



## Theories of Liability

- Professional Negligence – Legal Malpractice
- Breach of Fiduciary Duty
- Conflicts of Interest
- Breach of Contract
- Fraud/Conversion
- Consumer Protection Acts (i.e. TCPA)
- Fair Debt Collections Practicing Act (FDCPA)
- Civil Conspiracy/Aiding and Abetting
- Abuse of Process/Malicious Prosecution
- Securities Laws
- Negligent Misrepresentation

## Duty Issues

- To prevail on a legal malpractice claim, the plaintiff must prove the following three elements:
    - ✓ (1) the attorney's employment;
    - ✓ (2) the attorney's neglect of a reasonable duty; and
    - ✓ (3) the attorney's negligence resulted in and was the proximate cause of loss to the client.
- *See Anderson v. Steven R. Andrews, P.A.*, 692 So. 2d 237, 240 (Fla. 1st DCA 1997); *Boltes v. Hullinger*, 629 So. 2d 198, 200 (Fla. 5th DCA 1993); *Weiner v. Moreno*, 271 So. 2d 217, 219 (Fla. 3d DCA 1973).

## Breach

- Expert testimony is generally necessary to establish breach and causation unless the breach is so obvious that it may be determined by the court as a matter of law or where the standard of care is within the ordinary knowledge and experience of the jurors. *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 97, 362 N.W. 2d 118, 121, 1985 Wisc. LEXIS 2111, \*1 (Wis. 1985) See also, *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325, 331 (Fla. Dist. Ct. App. 4th Dist. 1998).

## Causation Arguments

- Underlying Litigation
  - Plaintiff must prove that lawyer's negligence was the legal cause of injury sustained by the plaintiff.
  - Litigation Malpractice – the plaintiff must prevail on the issues in the underlying matter. All of the issues that would have been litigated in the underlying case, with the jury determining the probable outcome.
  - Note that a client's failure to pursue an appeal that likely would have cured the effect of the lawyer's error is arguably fatal to a malpractice claim ("Abandonment").
  - Other causation arguments – i.e., collectability, market depreciation of value.
- Transactional

## Damages

- Speculative Damages
  - The plaintiff has the burden of presenting sufficient evidence from which damages can be determined on some rational basis. Damages that are remote and speculative cannot be recovered. *O'Brien v. Larsen*, 521 P.2d 228 (Wash. Ct. App. 1974); *In re Witko*, 374 F.3d 1040 (11<sup>th</sup> Cir. 2004).
- Collectability Issues
  - Uncollectability may be a relevant inquiry because it relates to the proximate cause and damages elements of legal malpractice.
  - Majority vs. Minority Jurisdictional Views

## Daubert Challenges

- Generally, to prevail on a legal malpractice claim, a plaintiff must present expert testimony in order to:
  - ✓ establish the applicable professional standard of care owed to the client, and
  - ✓ establish that the attorney's conduct breached that standard of care and caused the damages the plaintiff alleges.
- The test used to determine whether an attorney is qualified as an expert witness is whether the proposed expert has "specialized knowledge, skill, experience, training or education regarding the subject matter."

## Comparative Negligence

- Nearly all courts (Wyoming is the primary exception) that have considered the defense have held, either directly or implicitly, that the defense is available in a legal malpractice action.
- Florida allows the defense however a client cannot be found to be comparatively negligent for relying on an attorney's erroneous legal advice or for failing to correct errors of the attorney which involve the exercise of professional expertise. *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325, 331 (Fla. Dist. Ct. App. 4th Dist. 1998).

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## In Pari Delicto/Unclean Hands

- *In pari delicto* is both an affirmative and equitable defense “rooted in the common-law notion that a plaintiff’s recovery may be barred by his own wrongful conduct.” *Pinter v. Dahl*, 486 U.S. 622, 632 (1988). *See also O’Halloran v. PricewaterhouseCoopers LLP*, 969 So. 2d 1039, 1044 (Fla. 2d DCA 2007).
- The doctrine of *in pari delicto* operates to bar legal remedies when both parties are equally in the wrong or where the plaintiff had greater responsibility for the wrongdoing than defendant. *Luzinski v. Peabody & Arnold LLP (In re Gosman)*, 382 B.R. 826, 837-838 (S.D. Fla. 2007).

## Failure to Name Necessary Parties

- Plaintiff: Lost opportunity to collect against a potential defendant or fully adjudicate the rights of all interested parties.
- Defendant: Lost opportunity to deflect blame; lost opportunity for indemnification.

## Set-Offs

- Set offs are sometimes available to defendants in legal malpractice actions. *Pharma Supply, Inc. v. Stein*, 2015 WL 328228, at \*5 (S.D. Fla. 2015).

## Judgmental Immunity

- A lawyer is not liable for an error of judgment about an unsettled or fairly debatable proposition of law. Examples include:
  - Failing to anticipate a change in a settled law
  - Failing to predict the ultimate resolution of an unsettled proposition of law on which conflicting decisions exist.
- A lawyer who exercises informed judgment based upon reasonable research, analysis, and preparation will not be liable for an error in judgment.
- To avoid liability for an error of judgment, a lawyer (1) must exercise informed judgment, (2) cannot ignore applicable statutory law, procedural rules and basic legal principles; and (3) must inform the client of the known pending resolution of even unsettled propositions of law.

## Trends in Claims Against Attorneys

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- Claims arising out of Real Estate Transactions
- Claims in Bankruptcy brought by Trustee on behalf of failed Companies.
- Claims brought by FDIC on behalf of failed Banks.
- Probate Matters
  - Improper drafting of estate documents.
  - Failure to consider tax issues.
  - Improper Financial Advice on investments by Trusts.
    - Madoff Issues
- Attorney investment in the subject transaction.
- Mortgage Foreclosure Litigation
- Collection Litigation
  - FDCPA, FCCPA, FCRA, TILA, RESPA, TCPA
- Conflict of Interest claims
- Third-Party Business Claims
  - Investors seeking damages against attorney who drafted PPM or POM.

THANK YOU FOR  
YOUR ATTENTION

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