS: Deceased Husband and Wife had two children: a Disabled Son and his Sister. Upon Husband's death, wife hired Law Firm to bring wrongful death action against Husband's doctors and hospital. Wrongful death action was the only asset of the estate. Estate entered into first settlement of wrongful death action, providing that Disabled Son's share of settlement was to be paid to Wife. Then Law Firm associated a Second Law Firm to continue prosecuting remainder of wrongful death action. A second settlement ensued, and again Disabled Son's share of settlement proceeds were paid to Wife who placed them in a joint account for her and Disabled Son. Law Firm allegedly advised Wife that it was "too much trouble" to advise the probate court and go through the appropriate procedures regarding the settlement funds. Sister later discovered that Wife had used most of Disabled Son's settlement proceeds. At Sister's behest, public guardian for Disabled Son sued the two law firms for professional negligence (and also sued Wife for fraud and breach of fiduciary duty).

PROCEDURAL POSTURE: Trial court granted law firms' motions to dismiss because the complaint failed to sufficiently allege that law firms owed Disabled Son a duty. Intermediate appellate court reversed and held that attorneys hired by special administrator of estate to bring a wrongful death action for the benefit of the surviving beneficiaries owes a fiduciary duty to those beneficiaries.

ISSUE: Does an attorney who brings a wrongful death action owe a legal duty to the decedent's beneficiaries at the distribution of funds phase of the action?

HOLDING: Yes. Traditionally an attorney is liable only to his client, not third persons. But if a non-client is an intended third-party beneficiary of the attorney-client relationship, the attorney's duty to the client may extend to the non-client as well. "The key consideration is whether the attorney is acting at the direction of or on behalf of the client to benefit or influence a third party." Here, "the primary purpose and intent of an attorney-client relationship between the personal representative of the deceased and the attorney who brings a wrongful death action is to benefit the decedent's beneficiaries." The Illinois wrongful death statute expressly says that the amounts recovered shall be for the exclusive benefit of the surviving spouse and next of kin. Interestingly, law firms argued that they could not owe a duty to the beneficiaries because there could be conflicts of interest among the beneficiaries. The court did not decide this issue, holding that it was not ripe for decision because defendants argued only that there was a "potential for conflict" among the beneficiaries, not that there were actual conflicts. The court also said that "we do not view the beneficiaries in a wrongful death action the same as individual beneficiaries of a decedent's estate, where a potential conflict of interest may arise between the estate's interest and the interest of the beneficiaries of the estate." But the court did not effectively explain the difference.

Sabin v. Ackerman, 846 N.W.2d 835

March 28, 2014; Supreme Court of Iowa

FACTS: Parents leased land to one child and the lease contained an option to buy the land with the rent payments credited toward the purchase price. When parents died leaving their estate to three of their four children, the land was the largest estate asset. The child/beneficiary/lessee then exercised the option and the estate conveyed the land pursuant to the option. The other children/beneficiaries claimed the sale price was undervalued and challenged the option. One of the children, who was executor of the estate, sued the attorney representing the estate for malpractice claiming that the attorney had a duty to represent the executor's personal interests and should have advised her to challenge the option before the estate conveyed the property, or at least to seek advice of an independent attorney.

PROCEDURAL POSTURE: State trial court granted summary judgment for the attorney, holding that the attorney had no duty to represent the executor's personal interests. The intermediate appellate court reversed, holding that there was a factual issue as to whether the executor reasonably believed that the attorney was representing her personal interests. Attorney then appealed to the Iowa Supreme Court.

ISSUE: Does an attorney hired to assist with the administration of an estate have a duty to advise the executor about her personal interests or to advise that she should consult independent counsel to advise about her personal interests?

HOLDING: No. As a matter of law, an attorney hired to assist in the administration of an estate does not have a duty to advise the executor about her personal interests. The attorney's duty is to protect the interests of the estate and its beneficiaries insofar as necessary to effect proper administration of the estate. The court rejected the argument that under the facts here the attorney had an affirmative duty to indicate that he was not representing the executor's personal interests and held that there was no evidence putting the attorney on notice that the executor reasonably expected the attorney to represent her personal interests. The court relied on the Restatement Governing Lawyers for the proposition that an attorney may agree to limit a duty *that a lawyer would otherwise owe* the client, and held that an attorney hired to administer an estate would not otherwise owe a duty to represent the estate's executor's personal interests.

Scott v. Burgin, 97 A.3d 564 [2014 D.C. App. LEXIS 299]

August 14, 2104; District of Columbia Court of Appeals

FACTS: Before his death, separated, but not divorced, Decedent had relationship with Girlfriend. Girlfriend met with Lawyer to request that Lawyer help Decedent obtain a divorce. Lawyer agreed to do so if Decedent retained him. Decedent met with Lawyer a year later and signed retainer agreement for “Divorce Proceedings.” Lawyer initiated divorce proceedings, but divorce was not secured before Decedent’s death. Although Decedent had designated Girlfriend as his beneficiary for retirement benefits, Decedent’s employer denied those benefits to Girlfriend because Decedent’s marriage had not been terminated. Girlfriend sued Lawyer for legal malpractice alleging that he negligently handled divorce.

PROCEDURAL POSTURE: Lawyer admitted that he negligently handled the divorce, but argued that Girlfriend was not his client and, therefore, had no standing to sue for malpractice. After jury award in favor of Girlfriend, lawyer appealed.

ISSUE: Although admittedly not Lawyer’s client, did Girlfriend have standing to sue Lawyer for legal malpractice as a third-party beneficiary who was a direct and intended beneficiary of the contracted for legal services?

HOLDING: No. Here Lawyer was retained to provide legal services in connection with divorce proceedings. Court distinguishes divorce proceedings from estate planning services that may intend to effect a future transfer of estate assets to beneficiaries. A divorce does not “of its own force” redistribute the divorced client’s assets to someone such as Girlfriend or effect a change in Girlfriend’s legal status. The only parties directly concerned with a divorce proceeding are the married couple and their minor offspring. Court observes that if Girlfriend had standing, then any frustrated creditor might claim standing if a debtor would have been enriched by a bungled divorce, and that standing would frustrate the whole purpose of the privity rule.

V. E-DISCOVERY ISSUES

Kyko Global Inc. v. Prithvi Info. Solutions Ltd., No. 13-cv-01034-MJP [2014 BL 168580]

June 13, 2014; Western District of Washington

FACTS: Counsel for Kyko obtained one of the defendant's personal computers when it was sold at public auction. A forensic evaluation led to discovery of numerous relevant evidence, including attorney-client communications.

PROCEDURAL POSTURE: Kyko moved to have the privilege documents admitted. The defendant sought sanctions and moved to disqualify Kyko's attorney for wrongfully obtaining the computer and privileged documents.

ISSUE: Whether an opposing party can extract privileged information from a computer purchased at a public auction.

HOLDING: The plaintiffs' attorneys in a civil fraud action did not violate the rule on handling inadvertently produced documents when they purchased a seized computer that belonged to one of the defendants at public auction and had an expert extract privileged communications. However, the privilege was not waived by the sale of the computer at auction where the owner had attempted to preserve the privilege by reformatting the hard drive and installing a new operating system.

The State Bar of California Standing Committee on Professional Responsibility and Conduct
Form Opinion Interim No 11-004 (Open for public comment)

ISSUE: What are an attorney's ethical duties in the handling of discovery of electronically stored information?

SUMMARY: An attorney's duty of competence requires a basic understanding and facility of issues relating to electronically stored information. Even an experienced litigator may lack competence to handle certain E-discovery issues. An attorney can address this lack of competence in one of three ways: 1) by acquiring the knowledge and skills before performance is required; 2) association or consult with technical consultants or counsel who have the knowledge and skills required; or 3) decline the representation. Ethical duties related to e-discovery include the duty of confidentiality, the duty of candor and the duty not to suppress evidence.

VI. JOINT VENTURES

LK Operating, LLC v. The Collection Grp., LLC, 331 P.3d 1147 [2014 Wash. LEXIS 573]

July 31, 2014; Supreme Court of Washington

FACTS: In a convoluted factual scenario, the following was assumed in deciding a motion for summary judgment. Law Firm lawyers owned LKO. Fair and his limited liability company, TCG (debt collection business), were clients of Law Firm. Fair proposed that Law Firm enter into joint venture with TCG. Powers, a member of Law Firm, designed transaction so LKO would enter into a joint venture with TCG. LKO was to provide funding for the joint venture and to arrange for Law Firm to provide at no cost to joint venture legal services for debt collection work. When TCG wanted to change the arrangement and then started using another law firm for the work, LKO sued for breach of contract. TCG claimed the joint venture contract was void as matter of public policy because Law Firm (including Powers) violated Rule of Professional Conduct 1.7 and 1.8. Law Firm said the transaction was not with a client because there were two separate agreements: one between LKO and TCG; and another between LKO and Law Firm to provide the legal services to TCG.

PROCEDURAL POSTURE: As relevant to this summary, trial court decided that Law Firm violated Rule 1.7 because it simultaneously represented LKO and Fair without obtaining consent from either to the conflict of interests. Trial court further held that violation of Rule 1.7 rendered the joint venture transaction voidable and ordered rescission of the joint venture transaction. Trial court did not find it necessary to rule whether Rule 1.8 was violated. All parties appealed various aspects of trial court's ruling. Intermediate appellate court affirmed ruling that Rule 1.7 was violated, but rescission was not proper remedy for that violation. But intermediate appellate court held that Rule 1.8 was violated and that rescission *was* a proper remedy for violating Rule 1.8. Law Firm appealed. Law Firm argued that transaction between LKO and TCG was separate from transaction between LKO and Law Firm to provide legal services; and, therefore, Rule 1.8 could not apply to joint venture transaction between LKO and TCG, neither of which were lawyers.

ISSUE: In determining application of Rule 1.8, which governs transactions between lawyers and clients, may a court consider all relevant aspects of a transaction, or must the court limit its inquiry to specific contracts? Is a violation of Rule 1.8 a violation of public policy supporting rescission of the transaction?

HOLDING: The court must consider the entire transaction and this specific violation of Rule 1.8 violated public policy. Whether the facts establish a violation of a rule of professional conduct is a question of law subject to de novo review. Based on the evidence here, the business transaction to be considered for application of Rule 1.8 is the entire transaction initially proposed by Fair and ultimately accepted in substance by Law Firm – TCG would provide management and Law Firm would invest money and provide legal services at no cost for debt collection business. The fact that the transaction was effected through LKO, which then secured the services of Law Firm is a matter of form not substance. Rule 1.8, as it read at the time, speaks to “business transactions,” not merely “contracts.” Here there were multiple contracts, but they all

constituted one business transaction subject to Rule 1.8. Next, the court held that Law Firm “entered into” the business transaction, and, therefore, Rule 1.8 applied. “TCG became a Law Firm client contemporaneously with and by virtue of the business transaction contemplated by TCG’s joint venture proposal.” Even though Law Firm did not directly receive consideration from TCG (because the consideration flowed to LKO), Rule 1.8 nevertheless applied to a business transaction with a client *or* when a lawyer knowingly acquires in a transaction a pecuniary interest adverse to a client. Here, because Law Firm entered into the transaction with the client, it did not have to have a pecuniary interest adverse to the client in order for Rule 1.8 to apply. Also, the court held that Powers entered into the transaction *as a lawyer* because, in part, the transaction depended on Law Firm’s provision of services. As such, Powers did not satisfy his burden to establish that he and Law Firm complied with Rule 1.8 because they did not communicate in writing the precise terms of the transaction. The absence of a writing violated Rule 1.8 as a matter of law; it did not matter whether TCG was apathetic and allegedly did not care about the unwritten particulars. Finally, the court held that the rules of professional conduct can be sources of public policy relevant to enforceability of contracts, although they are not necessarily so in every case. “The underlying inquiry . . . is whether the contract itself is injurious to the public. While all RPC violations are in some way injurious to the public, not all RPC violations will render any related contract injurious to the public.” Because Rule 1.8 is directly concerned with business transactions between lawyers and clients, “there is no way to enter a contract in violation of [RPC 1.8] without implicating the formation or terms of the contract itself. Therefore, a violation of the rule presumptively, though not necessarily, results in a contract violative of the public policy underlying former RPC 1.8(a).” Here Law Firm did not satisfy its burden to prove that the contract at issue did not violate public policy because “(1) there was no undue influence; (2) he or she gave the client exactly the same information or advice as he would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger.”

Nelson Bros. Prof'l Real Estate, LLC v. Freeborn & Peters, LLP, 773 F.3d 853 [2014 U.S. App. LEXIS 23000]

December 5, 2014; United States Court of Appeals for the Seventh Circuit

FACTS: Nelsons and Alliance entered into joint venture to buy a shopping center. Joint venture hired Lawyer, who originally represented Alliance, to represent joint venture in the project. Nelsons accused Lawyer of malpractice by favoring Alliance over Nelson Brothers, by structuring deal so that only Nelsons would be liable for joint venture's debt, by failing to advise of mechanics' liens on the property, and the like. Lawyer admitted that he never discussed with Nelsons the potential conflicts of interest between the Nelsons and Alliance or suggested that Nelsons should get their own lawyer.

PROCEDURAL POSTURE: Lawyer appeals from jury verdict awarding damages to Nelsons.

ISSUE: Does law firm for joint venture owe duty to both members of joint venture, and where one member of the joint venture is an LLC, does law firm owe duty to individual members of LLC?

HOLDING: Yes, as to both questions. A law firm representing a joint venture represents both parties to the joint venture and owes duties to both. A reasonable jury could have found here that Lawyer violated its ethical obligations to Nelsons by not warning them of Lawyer's conflict of interests and by favoring Alliance over Nelsons. Also, Lawyer here created individual liabilities for the Nelsons (personal guarantees) and, therefore, this case differs from the usual case in which owners of an entity cannot sue individually for damage to the entity.

VII. MISCELLANEOUS

Forbes v. Hixson (In re Estate of St. Martin), 145 So. 3d 1124 [2014 BL 143681]

May 22, 2014; Supreme Court of Mississippi

FACTS: After plaintiff was injured in a gas station explosion, his wife entered into a contingency fee arrangement with Louis St. Martin, a Louisiana attorney. St. Martin was to receive one-third of any settlement or judgment obtained. He later hired a Mississippi attorney to serve as local counsel; St. Martin was listed as “of counsel” on pleadings and attended depositions in Mississippi. Over the course of the representation, St. Martin advanced the Forbes family about \$100,000 for expenses, vacations, a car, and personal expenses. The Forbes suit was settled for more than \$13 million. A year and a half later, Forbes sued St. Martin, ultimately amending the claim to include an allegation of professional negligence.

PROCEDURAL POSTURE: The chancery court granted summary judgment in favor of St. Martin. The Court of Appeals remanded, finding that the chancery court had erred in granting summary judgment on all claims because there were disputed questions of fact.

ISSUE: Can a violation of a rule of professional conduct void a contingency fee award?

HOLDING: In a sharply divided decision, the court held that, although St. Martin’s cash advances would have violated the Mississippi Rules of Professional Conduct if he had been subject to them, a violation of the rules “does not give rise to a cause of action nor should it create any presumption that a duty has been breached . . . a violation of [the rule] standing alone is not a basis for voiding a contingency-fee agreement.” St. Martin’s contingency fee award of \$4.6 million was therefore upheld.

Rockwood Select Asset Fund XI (6)-1, LLC v. Devine, Millimet & Branch, 750 F.3d 1178
[2014 BL 125985]

May 6, 2014; United States Court of Appeals for the Tenth Circuit

FACTS: Plaintiff Utah company was asked to loan money; it requested the borrower to obtain an opinion letter from plaintiff's New Hampshire law firm. Plaintiff realized that the letter contained falsehoods, and sued the defendant law firm in Utah federal court.

PROCEDURAL POSTURE: The district court dismissed the suit based on a lack of personal jurisdiction over the New Hampshire law firm. Plaintiff appeals.

ISSUE: Is an allegedly false opinion letter sent to Utah from a New Hampshire firm enough to support personal jurisdiction over the firm in Utah?

HOLDING: Under the Due Process Clause, the defendant law firm's contacts with Utah – the opinion letter addressed to a Utah address and a telephone call with the plaintiff's owner in Utah – were insufficient to confer personal jurisdiction over the firm. Also, the opinion letter was picked up in New Hampshire by an intermediary. Regardless, personal jurisdiction over the defendant firm in Utah cannot be based on the plaintiff's strong connection to Utah.

June 19, 2014; Court of Appeals of Wisconsin, District Four

FACTS: The defendant attorneys represented the plaintiff in the sale of a business. A dispute arose regarding ownership of the business personal property and resolution of an IRS lien. As the lease for the property was expiring, one of the defendant attorneys, Bryan Tillman, advised the plaintiff to remove the business personal property from the premises. The property removed included personal property of some of the employees of the business and property in which River Bank had a security interest. During the removal of the property the leased building was significantly damaged. The plaintiff was arrested and charged with felony theft felony criminal property damage and transfer of encumbered property. The plaintiff convicted of these crimes notwithstanding her defense that she relied on advice of counsel. The plaintiff filed an action against the defendant law firm and the jury returned a verdict finding Tillman 50% liable, the plaintiff 40% liable, and Fehr, for whom Tillman was working as attorney, 10% liable. The jury awarded the plaintiff \$210,000 for legal fees, in defending the criminal charges, lost earning capacity, and general damages. The plaintiff also requested damages for the restitution she was ordered to pay of \$50,000. However, the verdict was a general verdict so it was not possible to determine what amounts were for injury suffered by the plaintiff what amounts, if any, were for the restitution. The defendant attorneys filed a motion for JNOV, which was denied. The plaintiff filed a motion that Fehr should be liable for the negligence apportioned to Tillman and that motion was denied well.

PROCEDURAL POSTURE: The defendant attorneys appealed the judgment against them. The plaintiff appealed the ruling that Fehr should be liable for Tillman's negligence.

ISSUE No. 1: Whether the defendant attorneys, relying upon *Fleming v. Thresherman's Mutual Insurance Co.*, 131 Wis.2d 123 (1986) and public policy considerations, who were alleged to have been negligent are entitled to indemnity from the plaintiff whose conduct intentionally caused injury to a third party?

HOLDING No. 1: No. The defendant attorneys are not entitled to indemnity from the plaintiff because the amounts that the defendant attorneys were ordered to pay were not itemized so it could not be determined if recovery for the restitution to third parties was included in the award. Further, public policy considerations did not preclude a recovery by the plaintiff on the facts presented in this case.

ISSUE No. 2: Whether Fehr should be liable for Tillman's negligence?

HOLDING No. 2: Yes. The jury's finding that Tillman was an independent contractor was clearly erroneous and Fehr was Fehr's employee. Accordingly, Fehr was responsible for Tillman's liability.

Smith v. RKelley-Law, PC, 2014 U.S. Dist. LEXIS 165270

November 26, 2014; United States District Court for the District of Massachusetts

FACTS: Plaintiff sued former attorney and firm that had conducted fraudulent mortgage closings. At trial, the court allowed a directed verdict for both the firm and its sole stakeholder, reasoning that the wayward attorney had acted outside the scope of his authority as an employee of the firm.

PROCEDURAL POSTURE: The First Circuit Court of Appeals reinstated the firm as a defendant, and directed the district court to examine the firm's liability under respondeat superior.

ISSUE: Can a law firm be vicariously liable for the fraudulent acts of a former associate?

HOLDING: The district court ruled against the firm, finding that it had no defenses to the claim of vicarious liability for the wayward attorney's acts. An evidentiary hearing or jury trial on the issue of damages remained.

VIII. STATUTE OF LIMITATIONS

Brady, Vorwerck, Ryder, & Caspino v. New Albertson's, Inc., 333 P.3d 229

August 7, 2014; Supreme Court of Nevada

FACTS: New Albertson's and Farm Road Retail, LLC entered into an agreement concerning the maintenance of a common area that they shared. The agreement provided that Farm Road would indemnify New Albertson's from any breach of the agreement by Farm Road. A woman fell on stairs at the New Albertson's location. A lawsuit was filed by the woman and her husband. In response to that lawsuit, New Albertson denied the allegations and filed a cross claim against Farm Road for refusal to indemnify New Albertson. Requests for admission were served by the plaintiffs on New Albertson in the underlying litigation. Counsel for New Albertson, who is the defendant in this legal malpractice action, mishandled the requests to admit which led to a grant of summary judgment in favor of the tort plaintiff against New Albertson on the issue of liability. On January 5, 2008, New Albertson settled with plaintiffs in the underlying matter. New Albertson's cross claim against Farm Road was then disposed of the court by finding that the settlement with the tort plaintiff was the result of the discovery violation. New Albertson appealed that order, but in April 2009, New Albertson and Farm Road entered into a settlement. On May 27, 2009, the appellate court dismissed the appeal of the dismissal of the cross claim pursuant to the settlement. On January 22, 2010, over two years after the settlement with the tort plaintiffs, but less than two years after the settlement with Farm Road, New Albertson filed an action against the law firm that represented them in the action brought by the tort plaintiffs.

PROCEDURAL POSTURE: The defendant law firm filed a motion for summary judgment premised on the two year statute of limitations in NRS 11.207(1). The District Court the motion for summary judgment and certified a question to the Nevada Supreme Court.

ISSUE: Certified question from the United States District Court for the District of Nevada: "whether the statute of limitations in NRS 11.207, as revised by the Nevada Legislature in 1997, is tolled against a cause of action for attorney malpractice pending the outcome of the underlying lawsuit in which the malpractice allegedly occurred."

HOLDING: Yes. The two year statute of limitations in NRS 11.207, as revised by the Nevada Legislature in 1997, is tolled against a cause of action for attorney malpractice pending the outcome of the underlying lawsuit in which the malpractice allegedly occurred. In reaching this conclusion, the Court held that so long as the litigation in which the malpractice occurred continues, the damages on which the attorney malpractice action is based remain uncertain. The court rejected the contention by the defendant law firm that the 1997 amendment of the statute caused the statute of limitations begins to run when the plaintiff is aware of any amount of damage. The Court maintained the status of Nevada law that predated the 1997 amendment in applying the litigation malpractice tolling rule to the discovery rule that requires the completion of the underlying litigation, including appeal to finally calculate the damages as the trigger to the commencement of the statute of limitations for attorney malpractice claims.

Lee v. Hanley, 227 Cal. App. 4th 1295, and modification of opinion upon denial of rehearing, 2014 Cal. App. LEXIS 719

July 15, 2014 and August 8, 2014

Court of Appeal of California, Fourth Appellate District, Division Three
The case is currently subject to further appeal to the California Supreme Court.

FACTS: The plaintiff engaged the defendant attorney to represent her in a civil matter that settled on January 25, 2010. After the matter settled, the plaintiff sought return of the unearned attorneys' fees and unused expert witness fees that had been advanced to the defendant attorney. The plaintiff hired other counsel to obtain return of the fees and sent correspondence on December 6, 2010. On December 28, 2010, the defendant attorney returned a portion of the expert witness fees, but not the attorneys' fees. On December 21, 2011, the plaintiff filed a complaint against the defendant attorney seeking return of the fees. The defendant argued that a one year statute of limitations applied.

PROCEDURAL POSTURE: The trial court dismissed the plaintiff's claim based upon the statute of limitations and the plaintiff appealed.

ISSUE: Does the one year statute of limitations for the provision of professional services apply to the failure of an attorney to return unearned attorneys' fees?

HOLDING: No. The Court held that an attorney's receipt of a client advance for future performance of legal services does not constitute the attorney's performance of those professional services and so the statute of limitations does not apply when the attorney fails to return any portion of the unearned fees. The Court held that the plaintiff may be able to state a cause of action for conversion, which is not covered by the one year statute of limitations applicable to attorneys.

April 1, 2014; Supreme Court of Connecticut

FACTS: The defendant law firm represented the plaintiff in an action against defendants in the underlying matter. During the course of that representation, the law firm agreed to represent another plaintiff against those same defendants. On December 14, 1999 a settlement was reached and the plaintiff's agreement to the settlement was confirmed by the trial court in open court. In February 2000, the defendants in the underlying matter filed a motion to enforce the settlement because the plaintiff refused to execute the settlement. On February 22, 2000, the defendant law firm filed a motion to withdraw from representing the plaintiff. On February 25 2000, the plaintiff executed the release to effectuate the settlement in the underlying matter. The draft was issued and the defendant law firm deducted its attorneys' fees. On February 21, 2006, the plaintiff filed a complaint against the law firm asserting that the law firm was not entitled to any fees because the representation of the plaintiff in the underlying litigation was unprofessional. The plaintiff's claim was based upon an alleged breach of contractual duties to the plaintiff in representing the other plaintiff in the underlying litigation whose interests, the plaintiff claimed, diverged from those of the plaintiff.

PROCEDURAL POSTURE: Judgment granted in favor of the defendant by the trial court based upon three statute of limitations applicable to legal malpractice claims, not the six year statute of limitations applicable to claims for breach of contract. Judgment upheld by the Appellate Court. Appeal to the Supreme Court.

ISSUE: Whether, in a case in which the defendant law firm breached its duty of undivided loyalty and failed to follow client instructions, did the six year statute of limitations apply or did the three year statute of limitations applicable to legal malpractice actions apply?

HOLDING: The three year statute of limitations applied because the plaintiff's claims sounded in the tort of legal malpractice, not breach of contract for failure. The claim that the defendant law firm pursued the interests of the other plaintiff in the underlying case and did not follow the instructions of the plaintiff not to accept the settlement, did not refer to a breach of specific provisions of the contract. Further, the plaintiff initially agreed to the settlement in open court and only had a change of heart to seek to reject the settlement after the defendants executed the agreement.

Red Zone, LLC, v. Cadwalader, Wickersham & Taft, LLP, 118 A.D.3d 581

June 19, 2014; Supreme Court of New York, Appellate Division, First Department

FACTS: The defendant law firm prepared a Side Agreement in 2005 for the plaintiff that was intended to memorialize an oral agreement between the plaintiff and non-party, UBS, with respect to a cap of fees for UBS that was acting as the plaintiff's exclusive financial advisor in the attempt to purchase Six Flags, Inc. Prior to the legal malpractice lawsuit, UBS successfully sued the plaintiff for \$10 million in fees. That litigation pended between 2007 and 2010. During that lawsuit, during which the defendant law firm assisted but did not represent the plaintiff, the appellate court held that the Side Agreement did not cap UBS' fees at \$2 million.

PROCEDURAL POSTURE: Appeal from judgment entered in favor of the plaintiff and against the defendant law firm in the amount of \$17.2 million.

ISSUE: Whether the statute of limitation was tolled by the continuous representation of the plaintiff or whether the gap in representation between 2005 and 2007 effected the statute of limitations.

HOLDING: No. The Court held that in cases in which a defendant law firm continues to offer advice and assistance to the former client, even if it does not continue to represent the client, the statute of limitations is tolled. This is particularly so in this case where the defendant law firm attempted to prevent UBS from demanding more than \$2 million as a means to rectify its malpractice in drafting the side agreement.

July 30, 2014; United States District Court for the District of Columbia

FACTS: The underlying dispute related to competing inventors of a corrective tape dispenser. In the underlying litigation, the plaintiff was denied benefit of its patent application because of the failure by the defendant law firms to attach an English language translation of the patent application. The motion to reconsider was denied on March 13, 2003. The plaintiff incurred \$11,000 in attorneys' fees in having that motion to reconsider prepared. As an appeal pended there were two settlement offers that were rejected by the plaintiff. Those offers were rejected based upon the advice of the defendant law firm. Ultimately, a *writ of certiorari* was denied by the United States Supreme Court on October 18, 2004 ending the underlying litigation. The defendant law firm continued to represent the plaintiff throughout the appeals. In December 2006, the plaintiff consulted counsel regarding whether there was a basis to make a legal malpractice claim against the defendant law firms. The legal malpractice action was filed on February 28, 2008.

PROCEDURAL POSTURE: Defendants' motion for summary judgment before the district court.

ISSUE No. 1: Did the three year statute of limitations for legal malpractice claims in the District of Columbia expire prior to the plaintiff filing its cause of action against the defendant law firms?

HOLDING No. 1: No. The Court held that the plaintiff's claim against the defendant law firms accrued on March 13, 2003 when the plaintiff's motion for reconsideration was denied. At that time, the plaintiff had spent of \$11,000 to prepare the motion to reconsider, that the motion to reconsider was necessary because the procedural mistake by the defendant law firm in not attaching the English language translation of the patent application. However, the Court held that the continuous representation doctrine tolled the statute of limitations until all appeals had been exhausted which did not occur until, at the earliest, when the final judgment was entered pursuant to the judgment of the federal Circuit on September 14, 2004 or, at the latest, when the *writ of certiorari* was denied on October 18, 2004. Because a tolling agreement was entered into within three years of the conclusion of the appeals and because the lawsuit was filed within 60 days of the expiration of the tolling agreement, the complaint was timely filed.

ISSUE No. 2: Did the defendant law firm breach its duty of care in failing to attach an English language translation of the patent application?

HOLDING No. 2: No. The case law at the time of the filing of the motion did not require attaching an English language translation. The first case holding that an English translation was required was the underlying case, and thus the defendant law firm did not breach its duty of care.