2017 NJSBA Annual Meeting

Legal Malpractice - A Practical Primer

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Legal Malpractice: A Practical Primer

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Common Pitfalls in Legal Malpractice Cases

- All legal malpractice cases involve a breakdown of the attorney-client relationship.
- The attorney-client relationship embodies the concept of the client's trust in his [or her] fiduciary, the attorney. In Re Loring, 73 N.J. 282, 289 (1977).
- All fiduciaries are held to a duty of fairness, good faith, and fidelity, but an attorney is held to an even higher degree of responsibility in these matters than is required of all others. In Re Honig, 10 N.J. 74, 78 (1952).
Common Pitfalls in Legal Malpractice Cases

- Trust is the bedrock upon which the attorney-client relationship is built.
- When the attorney is still representing the client, the attorney must act with reasonable diligence and promptness, RPC 1.3, and with a degree of skill and competence that comports with reasonable professional standards. See, RPC 1.1.
Common Pitfalls in Legal Malpractice Cases

- The attorney also must communicate to the client information that the client needs to know. *Stoeckel v. Twp. of Knowlton*, 387 N.J. Super. 1, 14 (App. Div.)


- A lawyer is required to maintain the highest professional and ethical standards in dealing with clients. *In Re Humen*, 123 N.J. 289, 299-300 (1991).
Common Pitfalls in Legal Malpractice Cases

Common Pitfalls in Legal Malpractice Cases - Staff Negligence

- In Shapiro v. Rinaldi, 2016 N.J. Super. Unpub. LEXIS 596, the issue before the Court was whether an attorney was liable for the fault of his secretary who failed to advise the attorney that a prospective client had called with a new case.
- The Court did not find the attorney liable and also found that the attorney had proper office procedures in place for the running of client intake, which the secretary failed to follow.
- This is a very significant opinion for solo practitioners who rely upon their secretaries and paralegals in the normal and ordinary course of practice.
In *Innes v. Marzano-Lesnevich*, 224 N.J. 584 (2016) the New Jersey Supreme Court noted that New Jersey has a strong public policy against shifting of counsel fees. The Supreme Court held that a prevailing non-client may be awarded counsel fees incurred to recover damages arising from an attorney's intentional violation of a fiduciary duty. The *Innes* decision is limited to a claim by a non-client in a situation where the attorney intentionally breaches a fiduciary duty. This ruling does not apply to claims against a lawyer for simple negligence.
Common Pitfalls in Insurance Coverage Cases - Prior Acts Endorsements

- In *President v. Jenkins*, 180 N.J. 550 (2004), the Court acknowledged that under certain circumstances, limited retroactive coverage might be both reasonable and expected.
- The Court also noted that the provision of "claims made" policies could be enforced if there was evidence that the insured fully understood the terms of the policy.
Common Pitfalls in Insurance Coverage Cases - Reporting of Claims

- Insured must be cognizant of when an insurance company requires notice of a claim.
- Late notice of a claim might result in the denial of coverage, or will at least lead to issues that would have otherwise not arisen if a claim was reported immediately.
- All lawyers must be knowledgeable of the insurance reporting requirements for potential claims and actual claims.
Many lawyers know that they must immediately report actual claims and lawsuits brought against them, but they do not realize or understand that they must also report any circumstances of which they are aware and that might result in a suit against them.

The failure to immediately report these potential claims might result in lawyers losing the coverage they thought they were paying for in their policy.
Common Pitfalls in Insurance Coverage Cases- Reporting of Claims

- Under New Jersey law, an insured does not forfeit coverage unless there has been both a breach of the notice provision and a "likelihood of appreciable prejudice." Cooper v. Government Employers Insurance Company, 51 N.J. 86, 94 (1968).

- The burden of proving a likelihood of appreciable prejudice is upon the carrier. Id.
Common Pitfalls in Insurance Coverage Cases- Reporting of Claims

• In order to prove the likelihood of appreciable prejudice, the insurer must establish:
  o (1) "that substantial rights pertaining to a defense against the claim have been irretrievably lost," and
  o (2) "the likelihood that it would have had a meritorious defense had it been informed of the [potential claim] in a timely fashion." *Morales v. National Grange Mutual Insurance Company*, 176 N.J. Super. 347, 356 (1980).

Thank You!

- For questions, please contact Jack Slimm at jlslimm@mdwcg.com or (856) 414-6021.
2017 New Jersey State Bar Association Annual Meeting

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May, 2017
MALPRACTICE, ETHICAL AND COVERAGE PITFALLS - USEFUL SUGGESTIONS FOR REAL-WORLD PRACTITIONERS

New Jersey State Bar Association

May 17, 2017
INTRODUCTION

Legal malpractice cases arise for a variety of reasons and affect varying forms of representation. It is important to be cognizant of the common pitfalls that lead to malpractice, which will lead to gaining knowledge on how to avoid them in your practice. These materials are meant to present an overview of the common pitfalls in legal malpractice cases and the evolving issues in legal malpractice jurisprudence. These materials will then highlight insurance considerations both before and after a claim is made as well as important ethical considerations in handling a case.

COMMON PITFALLS IN LEGAL MALPRACTICE CASES

I. AVOIDING LEGAL MALPRACTICE CLAIMS

All legal malpractice cases involve a breakdown of the attorney-client relationship. The attorney-client relationship embodies the concept of the client's trust in his [or her] fiduciary, the attorney. In Re Loring, 73 N.J. 282, 289 (1977). All fiduciaries are held to a duty of fairness, good faith, and fidelity, but an attorney is held to an even higher degree of responsibility in these matters than is required of all others. In Re Honig, 10 N.J. 74, 78 (1952).

Trust is the bedrock upon which the attorney-client relationship is built. This fundamental principle was re-affirmed by the Supreme Court:

There are very few of the business relationships of life involving a higher trust and confidence than that of attorney and client, or generally speaking, one more honorably or faithfully discharged; few more anxiously guarded by the law, or governed by the sterner principles of morality and justice; and it is the duty of the Court to administer them in a corresponding spirit, and to be watchful and industrious, to see that the confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it. State in the Interest of S.G., 175 N.J. 132, 139 (2003), citing, In Re Loring, 73 N.J. 282, 289-90 (1977) (quoting, Stockton v. Ford, 52 U.S. (11 How.) 232, 247 (1850)).
Apart from the duty of loyalty, an attorney's fiduciary role includes an affirmative obligation to act in, and to look out for, a client's best interests.  


It has been held that clients are entitled to counsel who are dedicated, without conflict, to their interests.  


It is well-established that a lawyer is required to maintain the highest professional and ethical standards in dealing with clients.  


It has been held that an attorney must never lose sight of the fact that the profession is a branch of the administration of justice, and not a mere money-getting trade.  


**A. Defense Attorneys Handling Affirmative Claims**

Defense attorneys who represent clients with affirmative claims should only do so pursuant to a Retainer Agreement.  

mod., 213 N.J. Super. 239 (App. Div. 1986), plaintiff former client challenged a decision, which
granted judgment to defendant attorney in plaintiff's legal malpractice action. Plaintiff's spouse
was a driver in an underlying automobile accident case, and defendant was hired to represent her.
Plaintiff had his own property damage cross-claim and hired defendant to represent him.
Defendant filed a cross-claim for plaintiff, who then terminated defendant's representation.
Defendant never withdrew from the representation of plaintiff, a motion to dismiss was filed and
defendant took no action, and plaintiff's underlying cross-claim was dismissed with prejudice.
The court reversed and held that defendant owed a duty to plaintiff that followed plaintiff's
rejection of defendant's representation of him on plaintiff's underlying cross-claim. Defendant
was unable to simply abandon plaintiff with respect to the cross-claim and should have taken
steps to make sure that plaintiff was otherwise represented or that plaintiff was served personally
so that he would have had an opportunity to appear pro se. Defendant's conduct was negligent as
a matter of law. Damages were reduced by the attorney fees that were to have been paid.

B. The Attorney's Duty To Non-Clients

An attorney's defined liability to third-parties comports with general principles of tort
law. Cases holding that an attorney owes a duty to a non-client are rather fact specific. In
Petrillo v. Bachenberg, 139 N.J. 472 (1995), the Court quoted from §552(1) of the Restatement
(Second) of Torts (1977), determining that pecuniary liability could be found for negligent
misrepresentation when an attorney supplied false information for the guidance of others in their
business transactions, if the attorney fails to exercise reasonable care or competence in obtaining
or communicating the information.

The Court recognized that attorneys may owe a limited duty in favor of specific non-
clients. Id. at 479. These cases involve: buyer/seller relationships and opinion letters, Id. at 486-
88, (finding that a duty to a non-client existed where an attorney prepared an incomplete report

Also, in Barsotti, v. Merced, 346 N.J. Super 504 (App. Div. 2002), the injured party's claims against the driver of an automobile, which struck his motorcycle, went to mandatory arbitration, and an award was entered in favor of the injured party, in the amount of $225,000. The driver responsible for the injuries had insurance coverage of $25,000. During the pendency of the action, the driver responsible sold the house he owned with his wife. He and his wife received net proceeds of $37,000. The attorney prepared the deed and attended the settlement. In addition, the attorney had been retained for the purpose of representing the driver responsible for his potential liability exposure in excess of his insurance coverage. The Appellate Court found there was no evidence to support the injured party's conspiracy allegation. There was not one scintilla of evidence from which the jury could have inferred that the attorney discussed what would be done with the money from the sale of the house. The attorney had no duty to protect the proceeds from the sale of the house, for the benefit of the injured party. The trial court
properly applied a "clear and convincing" standard to the fraud claim, which the injured party did not meet.


1. **Creditor Fraud Claims**

In *Banco Popular, N.A. v. Gandi*, 184 N.J. 161 (2005), the bank alleged the attorney helped his client transfer assets to defraud a creditor. The bank had lent money to the client before and after the alleged fraudulent transfer; it claimed it made a subsequent loan in reliance on misrepresentations in the attorney's opinion letter. The client defaulted on its debts to the bank; the bank obtained judgment against him and filed the instant suit, seeking judgment against the attorney and to set aside the client's asset transfers. The high court held the bank's conspiracy, negligent and intentional misrepresentation, and negligent investigation claims should not have been dismissed, but the creditor fraud claim was properly dismissed. There was no cause of action for creditor fraud in New Jersey, but the attorney could be liable for conspiracy to violate the Uniform Fraudulent Transfer Act (UFTA) for his participation in the transfer. The bank had to prove that the attorney agreed to perform a fraudulent transfer, which, absent the conspiracy, would have given a right of action under the UFTA. The attorney also could be liable for misrepresentations he made in connection with the opinion letter he issued on the subsequent loan.
Banco Popular recognizes that in order to be found liable for "aiding another in executing a fraudulent transfer", there must be proof that the conspirator "agreed to perform the fraudulent transfer" which, absent the conspiracy, would give a right of action under the U.F.T.A. A creditor asserting a claim against a conspirator must satisfy the Agreement and have knowledge of aspects of a civil conspiracy, and all of the underlying components of a U.F.T.A. claim. An unwitting party may not be liable under a conspiracy theory. *Id.*

C. Keeping The Client Informed

In *Matter of Kasdan*, 115 N.J. 472 (1989), the Court held that an attorney must not inform the client that a case is proceeding smoothly when the attorney knows it is not. In *Kasdan*, the attorney did not disclose to her client that the Complaint had been dismissed as a result of her failure to provide Answers to Interrogatories. In addition, there were subsequent misrepresentations which the attorney made to the client when she assured him that the matter was still pending and when she fabricated trial dates to mislead him into believing that the litigation was preceding apace. See also, *In Re Goldstein*, 97 N.J. 545 (1984).

D. Business Transactions Between a Lawyer and Client

A lawyer should always think twice before entering into a business transaction with a client, but it is not prohibited in the right scenario. In *Milo Fields Trust v. Britz*, 378 N.J. Super. 137 (App. Div. 2005), the Court held that a business transaction between an attorney and client is not prohibited. Although transactions between a lawyer and client are presumptively invalid, the presumption can be overcome by evidence showing full and complete disclosure of all facts known to the attorney, absolute independence of action on the part of the client, the fairness and equity of the transaction, the lack of overreaching, and the client's understanding of the importance of the independent representation.
Transactions between an attorney and a client are subject to close scrutiny by the Court, and "the burden of establishing fairness and equity of the transaction rests upon the attorney." In *Re Gallop*, 85 N.J. 317, 322 (1981) ("Agreements between attorneys and clients concerning the client-lawyer relationship generally are enforceable, provided the Agreement satisfies both the general requirements for contract and the special requirements for professional ethics." *Cohen v. Radio-Electronics Officers Union*, 275 N.J. Super. 241 (App. Div. 1994), modified, 146 N.J. 140 (1996) (citing, *Restatement of the Law Governing Lawyers* §29A cmt. c (proposed Final Draft No. 1 1996)). "An otherwise enforceable Agreement between an attorney and client would be invalid if it runs afoul of the ethical rules governing that relationship." *Id.* at 156. "It has been held that consistent with the special considerations inherent in the attorney-client relationship, … the attorney bears the burden of establishing the fairness and reasonableness of the transaction…." *Ibid.*

Also, Courts should construe Agreements between attorneys and clients "as a reasonable person in the circumstances of the client would have construed it." *Restatement (Third) of the Law Governing Lawyers* §18 (2000).

1. **Business Failures**

   In some situations, plaintiffs allege that the attorney's conduct was a substantial contributing factor to a plaintiff's losses sustained as a result of a business failure. However, in New Jersey, the expert for a plaintiff must offer competent testimony and opinion regarding (a) why the business failed; (b) whether the reason for the failure was relevant to the expert's opinion of actionable malpractice; (c) knowledge of the specific industry or business; and (d) that the attorney's actions caused the failure of the business or the plaintiff's consequent loss. *Jack v. Stuart*, A-5986-96T5 (App. Div. January 12, 1999). Without expert testimony on the
above issues, the case will be subject to dismissal at the close of the evidence pursuant to Rule 4:40. Jack, supra.

E. Unauthorized Settlements

Lieberman v. Employer's Insurance of Wausau, 84 N.J. 325, 419 A. 2d 417 (1980), involved a medical malpractice claim as a result of a neurosurgeon's performance of an arteriogram. The neurosurgeon instructed the defense attorney assigned by the carrier not to settle the claim. However, the attorney also knew of the carrier's intention to settle, if at all practicable. The attorney was, therefore, aware of a conflict of interest between the physician and the carrier regarding settlement. The physician's policy required the consent of the insured as a condition of settlement.

The New Jersey Supreme Court held that the attorney breached his duty by failing to inform the neurosurgeon of the clear conflict of interest. His subsequent failures to either withdraw from the case or terminate his representation of either the insured or the carrier was likewise improper. The Court held that the attorney's active participation in the settlement of the claim against the wishes of his client, the insured, constituted malpractice.

F. Settlement of Claims by the Attorney

An attorney must attempt to consummate a settlement within a reasonable time after it is reached. Johnson v. Schragger, Levine, Nagy & Krasny, 340 N.J. Super. 84 (App. Div. 2001). In Johnson, plaintiff retained the firm of Albert, Schragger, Levine, Levy & Seigel, (the predecessor to the law firm) to file suit against Ms. Niles as a result of a dispute he had with her arising out of his sale of a horse to Ms. Niles. The attorney handling the matter obtained a settlement for client, but the terms of the settlement were not complied with by the other party. The attorney subsequently left the firm, but continued to represent the client. Eventually, attorney obtained a judgment against the other party under the terms of the settlement agreement.
At some point thereafter, the other party sold real estate, but client's judgment was not satisfied. The record was unclear as to why this judgment was not satisfied. The other party filed bankruptcy and client brought suit against law firm for negligence in handling the matter. The trial court dismissed client's complaint on summary judgment and client appealed. The appellate court found that, because law firm had only represented client for 83 days before the attorney left the firm and the attorney continued to represent client long after he left, nothing law firm did was a substantial factor in bringing about the loss to client, and law firm was not a proximate cause of the damages client suffered.

G. Wills, Trusts and Estates

Attorney representation in estate planning and administration cases is a common area of liability. Attorneys must know who they represent, which may or may not lead to an adequate defense.

The attorney's client is the Executor of the Estate, and not the Estate itself. When an attorney is employed to render services in procuring admission of a Will to probate or in settling the Estate, he acts as attorney for the Executor, and not of the Estate, and for his services the Executor is personally responsible. Barner v. Sheldon, 292 N.J. Super. 258 (Law Div. 1995), affirmed, o.b. 292 N.J. Super. 157 (App. Div 1996). In Barner, the defendant attorney prepared a will for the decedent in which he left his business equally to his three children. He left the residuary of the estate equally to his three children and his wife. Plaintiff decedent's children filed a legal malpractice suit alleging that defendant had a duty to inform them that they had a right to disclaim a share of their father's estate, which would have reduced the federal estate taxes. They sought damages for the amount of taxes that they claimed the estate needlessly paid. Defendant admitted that he did not so advise plaintiff, but contended that he had no duty to do so because he represented the estate and not its beneficiaries. Defendant filed a motion in limine to
dismiss plaintiff's complaint on the basis that defendant owed no duty to plaintiffs. The court granted the motion in limine because it found that defendant had no duty to advise plaintiffs of adverse tax consequences related to the bequest. The court found no duty on the basis of fairness or public policy considerations and reasoned that plaintiffs should have retained an attorney to assist them. The court dismissed plaintiff's claims.

In *Estate of Fitzgerald v. Linnus*, 336 N.J. Super. 458 (App. Div. 2001), after the death of her husband, plaintiff wife hired defendant attorney. Plaintiffs (decedent's wife and children) later sued defendant for malpractice after plaintiff wife found out she could have protected her assets had she taken advantage of certain tax benefits. Plaintiffs claimed defendant owed a duty not only to plaintiff wife, but to her children as her putative estate beneficiaries. Plaintiffs also claimed that defendant negligently failed to advise plaintiff wife that she could disclaim a portion of the decedent's life insurance proceeds in favor of plaintiff children, which would have resulted in a substantial estate tax savings upon plaintiff wife's death. Defendant denied that he was retained to provide estate planning services or that he owed such a duty to plaintiffs. The trial court granted defendant summary judgment. The appellate court affirmed. Plaintiff wife's claim failed since defendant owed her no duty with regard to her own estate planning, as he was retained by her solely in her capacity as executrix of decedent's estate. Also, defendant owed plaintiff children no duty since they were not beneficiaries of decedent's estate or insurance policies.

In *Estate of Patricia Albanese v. Lolio*, 393 N.J. Super. 355 (App. Div. 2007), the plaintiffs, the Executrix of her mother's Estate, her co-beneficiary sisters, and the Estate itself, appealed from an Order for Summary Judgment in favor of the defendant attorney and his law firm in a legal malpractice action stemming from advice given to the Executrix on how to pay
Federal Estate taxes that resulted in a large liability to each of the individual partners. The issues before the Court were: (1) whether the firm owed a duty to the individual beneficiaries to inform them of the personal tax implications which flowed from the defendants’ advice; and (2) whether the defendants breached a duty to the Executrix to make the scope of their representation clear. The trial court granted summary judgment to defendants after determining that they owed no duty to plaintiffs. In addressing the issue of duty, the court determined that the retainer agreement between the executrix and defendants should have been clearer on the scope of representation as it did refer to the executrix individually and as an executrix. The retainer also obligated defendants to advise and counsel as to post-mortem planning, including, but not limited to, calculating tax needs. However, as to the sisters and any other beneficiaries, the court held that defendants owned no duty to them.

In Transamerica v. Keown, 451 F. Supp. 397 (D.N.J. 1978), an attorney, Mr. Keown, was the succeeding Trustee of a Trust created by the Will of Clarence Munger. The Will provided that the Trustee was to invest the corpus in securities at the discretion of the Trustee. Mr. Keown concluded that the term "securities" encompassed real estate, and invested in property located in Egg Harbor, New Jersey. In the malpractice action, Judge Brotman noted that one of an attorney's primary functions is the interpretation of legal instruments such as Will and Trusts. The decision to invest in real estate was chargeable to Mr. Keown in his role as attorney for the fiduciary. The Court held that the attorney misinterpreted the securities provision of the Will, and that interpreting the word "securities" to include real estate fell short of the standard of skill ordinarily possessed by others in the profession.

1. Claims by Beneficiaries: Burden of Proof

father's Revocable Trust Agreement in a manner that was directly contrary to his father's intent. Because plaintiff failed in an earlier probate proceeding to prove by clear and convincing evidence that the Trust Agreement was contrary to Pivnick's father's intent, the Motion Judge concluded that collateral estoppel barred the current malpractice action, and dismissed plaintiff's Complaint. Plaintiff appealed, claiming that malpractice actions must only meet a preponderance burden of proof. Plaintiff argued that the Motion Judge erred because collateral estoppel does not apply when the prior litigation involves a higher burden of proof. The Appellate Division affirmed. In Pivnick, since the reformation action had required proof by clear and convincing evidence, the burden of proof in the legal malpractice action was "clear and convincing evidence" as well, rather than preponderance of the evidence.

2. The Duty to Report Misdeeds

In Estate of Spencer v. Gavin, 400 N.J. Super. 220, 249 (App. Div. 2008), the professional liability issues in the case arose out of circumstances in which a lawyer, while acting in his capacity as an executor and administrator, stole $400,000 or more from his clients' three related estates. Within months after absconding with those funds and dissipating them, the lawyer-executor died of cancer. The motion judge held the fellow attorney did not owe the estates any duty. The primary question was whether the fellow attorney, who evidently did not participate in the thievery, but who had a close and interdependent business relationship with the lawyer-executor, and who concurrently performed legal work at the lawyer-executor's request for at least one of the same estates, had a duty to report the lawyer-executor's malfeasance upon allegedly learning of it. The Appellate Court held that a reporting duty in such circumstances was mandated by principles of legal ethics (N.J. Ct. R. Prof. Conduct 8.3(a)), tort law, and public policy, so long as the attorney was shown to have had actual knowledge of the other lawyer's
wrongdoing. As there were genuine issues of material fact as to the attorney's actual knowledge of the thefts, summary judgment was improper.

3. **Holographic Wills**

In New Jersey, a Will which does not comply with **N.J.S.A. 3B:3-2** [Statute Regarding Formal Wills] is valid as a holographic Will, whether or not witnessed, if the signature and material provisions are in the handwriting of the Testator. **N.J.S.A. 3B:3-3**.

The proponent of a holographic Will bears the burden of producing evidence of testamentary intent, which is that the decedent intended the document to be a Will. *Simonelli v. Chiarolanza*, 355 N.J. Super. 380 (App. Div. 2002). In *Simonelli*, on appeal, the client argued that the facts of record created a genuine issue as to whether a piece of paper found in a safe deposit box maintained by her fiancé constituted a holographic will. The appellate court concluded that even though the writing found in the safe deposit box was in the fiancé’s handwriting and was signed by him, the fiancé never made any statement suggesting that the paper was intended to be a will. The document itself did not identify it as a will. Thus, the record provided no basis for a finding of testamentary intent. In addition, the will lacked other "material provisions" as required by N.J. Stat. Ann. § 3B:3-3. The note authored by the fiancé did not explain what property constituted his estate; thus, it was quite clear that the document at issue was so barren of "material provisions" as to fail to satisfy the requirements for a holographic will. Because no damages could have been proximately caused by any alleged negligence of the attorneys unless the document could have been found by a jury to be a holographic will, summary judgment was properly granted.
4. Lawyers' Duty to Obtain Psychiatric Examinations in Order to Address Testamentary Capacity

In Lovett v. Estate of Lovett, 250 N.J. Super. 79 (Ch. Div. 1991), the Testator’s surviving children filed a legal malpractice action against an attorney who drafted a simple will for the testator to replace testator’s sophisticated will. Plaintiffs’ were the former guardians and surviving children of the decedent Richard R. Lovett, Jr. Prior to his death, Lovett was a successful business man. He and Ruth Lovett were married on December 25, 1976. Both had been married previously and prior to their marriage to each other, they entered into a pre-nuptial agreement.

Richard, Jr. executed various codicils to his wills. Those codicils and Mr. Lovett’s original will were prepared by a firm, the same firm who represented the plaintiffs in the legal malpractice action. The documents were sophisticated. In any event, Lovett became disenchanted with the complexity of the documents and sought to create a simple will. So he did not return to his prior attorneys. Instead he consulted our client, Morgan Thomas. Mr. Lovett was 73 at the time and had some memory problems. He gave his wife a power of attorney. They wanted their pre-nup cancelled. Mr. Thomas was advised and made arrangements to obtain the prior wills and codicils he revised them and advised that the new will would have less favorable tax consequences than the existing plan. Lovett did not care about taxes since he would not be paying them. So Lovett signed the new will and the new revocation of the earlier pre-nup and power of attorney.

At a third meeting all the documents were signed and executed. A tape recording was made. However, the attorney, Mr. Thomas did not schedule a psychiatric exam for the testator before the estate documents were signed. The court found that although the testator had been diagnosed with Parkinson’s Disease, and the fact that his memory was not a strong as it had been
in the past, self sufficient to warrant a psychiatric exam. The court held that the circumstances which justify a suggestion from a lawyer that a client by psychiatrically evaluated as a pre-requisite to sign legal documents are rare. This was not such a circumstance. The plaintiffs’ complained that the attorney failed to advise Lovett of the tax ramifications of the new will. The attorney did advise of the tax consequences. However, the client did not care. So the question wasn’t whether Lovett’s decision was a wise one or even whether Thomas should have advised him against it. The question was whether Thomas had an obligation to do tax research and then explain the details of the differences so that Lovett’s decision could be better informed. The issue was whether Thomas should have taken additional steps knowing that his client was generally aware of the downside and nevertheless had a strong feeling in favor of proceeding. The court found that the attorney’s failure to do so was not unreasonable. The attorney made a reasonable choice in deciding not to spend his client’s money to research the precise tax differences once it was cleared that it would not make a difference. Additionally, in certain circumstances, a contrary choice might be warranted despite a client’s protestations such as where the tax differences are particularly dramatic. In this case, the court was never advised as to what the quantative differences were. Therefore, there was no justification for the court concluding that the fair to explain them, regardless of what they were, it was legal malpractice.

The next issue was whether it was malpractice for the attorney not to meet with Lovett outside the presence of his wife. The court noted that usually meeting with a client alone is well advised. Here, the plaintiffs’ story was that since Ruth was going to gain by the will change and the cancellation of the pre-nuptial agreement, the attorney had an obligation to ensure himself that Lovett was acting freely and voluntarily. Presumably he could not do that while Ruth was in the room. Plaintiffs argued that a lawyer who meets with a husband and wife to discuss a change
in the husband’s estate plan, knowing that the wife stands to benefit, commits malpractice unless he or she verifies the husband’s intentions outside the presence of the wife. The court did not agree with that proposition. There was more than enough evidence from which the attorney Thomas could have reasonably concluded that it was Lovett, not his wife, who was controlling the decisions. The signing of the estate documents was taped, and based on that tape recording the court was persuaded that Lovett was alert and reasonably informed. There was nothing to conclude that Lovett was being unduly influenced. The plaintiffs’ argued that the attorney failed to adequately investigate Lovett’s assets and his businesses. The court noted that such an inquiry would have been more prudent and in most cases appropriate. On the other hand, given the fact that the new will was making no changes in the beneficiaries and was coincidental with the general power of attorney in favor of Lovett’s wife, the potential adverse consequences to Lovett’s business interests were minimized. The only other impact would be tax consequences. Since Lovett already expressed his intentions to that subject, Thomas’ inquiry into the details of Lovett’s assets would probably not have made any difference. The court’s reaction was that plaintiffs’ claim failed for lack of proof. There was no proof that the attorney’s failure to have made an inquiry resulted in any adverse consequence to Lovett or his estate.

H. Trial Attorneys

In Cellucci v. Bronstein, 277 N.J. Super. 506 (App. Div. 1994), cert. denied, 139 N.J. 441 (1994), the plaintiff alleged that the attorney negligently filed a Workers’ Compensation Petition while representing a negligence action against a tavern, thereby diminishing the scope of recoverable damages. The Trial Court dismissed the action, and the Appellate Division affirmed. The Cellucci Court noted that, in New Jersey, an attorney is not liable for an errant exercise in judgment in representing a client so long as the lawyer demonstrates a reasonable knowledge of the law, and applies it to relevant facts. Cellucci, 277 N.J. Super. at 523.
In *State v. Bentley*, 46 N.J. Super. 193, 134 A. 2d 445 (App. Div. 1957), the Court held that an attorney is not obliged to interview witnesses, even when requested by his client to do so, unless his judgment indicates that he should. When a defendant is represented at trial by an attorney, the attorney has implied authority to make all necessary decisions on matters incidental to the management of the case, and the client is bound by such acts. *State v. Bentley*, 46 N.J. Super. 193, 134 A. 2d 445 (App. Div. 1957).


### I. Public Defenders

In *Delbridge v. Office of the Public Defender*, 238 N.J. Super. 288, 569 A. 2d 854 (Law Div. 1989), Judge Villanueva held that a public defender is not immune from liability for professional malpractice. See also, "Public Defender Malpractice Immunity", 6 A.L.R. 4th 774 (1981). Once a public defender is appointed to a particular case, his public or State function ceases and, thereafter, he functions purely as a private attorney concerned with servicing his client. Therefore, the Court in *Delbridge* ruled that the attorney was subject to liability for tortious conduct. The Court noted, however, that public defenders enjoyed qualified immunity, except for conspiracy or intentional misconduct or legal malpractice. See also, *Tower v. Glibber*, 467 U.S. 914, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984), (public defenders do not enjoy immunity in §1983 actions where there is an alleged conspiracy or intentional misconduct).
J. Specialists

A specialist must employ not merely the skill of a general practitioner, but also that special degree of skill normally possessed by the average specialist. Procanik by Procanik v. Cillo, 226 N.J. Super. 132 (App.Div. 1988). In Procanik, eighteen months after defendant attorney, who had medical malpractice expertise, and defendant law firm declined to represent plaintiffs, infant and parents, a complaint was filed on plaintiffs' behalf that alleged a wrongful life and wrongful birth against based on the circumstances of the birth of plaintiff infant, a rubella-syndrome child, who by reason plaintiff mother's German measles infection, not definitively diagnosed, early in her pregnancy had serious physical and mental disabilities. Plaintiff mother claimed that had she known of potential problems, she would have undergone an abortion. A legal malpractice complaint was also filed. The court reversed the judgment against defendants on the basis that the record did not raise a prima facie case of professional negligence against defendants. As defendant attorney had correctly explained the existing decisional law of the jurisdiction that prohibited such actions, recent disparate views of a sister jurisdiction, the consequent fact of potential change of decisional law on appeal, and the procedures for obtaining change, he had fulfilled any obligation he may have had to explain his reasons for declining the case.

K. Attorney Errors in Judgment

In Cellucci v. Bronstein, 277 N.J. Super. 506 (App. Div. 1994), the Court held that the common law of the State of New Jersey does not make a lawyer liable for an errant exercise in judgment when representing a client, so long as the lawyer demonstrates a reasonable knowledge of the law, and applies it to relevant facts. The Appellate Division found that the plaintiffs' legal malpractice expert applied a standard of care which exceeded recognized legal standards, and also used a flawed analysis of applicable law. The Appellate Division affirmed the Trial Court's
dismissal of the action because the expert applied a flawed standard of care, and improperly construed the applicable Statutes and law regarding employee intoxication, as applied to a workers' compensation action.

The holding of the Court in Cellucci is significant because it reaffirms New Jersey's Rule that attorneys are not liable for a mistake in the exercise of judgment as long as they have a reasonable knowledge of the law as it applies to the facts of the case they are handling. In addition, the opinion makes it clear that legal malpractice actions are subject to dismissal if the plaintiff's liability expert renders a flawed opinion on the law regarding the underlying case or transaction.

L. The Lawyer's Duty of Good Faith and Loyalty to Shareholders

In Villanueva v. Brown, 103 F. 3d 1128 (3d Cir. 1997), plaintiff investor brought suit alleging that a release of funds from defendant attorneys' trust account without authorization from plaintiff constituted conversion and was a breach of fiduciary duty. The suit also alleged that defendant notary was negligent. The district court granted defendants' motion for judgment as a matter of law. On appeal, the court affirmed the judgment as to defendant attorneys and reversed as to defendant notary. Plaintiff's accountant presented defendant attorneys with a limited power of attorney, which contained a notarial seal. Plaintiff thereby purported to appoint the accountant her agent, and appeared to give him the authority to authorize defendant attorneys to release the funds she had deposited with them. Defendant attorneys were entitled to conclude that they had been given the authority to make the disbursements. However, defendant notary was negligent in affixing her seal to the limited power of attorney without taking any steps reasonably calculated to insure the genuineness of plaintiff's signature. That claim was remanded for a factual determination as to whether plaintiff ratified the disbursements.
In Villanueva, the Third Circuit made it clear that if Ms. Ostroff was a victim of fraud, she was a victim of Mr. Rubin and/or Mr. Rubinstein's fraud, and not one perpetrated by Brown & Michael.

**M. The Liability of Defense Attorneys**

In Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64 (App. Div. 2007), the defendant law firm appealed from a Judgment awarding their former clients, Carbis Sales, Inc. and Safe Step Reinsurance, $704,405.20 in damages. The attorneys argued that the Trial Court erred in admitting the "net opinion" of the plaintiff's expert, and then refusing them discovery of a memo prepared by an investigator retained by plaintiffs. The legal malpractice claim arose out of defendants' representation of plaintiffs in a products liability cause of action. Plaintiffs were alleged to have defectively altered a particular ladder and that it had collapsed, causing injuries to a worker. Plaintiffs were held liable to the worker in the amount of $1,005,842.27. Plaintiffs established that defendants were liable for malpractice based on various failures and omissions in their defense of plaintiffs in that action. The court found that the trial court properly admitted the testimony of plaintiffs' legal expert as the opinion was based on factual evidence, reflected the standards of care for a lawyer, and did not constitute a net opinion. Also, no error was found as to the trial court denying defendants' motion to compel the discovery of a memo prepared by plaintiffs' insurance investigator as the motion was grossly out of time. As to plaintiffs' cross-appeal, the court was convinced that neither the jury charge nor the verdict sheet in the case properly directed the jury's deliberations and that the low damage amount returned, compared to the amount claimed by plaintiffs totaling over $1 million, was suspect and required a new trial.

**N. Claims by Guarantors**

On April 9, 1999, New Jersey's Appellate Division held that a father, who was a guarantor of his daughter's legal fees in a matrimonial action, did not have the right to sue the
daughter's attorneys for legal malpractice. In *DeAngelis v. Rose*, 320 N.J. Super. 363 (App. Div. April 9, 1999), the daughter, who was the client of a law firm, did not file a claim for legal malpractice. Yet, the father as the guarantor, brought the action. Judge King, on behalf of the Appellate Division, concluded that the father, simply because he was a guarantor, had no right to sue the attorneys for legal malpractice.

O. Failing to Pursue Discovery

In *Marcantonio v. Lehman*, A-277-97T2 (App. Div. December 28, 1998), New Jersey's Appellate Division held that attorneys have a duty to pursue timely discovery. However, when raised in a legal malpractice context, plaintiff must demonstrate that failure to pursue discovery by the attorneys in the underlying action caused harm to the plaintiff. Plaintiff must prove with specificity what discovery was omitted and what effect the omission had on plaintiff's ability to prove the elements of the cause of action. Specifically, the plaintiff must show in the legal malpractice action that the deficiency on the attorney's part led to his case being dismissed.

Simply put, a plaintiff cannot simply argue that sufficient discovery was not done in an effort to prove an underlying claim. Plaintiffs must produce testimony and expert opinion as to what discovery was missed, and that it would have made a difference. Absent such proofs, the claims against the attorneys for failure to make timely discovery will be dismissed. *Marcantonio*, supra.

1. The Duty of the Attorney to Join the Proper Parties

In *Prince v. Garruto, Galex & Cantor*, 346 N.J. Super. 180 (App. Div. 2001), the client hired the law firm to represent him in a medical malpractice action. The law firm proceeded against pediatricians who had prescribed a drug that caused the client's teeth to discolor, but did not include the drug manufacturer as a defendant. After the trial court held for the pediatricians, the client sued the law firm for failure to include the drug manufacturer. The Appellate Court
held that the adequacy of the drug manufacturer's warning presented a jury question in a classic case of joint liability. A jury in the underlying action could have found that the drug was a defective product based on the inadequacy of the warnings and could also have found the pediatricians negligent in having prescribed it. Therefore, the client demonstrated a sufficient prima facie case of legal malpractice for failure to join a party.

P. Medical Malpractice Claims

In an attorney malpractice case, where the legal malpractice alleged is a failure to pursue a medical malpractice claim, the plaintiff must prove that his medical malpractice claim was viable. The burden to establish damage proximately resulting from a lawyer's negligence is often referred to as a suit-within-a-suit. \textit{Albee Associates v. Orloff & Siegel}, 317 N.J. Super. 211 (App. Div. 1999). In order to recover from an attorney failing to follow procedure, those precipitating a dismissal of his or her client's case, a client must establish the recovery which the client would have obtained if malpractice had not occurred. \textit{Id.} at 222-223 (quoting, \textit{Frazier v. New Jersey Manufacturers Insurance Co.}, 142 N.J. 590 (1995).

Q. Attorney's Liability for Acts of Private Investigators

In \textit{Hawkins v. Brian Harris, Esquire}, 141 N.J. 207 (1995), in the course of pretrial proceedings, the appellant insured alleged that appellees, attorneys, insurer, and investigators, defamed her. Appellees filed a motion for summary judgment on the defamation claim that asserted the privilege of judicial immunity. The lower courts affirmed the grant of summary judgment, and held that the absolute privilege accorded to statements made by participants in judicial proceedings extended to statements made by private investigators employed by parties and their representatives. The court affirmed because the pretrial statements, which portrayed appellant as an insurance cheat and as a suborner of perjury, were made in judicial proceedings by litigants or other participants authorized by law to achieve the objects of the litigation and had
some connection or logical relation to the action. The court stated that the trial court might not have fully considered the relevance of the investigator's alleged suggestion of appellant's adultery. However, the court held that the issue was not before them in the instant appeal.

The immunity that attends judicial proceedings protects both counsel and other representatives who are employed to assist a party in the course of litigation. Petty v. General Accident, 365 F. 2d 419 (3d Cir. 1966) (applying New Jersey law). The privilege protects an attorney's agents and employees in acts which they do at the attorney's request. Youmans v. Smith, 47 N.E. 265 (N.Y. 1897).

In Middlesex Concrete Products v. Carteret, 68 N.J. Super. 85 (App. Div. 1961), the Court found that the litigation privilege immunized accusations made by an engineering consultant working for a defendant in a pending lawsuit.

R. Examination of Title and Real Estate Matters

When an attorney is retained to represent the purchaser and examine the Title, he must make a painstaking examination of the records, and report all facts relating to the Title. The attorney will be liable for any injury that may result to his client as a result of negligence in the performance of these duties, i.e. from a failure to exercise ordinary care and skill in discovering in the records and reporting all the Deeds, Mortgages, Judgments, etc. affecting the Title in respect to which he is employed. St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 443 A. 2d 1052 (1982).


Also, attorneys have been held responsible to their clients for failure to report a Judgment that was a lien upon the land. Jacobson v. Peterson, 91 N.J.L. 404, 103 A. 983 (Sup. Ct.).

In Smith v. John Boyd and Chicago Title Insurance Co., 272 N.J. Super. 186, 639 A. 2d 413 (Law Div. 1993), the Court noted that the purchase of real estate essentially requires the purchaser to be aware of the seller, and to exercise such protections as are reasonably available to the purchaser. Citing, Johnson v. Usdin Lewis Co., Inc., 248 N.J. Super. 525 (App. Div. 1991). The Court in Smith also held that the seller is not obligated by common law to advise the buyer of the state of Title.

In Smith v. Boyd, plaintiff purchaser was the successful bidder at a sheriff's foreclosure sale conducted at the request of a foreclosing second mortgagee who was represented by defendant attorney. In processing the foreclosure, defendant attorney relied on a title report prepared by defendant title insurance company that failed to include the existence of an open first mortgage on the property. Plaintiff brought an action against both defendants. The court dismissed plaintiff's complaint and held that there was no liability on the part of defendant attorney because he did not know of the open mortgage and was not given reason to suspect that there was a prior mortgage open of record. The court also held that N.J. Stat. Ann. § 2A:61-16 provided a defense to defendant title insurance company for the negligent preparation of the title report. The court stated that § 2A:61-16 provided plaintiff the ability to protect against liens omitted from the announcement by obtaining a title search and rescinding his bid if the search disclosed a defect. However, plaintiff was required to, but did not, raise the existence of any defect, including the prior mortgage, before delivery of the deed.

In RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Ins. Co., 58 F. Supp. 22 (D.N.J. 1999), Judge Orlofsky, applying New Jersey law, granted partial Summary Judgment on
the issue of liability to a non-client plaintiff, against the defendant/attorney, Mr. Nigro, and his law firm. Judge Orlofsky found that Mr. Nigro breached a duty to the non-client for failing to review documents and/or failing to discover and/or disclose the existence of a second Mortgage encumbering the commercial real estate premises. *Id.* at 525.

It is to be noted that, in *RTC*, the attorney represented the buyer and seller in a commercial real estate transaction. Therefore, the attorney violated RPC 1.7. See, *Baldasarre v. Butler*, 132 N.J. 278, 291 (1993), where our Supreme Court made it absolutely clear that an attorney may not represent a seller and a buyer in a commercial real estate transaction even if both give their informed consent.

**S. The Duty of the Attorney to Formulate a Litigation Strategy**

In New Jersey, attorneys have a duty to timely formulate and implement a reasonable litigation strategy. In *Soult v. Mattioni*, A-2619-07T2 (App. Div. February 20, 2009), the plaintiffs argued that the defendant attorneys, in an underlying toxic tort case, had a duty to search for medical experts who would establish injury resulting from carbon monoxide exposure to a family as a result of a defective heater. The attorneys filed suit, but could not get, after consultations with a neurologist and a pulmonologist, an affirmative opinion that injury resulted from the exposure. The Trial Court dismissed the action, and the Appellate Division affirmed.

The Appellate Division held that the plaintiffs' expert in the legal malpractice action offered opinions which were net opinions. That is, the plaintiffs' expert in the legal malpractice action opined that an attorney representing a plaintiff has a duty to shop for a favorable expert. The Appellate Division rejected that opinion, finding that it is not the standard of care in New Jersey to shop for a favorable expert once unfavorable reports are rendered.
T. An Attorney's Reasonable Professional Judgment is Immune from Malpractice


In Prince, supra., the attorneys defense of the legal strategy was not successful because there the attorneys failed to properly add a drug manufacturer as a defendant in a medical malpractice action against a pediatrician who had prescribed an antibiotic that caused permanent staining of the plaintiff's teeth. The defense's litigation strategy was not successful in this case because the plaintiff came forward with proof to show that there were issues regarding the drug manufacturer's warning, which could have presented an issue for the jury based upon expert testimony.

U. The Attorney's Liability for the Client's Representations

In situations where claims are made for misrepresentation based upon statements of clients, it has been held that the attorney, who puts into writing an agreement between two parties, does not vouch for the representations either party has made to the other. Wiebel v. Morris, Downing & Sherred, C.A. No. 07-3150 (S.R.C.) (D.N.J. June 2, 2009). In Wiebel, the plaintiff filed a Complaint against the defendant attorneys. On January 12, 2009, the Court granted the attorneys' first Motion to Dismiss the Complaint, and dismissed the Complaint without prejudice. However, plaintiff was granted leave to file an Amended Complaint, and did so. The attorneys then moved to dismiss the Amended Complaint.
The Court found that Wiebel failed to allege sufficient facts to raise above the speculative level a right to relief based upon the attorney's breach of a professional duty of care to Wiebel, a non-client. The plaintiff had failed to allege facts to support a claim that the attorney made actionable representations to Wiebel, nor a claim that the attorney invited Wiebel to rely on such actionable representation. The Court found that on the misrepresentation claim, the plaintiff failed to state a valid claim for relief.

V. Claims Against Defense Counsel Arising out of Criminal Cases

In a legal malpractice claim against an attorney arising out of an underlying criminal case, one must first consider McKnight v. Office of Public Defender, 197 N.J. 180 (2008). That is, the McKnight case held that although plaintiff is not required to allege or approve “actual innocence” as a prerequisite to maintain the criminal malpractice claim, he “has to be exonerated to the point of being able to show some injury cause by the alleged malpractice, whether that relief is dismissal of the charges, acquittal on re-trial, conviction of a lesser and cleared offense or otherwise…McKnight, 197 N.J. 180-182 (2008) (citing and adopting Judge Stern’s decent in 397 N.J. Super 265, 298 (App. Div. 2007). For example, there may have been a vacation of a guilty plea and dismissal of the charges, entry of judgment on a lesser offense after spending substantial time and custody following conviction for a greater offense, or any disposition more beneficial to the criminal defendant than the original judgment. The criminal defendant must have secured some relief so as to trigger the accrual of the malpractice claim. So in these cases, one must determine whether the plaintiff obtained exoneration; vacation of a guilty plea; dismissal of the charges, entry of judgment on a lesser offense after an appeal; an Order setting aside a guilty plea; an acquittal on re-trial after having a guilty plea set aside or conviction of a lesser offense. Those would be prerequisites to the filing of a legal malpractice action against defense counsel arising out of a criminal case. In Cortez v. Gindhart, A-0430-12T1 (App. Div.
May 21, 2014), plaintiff filed a Complaint against his former defense counsel alleging malpractice. Cortez was the owner of a tax preparation business. After an IRS investigation regarding preparation of fraudulent tax returns, Cortez retained Gindhart to represent him.

Gindhart represented Cortez until shortly after Cortez was indicted in April 2008. Cortez alleged that Gindhart recommended he retain an accountant, and assured Cortez that all communications Cortez had with the accountant would be privileged. Cortez retained the accountant who then assisted in the audit, and prepared his tax returns. The Complaint alleged that shortly after the accountant was retained, the IRS matter was referred to the Criminal Investigation Division.

Cortez alleged that he asked Gindhart to represent two employees of his company who were potential targets of the IRS investigation, and that although Gindhart initially declined on the ground he might have a conflict of interest, he later agreed to do so. The Complaint alleged that Cortez made requests to Gindhart to negotiate a plea agreement with the U.S. Attorney. It further alleged that Gindhart refused to negotiate a plea agreement. However, a letter of November 28, 2006, addressed to Gindhart from the trial attorney for the Department of Justice stated, in response to Gindhart's November 27, 2006 letter, that "Regarding the investigation of your client . . . Cortez, and a possible pretrial resolution of this matter." The letter went on to calculate the tax loss, and the violation of 26 U.S.C. §7201 and the penalty, including incarceration which could be ordered. So, a plea agreement was offered. The Complaint alleged that the accountant was subpoenaed to testify before the Federal Grand Jury, and that the attorney unsuccessfully fought to quash the subpoena based upon privileged communications. However, the accountant was ordered to testify, and disclosed incriminating documents regarding Cortez. The Grand Jury returned an indictment against Cortez and an employee for filing false and fraudulent tax returns for tax payers. Gindhart withdrew from representing
Cortez retained new counsel who negotiated a plea agreement. Cortez pled guilty to two counts, and Cortez was sentenced, and ordered to pay restitution. Then Cortez filed a Complaint against Gindhart. A Motion to Dismiss was filed on behalf of Gindhart. Cortez argued that he did not dispute his guilt or conviction but rather, his sentence. The Appellate Division held that in order to survive summary judgment, Cortez had to show that the claims he asserted were viable. As to the legal malpractice claim, Cortez was required to show that competent evidence existed to support each of the elements of the negligence action. Cortez admitted he was guilty of the offenses to which he pled guilty. The injury he claimed was that he was deprived of an opportunity to accept a more favorable plea offer and as a result of the deprivation, he received a harsher sentence. First, the court noted that the test is not whether defense counsel could have done better, but whether he met the Constitutional threshold for effectiveness under State v. Nash, 212 N.J. 518 (2013). The Appellate Division noted that a defense counsel's duty to provide representation in the plea negotiation process plainly includes the duty to explore the possibility of resolving criminal charges through a plea agreement when directed to do so by a client, to keep the client informed of the plea offer, and to follow the client's instructions in accepting or rejecting a plea offer. See, Vastano v. Algeier, 178 N.J. at 234-35. Also, in Alampi v. Russo, 345 N.J. Super. 360 (App. Div. 2001), the plaintiff client pled guilty to a criminal offense committed before he was represented by counsel. The court found it appropriate to require a plaintiff who seeks to recover damages for alleged invalid conviction to first prove he was unlawfully convicted. However, the court stated that they did not reach the question of the requirement for exoneration from a criminal conviction in all cases before a plaintiff could make out a jury issue. The court eschewed a bright line rule requiring exoneration in all cases. In Cortez, the Appellate Division noted that if an attorney fails to communicate a plea offer prior to
a plea cutoff date, the client who proceeds to trial and receives a harsher sentence than the offer has suffered an injury, i.e. a result measurably worse than the sentence that would have been imposed in the absence of attorney negligence. In such circumstances, the client's malpractice claim would not depend upon the invalidity of the conviction or the repudiation of a knowing and voluntary plea. The court did not view McKnight as barring such a claim for lack of some exoneration. Cortez's allegation against Gindhart did not depend upon the invalidity of the conviction or his admission of guilt. His allegation that Gindhart failed to engage in any plea negotiations despite his requests could form the basis for a legal malpractice claim without evidence of exoneration if he was able to prove that he suffered such an actual injury that was proximately caused by the alleged negligence. In Cortez, the plaintiff's claims were based on what he asserted was a missed opportunity. He had to demonstrate that the missed opportunity had actual value. He had to show that the government was willing to extend a plea offer to him at the time Gindhart represented him that was more favorable than the one he accepted, and that his sentence would have been less than the one he received. However, Cortez failed to do so. Cortez provided no evidence that the government was willing to enter into a more favorable plea agreement before Gindhart ceased representing him or that he would have received a more lenient sentence if he had entered a guilty plea earlier. The government's November 2006 letter to Gindhart stated that according to the sentencing guidelines, the base offense level for Cortez's conduct was 20; and that it was likely that the offense level would be increased by two points based upon a finding that Cortez was in the business of assisting in the preparation of tax returns. The government predicted a guideline range of 41-51 months imprisonment. The government advised it was possible the offense level could be reduced by two points if Cortez accepted responsibility for the offenses and reduced by an additional point by a timely notification of an
intent to plead guilty. Pursuant to the letter which was a non-binding plea agreement, the most favorable offense level available to Cortez in 2016 was 19. According to the sentencing table in effect at the time, that offense level called for a recommended range of 30-37 months imprisonment. Cortez had presented no evidence to demonstrate that a more favorable plea offer was available to him at any time while he was represented by Gindhart. In fact, his sentence of 36 months incarceration was well within the range the government stated could apply if Cortez accepted responsibility and gave a timely notification of his intent to plead guilty in 2006. Thus, Cortez's legal malpractice claim rested upon an allegation of injury that was based upon mere speculation. Therefore, the Appellate Division held that it was correctly dismissed.

W. Attorney Liability for Staff Negligence

In Shapiro v. Rinaldi, 2016 N.J. Super. Unpub. LEXIS 596, the issue before the Court was whether an attorney was liable for the fault of his secretary who failed to advise the attorney that a prospective client had called with a new case and had sent materials on the case including photos, medicals and the like. The secretary told the prospective client (who she knew from other matters) that she would share the information with the attorney and that he would definitely call her back. However, the attorney never called the prospective client back because he did not know about the call. The statute of limitations ran on the Tort Claims Act. In their opinion, the Appellate Division found that plaintiff failed to establish an attorney-client relationship with the attorney. The Court also found that the attorney, a solo, had proper office procedures in place for the running of a firm and client intake, which the secretary failed to follow. Also, plaintiff argued that attorney-client relationship by implication. The Appellate Division rejected that theory finding that one would still need reliance, and that there was no proof that the prospective client acted reasonably in her belief that she was represented by the attorney.
Also the Appellate Division found that even if there was a violation of R.P.C. 5.3(b), that violation would not, standing alone, create a cause of action for damages in favor of plaintiff. Accordingly the Appellate Division held there was no basis for holding the attorney liable for malpractice. This is a very significant opinion for solo practitioners who rely upon their secretaries and paralegals in the normal and ordinary course of practice.

X. Exposure of Attorneys Handling Commercial Litigation Cases.

In Cottone v. Fox Rothschild, LLP, 2014 N.J. Super. LEXIS 2143, this professional liability matter arose from the representation by defendants Fox Rothschild, LLP and Eric J. Michaels, Esq., of plaintiff Robert Cottone in certain settlement proceedings and in the negotiation of a redemption agreement. The primary issue before the Appellate Division was whether the trial court correctly determined that an attorney owes no duty, as a matter of law, to explain unambiguous business terms in a written agreement, when the client is a sophisticated businessperson who negotiated the terms of the agreement himself. The Appellate Division determined that the defendants owed plaintiff a duty of care, as a matter of law, arising from their attorney-client relationship.

Plaintiff was the sole shareholder of Brokerage and Insurance Consulting Inc. (BIC), a commercial insurance brokerage company. In January 2000, plaintiff sold all of his stock in BIC to NIA Group, LLC (NIA) for $1,000,000 and a "Non-Voting Membership Interest Purchase Warrant" (the Original Warrant). The Original Warrant entitled plaintiff to purchase 2.75% of NIA's outstanding equity, referred to as "Membership Interests," at a price of $1,237,500. Plaintiff's right to exercise the Original Warrant would vest incrementally over five years, and became fully vested as of January 2006.

Contemporaneous with the sale of BIC, plaintiff entered into a five-year employment contract with NIA. The contract included a provision whereby NIA would compensate plaintiff,
as commission for every year in which his revenues exceeded one million dollars, with additional non-voting equity. Pursuant to that agreement, plaintiff would eventually acquire a .32910% equity interest in NIA. Defendant Michaels, a partner at defendant law firm Fox Rothschild, represented plaintiff in these matters, as well as subsequent transactions between plaintiff and NIA.

NIA's purchase of BIC eventually resulted in the formation of a new business entity, NIA Group II, LLC (NIA-II), which then led to a restructuring of the company's ownership interests. Michaels represented plaintiff in a new transaction to transform his NIA interests into equivalent interests in NIA-II. On January 1, 2006, plaintiff and NIA-II entered into a formal conversion agreement, which gave to plaintiff equity interests in NIA-II that were "identical in all respects" to his former interests in NIA. The Original Warrant was replaced by a second warrant (the Warrant). Whereas the former gave plaintiff the right to purchase 2.75% of NIA's Membership Interests, the latter entitled him to purchase 275,000 "units" of equity in NIA-II. The agreement also converted his .32910% in NIA equity, acquired pursuant to the employment contract, into 32,910 Units in NIA-II. By separate agreement, also dated January 1, 2006 NIA-II extended plaintiff's employment to January 2011.

In June 2009, plaintiff filed a lawsuit against NIA-II and Paul Gross, its President and Chairman. Among his various claims was an allegation that Gross had misrepresented NIA's value at $50,000,000 during negotiations to purchase BIC, and thus distorted the financial worth of the equity plaintiff could acquire under the Original Warrant and employment contract. Plaintiff alleged that an increase in the total number of outstanding membership interests had diluted his equity interests in NIA.
Around the time plaintiff filed his lawsuit, NIA-II was involved in negotiations for its sale to Marsh & McLennan Agency, LLC (MMA). Accordingly, plaintiff's suit was placed on a due diligence list, which was tasked to Steven Grossberg of NIA-II. Grossberg initiated settlement discussions with plaintiff soon afterwards, sometime around early July 2009. Grossberg's initial settlement offer was rejected by plaintiff, though neither individual could recall the exact terms when deposed. Grossberg then asked plaintiff to "put together a proposal so that I can see where you are coming from."

Plaintiff solely negotiated the economic terms of the pending agreement with Grossberg, the representative of NIA-II. Neither Michaels, nor any other attorney from Fox Rothschild took part in those direct negotiations.

In late August 2009, NIA-II sent plaintiff an initial draft redemption agreement prepared by its attorneys at Sills Cummis & Gross P.C. (Sills Cummis). Michaels then reviewed the first draft with plaintiff, which both men later recalled taking place over the phone. According to plaintiff, he had "a very difficult time" getting through the document, and told Michaels "this thing is a nightmare." Allegedly, Michaels commented that the contract as drafted was "complicated, ugly, [and] difficult to read." At his deposition, plaintiff stated that he did not recall discussing, or asking Michaels to go over, the specific provision dealing with his potential kicker.

According to Michaels, he went through the initial draft with plaintiff "almost in painstaking detail," during which plaintiff flagged any items that concerned him. At deposition, Michaels testified that they talked about the kicker provision, but could not recall the nature of such discussion, and asserted that plaintiff "seemed satisfied with [the] agreement."
The dispute leading to this lawsuit centers on Section (1)(c) of the Redemption Agreement (the kicker provision), which addresses NIA-II's agreement to pay plaintiff additional consideration — also referred to at other times as a kicker or bump — in the event that NIA-II was sold by July 31, 2010. Pursuant to that provision, the "Additional Consideration" to be paid to plaintiff under such circumstances was defined as:

[T]he difference between the price per unit used to calculate the Unit Purchase Price and the net price per unit to be paid to the members of [NIA II] (or distributed to the members of [NIA II] on a pro rata basis relative to unit ownership) in connection with a Sale of the Company (the "Per Unit Sale Price") (for purposes of this Section 1(c), the Per Unit Sale Price is to be calculated as if [plaintiff]'s units were issued and outstanding at the time of such Sale of the Company), multiplied by the number of units being redeemed hereby (and, for the avoidance of doubt, not any units underlying the Warrant).

As previously mentioned, the last parenthetical language — "and, for the avoidance of doubt, not any units underlying the Warrant" (the "avoidance of doubt" language) — had been absent from earlier drafts but was later inserted by Sills Cummis in the September 24 draft.

MMA ultimately purchased NIA-II in December 2009. After the deal was finalized, plaintiff observed "charts going around" the office listing equity-holders and their corresponding distributions from the sale. Plaintiff asked a company official why he was not on the charts "get[ting] paid with everybody else." He was told to read the Redemption Agreement, that it provided for a bump on his acquired units only. Plaintiff immediately called Michaels.

According to plaintiff's deposition testimony, the following exchange transpired, in substance. Plaintiff demanded, "There could be close to a million dollars involved. What the hell happened?" Michaels pulled the file, reviewed the drafts and Redemption Agreement, and then replied: "[I]n the first draft we can make a case that you should have gotten it. . . . [In] the final [version], they added language that absolutely kills the bump on the warrants." Michaels then
admitted that he had "missed it." For his part, Michaels denied at deposition to having made any such admission.

Plaintiff also testified at his deposition that had Michaels recognized and explained to him that Section 1(c) of the Redemption Agreement, and particularly the "avoidance of doubt" language, excluded a "bump" on his Warrant equity, he would not have executed the agreement. According to plaintiff, he "was an obstacle to a hundred million dollar transaction." Therefore, either NIA-II would have acceded to a kicker on the Warrant, or he would have rejected the Redemption Agreement, held onto the Warrant and exercised it after the MMA sale. Plaintiff also remarked, "I would have been a total fool to accept anything less than my entire interest in NIA."

On May 13, 2010, plaintiff filed a complaint for legal malpractice against Fox Rothschild and Michaels. Following discovery, which included depositions of plaintiff, Michaels, Grossberg and Gross, defendants, moved for summary judgment.

In his opposition materials, plaintiff submitted an expert report prepared by Gary Falkin, Esq. Falkin had access to, and based his conclusions upon, discovery materials such as the depositions of plaintiff, Michaels and Grossberg, emails and other correspondence between the principal actors, and multiple drafts of the Redemption Agreement.

At first, Falkin described the applicable standard of care, citing the New Jersey Rules of Professional Conduct (RPC) and controlling case law. Then, after comprehensively reciting the facts and circumstances of the representation, Falkin opined that Michaels had deviated from accepted standards of legal practice by failing to "fully discuss the matter" with plaintiff and to ensure that the Redemption Agreement "accurately reflected the deal [plaintiff] believed he had made." In reaching that conclusion, Falkin emphasized the following facts: (1) Michaels was
aware that plaintiff's priority was to "monetize" his equity interests; (2) Michaels could not recall ever discussing or explaining the kicker provision with plaintiff; (3) Michaels, referring to the exclusion of the Warrant from the kicker provision, allegedly admitted to plaintiff that he had "missed it"; and (4) in discussions with plaintiff subsequent to the MMA sale, Michaels never once countered that he had, in fact, discussed and explained the contested language to plaintiff.

In addition, Falkin found further deviation in Michaels' failure to notice the language inserted by Sills Cummis in the September 24 draft — the "avoidance of doubt" language. According to Falkin, the previous drafts were "ambiguous" as to whether NIA-II would be paying additional consideration on the Warrant; the added language removed all doubt, which should have been caught and changed by Michaels.

Finally, Falkin assailed Michaels' contention at deposition that he was a "mere scrivener" throughout the representation, and thus was only responsible for ensuring that the written agreement reflected the terms negotiated by plaintiff. To Falkin, this testimony demonstrated that Michaels had abdicated his role as counsel and reinforced his conclusion that Michaels failed to fully address the issues raised by the representation and advise plaintiff accordingly.

Upon review of the record, viewing the facts in the light most favorable to plaintiff, the Appellate Division concluded that plaintiff's claim should not have been resolved on summary judgment because there were genuine issues of material fact. First, the parties dispute whether the deal orally negotiated by plaintiff and Grossberg included a kicker for his Warrant interests. The Appellate Division was compelled to credit plaintiff's deposition testimony that the negotiated terms included additional compensation for his Warrant in the event that NIA-II was purchased within the specified time period. Second, there are conflicting factual contentions regarding whether plaintiff communicated to Michaels his desire and expectation that the
Redemption Agreement include a kicker for his Warrant. According to plaintiff, he explained to Michaels that he would be "getting a kicker on what [he] owned, and [his] equity." Third, plaintiff claims that Michaels admitted fault after the import of the final kicker provision became clear, specifically alleging that Michaels confessed to having "missed it." While plaintiff may not be able to satisfy his burden of proof with respect to his version of events, defendants should not have prevailed on that factual issue on a motion for summary judgment.

Finally, plaintiff presented the opinion of his expert Falkin, who proffered a standard of care and concluded that Michaels had deviated from it by failing (1) in the first instance, to ensure that the Redemption Agreement provided for a kicker on plaintiff's Warrant in accordance with his stated objective to "monetize" his equity interests, and (2) to notice or inquire into the exclusion of the Warrant from the kicker provision. Falkin underscored the fact that Michaels allegedly admitted to "missing it" and pointed to Michaels' deposition testimony in which he stated that his only role vis-à-vis the economic terms in the deal was as a "scrivener." The parties quarrel over the propriety of the motion judge's conclusion that the Redemption Agreement was unambiguous. Defendants contended that contract ambiguity is determined by the court as a matter of law, while plaintiff argued that his expert's opinion that the contract was ambiguous created a fact dispute for a jury to resolve. The Appellate Division agreed with the judge that the Redemption Agreement's "avoidance of doubt" language was unambiguous and precluded plaintiff from receiving a kicker on his warrant equity. Thus, the real question in this litigation is whether Michaels committed malpractice by not inquiring into or explaining the terms of the Redemption Agreement, that is, whether a competent and diligent attorney acting in similar circumstances would have done so.
The Appellate Division held that Falkin's opinion, "clearly based on factual evidence of record, to which he applied generally accepted standards of care," Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 80 (App. Div. 2007), should have been credited by the motion judge for purposes of summary judgment.

In Binder v. Price Waterhouse & Co., L.L.P., 393 N.J. Super. 304 (App. Div. 2007), fifteen years after a Chapter 11 reorganization plan was approved, plaintiff litigation trustee sued defendant accounting firm for accounting malpractice and breach of contract. The trustee's predecessor had retained the firm to provide services to the litigation trust. Nearly seven years after the reorganization plan was confirmed, plaintiff trustee timely sued the firm in bankruptcy court, alleging malpractice and breach of contract. The complaint was dismissed, reinstated, and then dismissed again. Under 28 U.S.C.S. § 1367(d), the pending federal suit suspended the running of the statute of limitations for purposes of the later state court suit, until 30 days after the dismissal of the federal suit. The trustee waited eight months to file his state claim after final dismissal of the federal suit, and then was dilatory in pursuing it. The primary issue was whether tolling principles applied to preserve the state court action after the normally applicable statute of limitations had already expired. The appellate court found the proper standard to apply in the case was equitable tolling, but that the trustee did not act promptly to file his state court action after dismissal of the federal action. He was unable to show he acted with reasonable diligence in filing the state court matter and failed to present a legitimate reason why his filing was untimely.

Y. Exposure of Bankruptcy Lawyers

In Albee Associates v. Orloff, Lowenbach, Stifelman and Siegal, P.A., 317 N.J. Super. 211 (App. Div. 1999), appellee law firm represented appellants in a federal civil fraud action. Appellee law firm failed to timely file a complaint for non-dischargeability in a bankruptcy proceeding filed by one of the defendants in the fraud action. The failure led to a discharge of
appellants' fraud claims against the defendant in the bankruptcy action. Consequently, appellants filed a legal malpractice action against appellee law firm. Appellants moved for summary judgment and appellee law firm filed a cross-motion for summary judgment. The lower court granted appellee law firm's motion on the basis of the alleged non-collectibility of a judgment that might have been obtained against the defendant in the federal fraud action. On appeal, the court determined that the critical issue was whether the record so clearly showed that a judgment would not be reasonably collectible such that the court could say with confidence that plaintiffs were not damaged. The court concluded that the evidence presented to them did not so clearly establish non-collectibility such that no reasonable juror could have concluded otherwise. Accordingly, the court reversed the lower court's decision and remanded the case.

In Dipasquale v. Indus. Urban Corp., 2016 N.J. Super. Unpub. LEXIS 426, Plaintiff was retained by Defendants to provide legal services in connection with various lawsuits brought by Valley National Bank arising out of a series of complex loan transactions. The terms of the agreement provided that Plaintiff would attempt to negotiate a favorable settlement with Valley National and, if unsuccessful, render legal advice to Defendants as to their other options including filing for Chapter 11 reorganization. After a period of time, Defendants became dissatisfied with the progress of the negotiations with Valley National and indicated to Plaintiff that they wanted to consider filing a reorganization in lieu of continuing to attempt an amicable resolution with Valley National. Thereafter, Defendants stopped paying Plaintiff's legal fees, and they declined Plaintiff's invitation to resolve the fee dispute by way of fee arbitration. Accordingly, on March 12, 2015, Plaintiff filed a complaint against Defendants based on the retainer agreement between the parties. In response, Defendants filed an Answer including a counterclaim against Plaintiff. The counterclaim included two counts, the first for gross
negligence and the second for legal malpractice. Both counts are premised on Defendants' allegation that Plaintiff erred in advising Defendants that they qualified for reorganization under Chapter 11 of the United States Bankruptcy Code. Defendants allege that their reliance on Plaintiff's advice and false promises resulted in damages for which Plaintiff is liable.

On August 17, 2015, Defendants timely filed an Affidavit of Merit ("AOM") in support of their legal malpractice counterclaim, as required by N.J.S.A. 2A:53A-27. The affidavit was prepared by Andrew M. Epstein, Esq. an attorney with the law firm Lampf, Lipkind, Prupis & Petigrow, P.A. In his affidavit, Mr. Epstein attests that he is duly licensed as an attorney in the State of New Jersey and his curriculum vitae is attached to the affidavit as an exhibit. Mr. Epstein attests that, to his understanding, Defendants' allegations are:

a. Not complying with the instructions given by or on behalf of defendants, in particular regarding the failure to institute a proceeding on defendant's behalf in the United States Bankruptcy Court;

b. Knowingly propelling defendants into meritless and costly litigation;

c. Failing to give defendants candid advice.

Mr. Epstein attests that in order to analyze whether Defendants' allegations have merit, the analyzing attorney should have a background in legal ethics and commercial litigation. Mr. Epstein attests that he has substantial experience in ethics proceedings and that he has concentrated in litigation throughout his career and is fully familiar with commercial litigation matters. Mr. Epstein's curriculum vitae supports his account of his qualifications, revealing that he co-wrote the "New Jersey Rules of Evidence with Annotations" (1972 Edition) and served as a member of the Union County Ethics Committee from 1987 to 1991 as well as on the Essex County Ethics Committee from 2007 to 2011, on which he was the Chair during the 2010-2011 term. Mr. Epstein attests that if the allegations in the counterclaim are proven, it is his opinion
that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work by Plaintiff fell outside acceptable professional or occupational standards.

On September 4, 2015, Plaintiff wrote a letter to the court, advising that it believed Mr. Epstein's AOM was deficient pursuant to N.J.S.A. 2A:53A-27 and requested a case management conference with the court and all parties pursuant to Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 836 A.2d 779 (2003). A Ferreira conference was held on September 25, 2015, at which Plaintiff's counsel argued that Defendants' AOM was deficient because the affiant, Mr. Epstein, does not practice in the field of bankruptcy law. The court tentatively agreed with Plaintiff during the conference and directed the Defendants to submit a new AOM from an attorney that practices in that area of law.

Rather than submitting an AOM in compliance with the court's directions, Defendants wrote a letter to the court advising that it was their position that Mr. Epstein's affidavit complied with N.J.S.A. 2A:53A-27 and requesting the court make a definitive decision prior to October 30, 2015, the 120-day statutory deadline. Because Defendants never made a motion to obtain the court's determination, however, there was nothing pending before the court to make a ruling. Suffice it to say that Defendants were aware of the court's tentative decision and Plaintiff's objection to the AOM. Upon the expiration of the deadline, Plaintiff filed the present motion, requesting the court to dismiss Defendants' counterclaim with prejudice for failing to comply with the requirements under N.J.S.A. 2A:53A-27. On January 8, 2016, the Court entertained oral argument for the case at hand. At the hearing, counsel for Defendants candidly advised the court that "[m]y client has been speaking to a bankruptcy attorney for four weeks. She does not even have an opinion, now at this juncture, given all of the information that she has, whether or not
reorganization was the appropriate thing to do." Thus it is evident that attempts to obtain an AOM from a bankruptcy attorney were unsuccessful.

The parties do not dispute that an affidavit of merit is required for Defendants' counterclaim. Rather, the central issue before the court is whether the affidavit of an attorney with sufficient experience in bankruptcy law is required to support Defendants' legal malpractice counterclaim under N.J.S.A. 2A:53A-27. For the reasons that follow, the court concludes that given the allegations in the Complaint, the AOM is deficient and the counterclaim for legal malpractice must be dismissed. The court will grant the application to amend the Complaint to include a breach of contract claim and of course Defendants are free to defend the case based on their position that the fees were unreasonable.

Z. When Attorneys Fees Can Be Awarded in Legal Malpractice Actions Brought by Non-Clients

In an article recently published by the Professional Malpractice Supplement of the New Jersey Law Journal, recent developments in the law of attorneys fees was discussed\(^1\).

In Innes v. Marzano-Lesnevich, 224 N.J. 584 (2016) the New Jersey Supreme Court noted that New Jersey has a strong public policy against shifting of counsel fees. There, the Court restated the basic principle of New Jersey law, that New Jersey Courts historically follow the "American Rule", which provides that litigants must bear the costs of their own attorneys' fees. Innes at 592, citing Litten Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372 (2009). In fact, the Innes Court made it clear that New Jersey has limited exceptions to the "American Rule". Id., citing In Re: Niles Trust, 176 N.J. 282 (2003) ("[n]o fee for legal services shall be allowed in the

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\(^{1}\) This article was also re-published on the National Association of Legal Fee Analysis (NALFA) blog on January 27, 2017. The article can be found at: http://www.thenalfa.org/blog/when-can-attorney-fees-be-awarded-to-non-clients-in-legal-malpractice-cases/
tax costs or otherwise, except in eight enumerated circumstances) (see also, R. 4:42-9(a)). The Innes Court made it clear that any departures from the "American Rule" are the exception.

In Innes, Mr. Innes and his wife, Maria Carrascosa, were involved in a contentious divorce and custody battle over their daughter, Victoria. The parties entered into an agreement whereby Carrascosa's attorneys would hold Victoria's United States and Spanish passports in trust to restrict travel outside of the U.S. with Victoria, without written permission of the other party. However, notwithstanding this agreement, Carrascosa's attorneys released Victoria's U.S. passport to Carrascosa, who used it to remove Victoria to Carrascosa's native Spain, where Victoria has remained for the past ten years. Also, by Order of the Spanish Court, Innes was prevented from contacting his daughter.

The Innes Court held that because the attorneys were acting in a fiduciary capacity as trustees and escrow agents for both Innes and Carrascosa, if they intentionally breached their fiduciary obligation to Innes by releasing Victoria's U.S. passport without Innes' permission, the attorneys could be held liable for counsel fees.

The Supreme Court only held that a prevailing non-client may be awarded counsel fees incurred to recover damages arising from an attorney's intentional violation of a fiduciary duty. Because the attorneys were holding Victoria's passport as trustees and escrow agents, they were fiduciaries for the benefit of both Carrascosa and Innes. Innes was relying on the attorneys to carry out the fiduciary responsibilities under the agreement, and to prevent Carrascosa from taking Victoria away from him. Therefore, the Supreme Court held that Innes would be entitled to counsel fees if there was a finding at trial that the defendant attorneys intentionally breached a fiduciary responsibility to Innes, regardless of the existence of the attorney-client relationship.
The dissent noted that, as escrow agents, the attorneys owed a fiduciary duty to Innes, the client of their adversary. See generally, In Re: Hollendonner, 102 N.J. 21, 26 (1985) (an escrow agent acts as an agent for both parties). The attorneys breached that duty when they turned over the child's passport without Innes' permission. The dissent noted, however, that a simple breach of a fiduciary responsibility was insufficient to shift fees.

In any event, the Innes decision is limited to a claim by a non-client in a situation where the attorney intentionally breaches a fiduciary duty. The Innes ruling would not apply, and fees could not be awarded in favor of a non-client, against a lawyer for simple negligence.

The current law on attorneys' fees, as articulated in Innes, began with the case of Saffer v. Willoughby, 143 N.J. 256 (1996). In Saffer v. Willoughby, 143 N.J. 256 (1996), there was a fee dispute between an attorney and his former client who filed the legal malpractice action against the former attorney. Saffer, 143 N.J. at 260. One of the issues in Saffer was the effect that a finding of malpractice should have on the fee dispute, and on the former client's damages. The Saffer Court concluded that "a negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred by a former client in prosecuting the legal malpractice action," because such fees are consequential damages that are proximately related to the malpractice. Id. at 272. However, as noted above, under Saffer, attorney fees were awarded to a former client.

In Packard-Bamberger &Co. v. Collier, 167 N.J. 427 (2001), the plaintiffs, in connection with their suit brought against the defendant corporate director, who also served as legal counsel to plaintiff corporation, sought to recover reasonable expenses and attorneys' fees as a consequence of defendant's malpractice. Finding intentional misconduct on the part of the attorney-director, the trial court awarded counsel fees. The Appellate Division reversed and plaintiffs appealed. The Supreme Court reversed the Appellate Division's decision.
In deciding Packard-Bamberger, the Supreme Court extended Saffer to claims by a successful claimant against attorneys for intentional misconduct. 167 N.J. at 443. In Packard, the Court found that the corporation's attorney intentionally withheld information and usurped a corporate opportunity. 167 N.J. at 442. Id. at 437-38.

In In re Estate of Lash, 169 N.J. 20 (2001), the Court recognized an exception to the "American Rule" in a case involving an estate administrator malfeasance claim covered by the terms of a surety bond. In Lash, the administrator of an estate breached his fiduciary duty by misappropriating estate funds. Id. at 24. When the estate could not recover from the administrator, the estate filed a complaint against Fireman's Fund Insurance Company, which issued a surety bond on the estate. Id. at 25.

The Lash Court found that the attorney committed a tortious breach of fiduciary duty. The Lash Court held that the Estate was entitled to recover from the attorney damages caused by his breach of fiduciary duty. Also, the Lash Court noted that in Saffer, 143 N.J. 256 (1996), the Court held that an attorney may be liable for attorney's fees incurred by the aggrieved client in the action for malpractice. The Lash Court also clarified that the Saffer ruling also applied when an attorney intentionally breaches a fiduciary duty to a client arising out of the attorney-client relationship. Lash, citing Packard-Bamberger, 167 N.J. 427 (2001). However, in Lash, the Supreme Court noted that the claim for attorney's fees was made by the Estate against an attorney-defendant where there was an attorney-client relationship.

In In re Niles Trust, 176 N.J. 282 (2003), the Court held that when an Executor or Trustee reaps a substantial economic or financial benefit from undue influence, the fiduciary may be assessed counsel fees incurred by plaintiffs. In Niles, the Court found that the Trustee's conduct was "inexcusable and reprehensible" because he had embezzled and misused the Estate of Laura
Niles. 176 N.J. at 290. Also, the Court found undue influence. 176 N.J. at 291. As a result, the Trial Court declared modifications to a Trust null and void. 176 N.J. at 291. The claimant sought fee shifting based upon a breach of a fiduciary duty relying upon Lash, 169 N.J. 20 (2001) and Packard-Bamberger, 167 N.J. 427. The Court found that the fees were damages caused by the attorney's breach of his fiduciary duty. Niles, 176 N.J. at 295. Therefore, the fees were to be reimbursed by the attorneys based upon his breach of fiduciary duty. 176 N.J. at 295-296. The Niles Court held that when an Executor or Trustee commits the pernicious tort of undue influence, there is an exception to the "American Rule" that permits the Estate to be made whole by an assessment of counsel fees against the fiduciary that were incurred by the Estate. Niles, 176 N.J. at 298-299.

**VARIOUS ISSUES REGARDING INSURANCE COVERAGE**

**I. PRIOR ACTS ENDORSEMENTS**

In President v. Jenkins, 180 N.J. 550 (2004), defendant doctor appealed the judgment of the Superior Court, Appellate Division (New Jersey), affirming the trial court's denial of the doctor's cross-motion for summary judgment and the dismissal of his cross claims against defendants, an insurer and an agency, alleging that the insurer had improperly failed to defend and indemnify him and that the agency had failed to obtain the insurance that the doctor had requested.

The doctor thought that his occurrence medical malpractice policy with defendant former insurer was to lapse in February 1998. The policy lapsed on October 26, 1997, due to an overdue premium. When obtaining new coverage from defendant insurer through defendants, the agency and a sales representative, the doctor never informed them that the policy with the former insurer had been cancelled in 1997. The insurer issued the doctor a binder that listed February 1, 1998 as the beginning of the binder period, January 1, 1998 as the beginning of the policy period, and
February 1, 1998 as the retroactive date. The doctor was sued for malpractice that allegedly occurred in January 1998. The insurer was improperly granted summary judgment. The insurer's policy was ambiguous. The binder was ambiguous because the retroactive date was set after the policy's effective date. Furthermore, the declarations page indicated that the retroactive date was January 1, 1997. An issue of material fact remained as to the doctor's reasonable expectations under the policy, as substantial evidence contradicted the doctor's assertions about his reasonable expectations as to the coverage dates of the policy.

The Court in President relied on Sparks v. St. Paul Ins. Co., 100 N.J. 325, (N.J. 1985). In Sparks, the defendant, an insurance company, issued an attorney a "claims made" professional malpractice policy that was renewable at successive one-year periods. The policy limited coverage to "'claims arising from the performance of professional services subsequent to the retroactive date'" in the policy. The policy's retroactive date was the same date as the effective date of coverage. The policy was prematurely terminated because the attorney failed to pay the premium.

Following cancellation, the attorney represented the plaintiffs in litigation, but because of his negligence the plaintiffs had judgments entered against them. The plaintiffs then filed a complaint against the attorney, and sought to have the defendant cover their claim. The defendant denied coverage, asserting it received notice of the claim after cancellation of the policy. The plaintiffs filed a declaratory judgment action against the defendant for coverage of their claim. The trial court granted judgment in favor of the plaintiffs and the Appellate Division affirmed.

The Court affirmed and explained that the difference between a "claims made" policy and an "occurrence" policy is that a "claims made" policy "'provid[es] unlimited retroactive coverage
and no prospective coverage at all," while an "occurrence" policy "provide[s] unlimited prospective coverage and no retroactive coverage at all." The Court noted that it previously had approved "claims made" policies, as had the substantial majority of courts throughout the country. The Court found that the policy's lack of retroactive coverage in the first policy year "materially diverge[d] from customary 'claims made' coverage." The Court concluded that if the policy at issue "comported with the generally accepted expectations of 'claims made' insurance," then it "would not hesitate to enforce [it]." However, the Court found that the policy's limitation on retroactive coverage did "not conform to the objectively reasonable expectations of the insured," and therefore, violated New Jersey's public policy.

Nevertheless, the Court acknowledged that under certain circumstances, limited retroactive coverage might be both reasonable and expected, e.g. if offered at a reduced premium to professionals in their first year of practice, or if the insured changed from an "occurrence" policy to a "claims made" policy. The Court also noted that the provision of "claims made" policies could be enforced if there was evidence that the insured fully understood the terms of the policy. The Court remanded to the trial court to consider whether there was such evidence in the case.

In Stein, Hinkle, Dawe & Associates, Inc. v. Continental Casualty Co., 110 Mich. App. 410 (Mich. 1981), the insurer sought review of the trial court's decision in an action seeking to have the insurer defend the insureds, an architectural and engineering business, in an action filed against them. The insureds claimed they were not warned by the insurer that failure to keep continuous coverage would preclude coverage for malpractice claims not made in the same policy year in which the alleged negligent act occurred. According to the insureds, they were not informed of the consequences of cancelling their insurance in 1969, nor were they advised that a
"prior acts" endorsement was available when they renewed their insurance in 1971. The court ruled that the trial court's finding that the insurer had a duty to warn the insureds that their coverage was inadequate was not clearly erroneous. The insurer handled all of the insureds' claims for 10 years. This relationship imparted upon the insurer a duty to warn of inadequate coverage. Silence of the insurer's agent to warn of the prior acts policy justified reformation of the contract by the trial court. However, the court ruled the insureds were not entitled to damages for emotional distress because the contract was commercial in nature, the insurer's breach was not willful, and the insureds were adequately compensated by the award of attorney fees.

II. PRIOR KNOWLEDGE ENDORSEMENTS

In Capece v. Allstate Ins. Co., 86 N.J. Super. 462 (Law Div. 1965), third party plaintiff insurer sought indemnification from third party defendant insurers of premises and automobile involved in an accident where judgment was obtained by plaintiff service station operator against third party plaintiff's insured when the automobile struck him while being driven onto a service station lift for brake repair. The court determined third party plaintiff was not entitled to indemnification or contribution by reason of its failure to give notice of suit or forward papers to defendants. The court explained defendants were prejudiced by being deprived of an opportunity to make timely investigations in the suit's defense. The court noted third party plaintiff's notice to its insured left the impression no coverage was available. The court explained that, as the subrogated party, plaintiff third party had no greater rights than its subrogee who was obligated to give written notice of the accidents to defendants as an insured operating the car in the performance of an operation incidental to the use of the insured's premises. The court concluded the failure of notice barred recovery when notice provision compliance was a policy coverage condition precedent.
III. REPORTING OF INSURANCE CLAIMS IN NEW JERSEY - WHEN SHOULD A CLAIM BE REPORTED?

The insured must be cognizant of when an insurance company requires notice of a claim. Late notice of a claim might result in the denial of coverage, or will at least lead to issues that would have otherwise not arisen if a claim was reported immediately.

Notice of a loss or suit, in accordance with the terms of a policy, must be given by or on behalf of the insured, and that compliance with a notice provision of a policy is a condition precedent to an insurer's liability thereunder. Mariani v. Bende, 85 N.J. Super 490, 499 (App. Div. 1964). The insurer is entitled to prompt notice, so that it might investigate the circumstances of the loss to determine whether and to what extent coverage may be owed. Such investigation may discourage a claim or result in settlement at a nominal or reasonable figure.

Some of the elements that must be considered are:

The purpose of a policy provision requiring the insured to give the company prompt notice of an accident or claim, is to give the insurer an opportunity to make a timely and adequate investigation of all the circumstances. An adequate investigation often cannot be made where notice is long delayed, because of the possible removal or lapse of memory on the part of witnesses, the loss of opportunity for examination of the physical surroundings and making photographs thereof for use at trial, and the possible operation of fraud, collusion, or cupidity. Such a requirement tends to protect the insurer against fraudulent claims, and also against invalid claims made in good faith. Further, if the insurer is thus given the opportunity for a timely investigation, reasonable compromises and settlements may be made, thereby avoiding prolonged and unnecessary litigation.

8.J. Appleman, Insurance Law and Practice, Section 4731 (footnotes omitted).

Whether the failure of the insured to comply with the provision requiring it to provide notice of an "occurrence" or suit within a reasonable amount of time is sufficient to deny coverage depends upon the effect that the breach has upon the insurer. Colangelo v. Bankers, 185 N.J. Super. 205, 210-211 (1982). The relevant consideration is whether the insurer is likely

Under New Jersey law, an insured does not forfeit coverage unless there has been both a breach of the notice provision and a "likelihood of appreciable prejudice." *Cooper v. Government Employers Insurance Company*, 51 N.J. 86, 94 (1968). The burden of proving a likelihood of appreciable prejudice is upon the carrier. *Id*.

In order to prove the likelihood of appreciable prejudice, the insurer must establish (1) "that substantial rights pertaining to a defense against the claim have been irretrievably lost," and (2) "the likelihood that it would have had a meritorious defense had it been informed of the [potential claim] in a timely fashion." *Morales v. National Grange Mutual Insurance Company*, 176 N.J. Super. 347, 356 (1980). Mere conjecture or suspicion that there may be a likelihood of appreciable prejudice is insufficient. *Molyneaux v. Molyneaux*, 230 N.J. Super. 169 (App. Div. 1989).

In *Cooper v. Government Employees Ins. Co.*, 51 N.J. 86 (1968), plaintiff obtained a judgment holding that defendant was obligated to provide coverage under an automobile liability policy. The issue was whether plaintiff and wife gave defendant notice of the accident as soon as practicable. Neither plaintiff nor his wife notified defendant until served with the summons and complaint almost two years later. Plaintiffs claimed they did not notify defendant because they had no idea a claim would emerge. The trial court found that plaintiffs held that view reasonably and in good faith whereas the appellate division held that persons of plaintiffs' education and
experience should have understood that notice was required under the circumstances. On appeal, the court reversed and held that N.J. Stat. Ann. § 17:28-2 requires the policy to read that failure to give any notice required to be given by the policy within the time specified therein should not invalidate any claim made by plaintiff if it is shown not to have been reasonably possible to give the notice within the prescribed time. The evidence well supported the trial court's finding that plaintiffs acted reasonably and in good faith.

The Court that although the policy requires notice "[i]n the event of an accident, occurrence or loss," and so provides without any exception, the cases hold a trivial or inconsequential event is beyond the intent of the provision. Bass v. Allstate Ins. Co., 77 N.J. Super. 491 (App. Div. 1962); Figueroa v. Puter, 84 N.J. Super. 349, 354 (App. Div. 1964); 8 Appleman, Insurance Law and Practice § 4743, p. 78; § 4744, p. 83 (1962); 13 Couch, Insurance 2d, § 49:138, p. 723 (1965). This does not mean that an insured, conscious of a possibility of a claim, may omit to report the accident upon the ground that in his opinion the claim is without merit either because the fault was not his or because the claimed injuries are unreal. Obviously an insured may not assume the role of judge and jury. But the insured does not lose the agreed policy protection if he omits to give notice because he reasonably and in good faith believes no claim against him is contemplated either because the damage is trivial or because there is no suggestion in the circumstances that he is causally involved. This accords with the reasonable expectation of the parties to the insurance arrangement.

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2 N.J.S.A. 17:28-2 requires the policy to read that failure to give notice within a prescribed time shall not invalidate a claim if notice was given as soon as was reasonably possible. The statute does not prevent a carrier from offering a more favorable provision and hence, notwithstanding the statute, it is correct to say that the carrier offers its provision on a take-it-or-leave-it basis.
For cases concerning attorney malpractice specifically, attorneys must be understand their reporting requirements in the event of a covered malpractice claim filed against them. In *Zuckerman v. National Union Fire Ins. Co.*, 100 N.J. 304 (1985), appellant attorney filed a complaint against respondent insurance carrier, seeking a judgment that would compel respondent to defend him in a malpractice litigation and to indemnify him against any resultant liability. The lower court entered judgment in favor of respondent and concluded that no considerations of public policy justified the requirement that the insurance company show prejudice in order to be relieved from liability when notification of a claim was not given until after a "claims made" policy expired. A condition to the enforcement of insurance contracts was that they not violate public policy. Accordingly, the requirement of notice in an occurrence policy was subsidiary to the event that invoked coverage, and the conditions related to giving notice should have been liberally and practically construed.

All lawyers must be knowledgeable of the insurance reporting requirements for potential claims and actual claims. Many lawyers know that they must immediately report actual claims and lawsuits brought against them, but they do not realize or understand that they must also report any circumstances of which they are aware and that might result in a suit against them. The failure to immediately report these potential claims might result in lawyers losing the coverage they thought they were paying for in their policy.

Most malpractice policies do not define a reportable potential claim. However, courts have interpreted these phrases many times and have found them unambiguous. A "claim" is usually defined to mean a demand for money or services, and might also include the filing of a disciplinary complaint.
The standard for determining whether an insured attorney should have been aware of a potential claim is often a combination of factors: the court first looks to see what information the lawyer actually possessed, and then determines whether an objectively reasonable insured lawyer would have recognized the potential for a claim based on this information.

If a lawyer believes that he or she committed some act of professional negligence, or if your client thinks a lawyer has, the lawyer is required to report the incident to their malpractice insurance carrier. This cannot be delayed because there may still be damages incurred by the client if you are unsuccessful, or if there is a long delay in the case, or the client incurs additional legal fees to fix the problem.

The consequences of failing to report a potential claim can be costly. Coverage can be lost in at least two different ways. First, the failure to disclose a potential claim on the application or renewal application will give the insurer the right to rescind the policy in its entirety if the misrepresentation is material. This means that the policy will be void from its inception (called void *ab initio*) and it will be as if the policy was never issued and the lawyer or law firm will get a refund of your premium. If this occurs, there will be no coverage for any claims or for any insureds, even those who did not know about the potential claim. Typically the insurer does not have to show that the lawyer intended to mislead the insurer, but only that the omitted information was important for the insurer to assess the risk it was underwriting when it issued the policy.

Second, most "claims made" policies do not cover any act, error or omission if a lawyer could have reasonably foreseen, when the policy was purchased that the lawyer had breached a duty or that a claim would be made. If a lawyer did have a reasonable basis to believe that his or
her conduct might be the basis of a claim, or constituted a breach of duty, the insurer can
disclaim coverage for the matter.

**CONCLUSION**

As can be seen from the above discussion, legal malpractice and insurance coverage
cases arise for a variety of reasons and knowledge of the claim can effect if a claim will be fully
covered. It is important to be cognizant of the common pitfalls that lead to attorney malpractice
and the reporting of claims, which will lead to gaining knowledge on how to avoid these areas in
your practice. These materials provided an overview of the common pitfalls in legal malpractice
cases and the evolving issues in legal malpractice jurisprudence. Additionally, these materials
highlighted insurance considerations when claims should be reported and issues that might arise
if a potential loss is not reported as soon as possible.

For more information on the above topics, please contact John L. Slimm, Esq. at
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Mike Mitrovic

Mike Mitrovic is President of Global Claims for Ironshore Inc. A recognized insurance industry executive, his career spans nearly forty years with extensive experience in all lines of claims management as well as transactional liability and tax liability underwriting.

Mr. Mitrovic joined Ironshore in May of 2007, responsible for launching U.S. operations. He oversaw the purchase of an admitted shell company and excess and surplus lines shell company and oversaw the development of specialty product lines and requisite regulatory approvals. He led the launch of IronPro, Ironshore’s professional and management liability unit, and served as President.
He was named President of Global Claims in 2008 to build the Ironshore claims management structure to serve multiple specialty lines underwritten throughout its regional offices worldwide. Mr. Mitrovic is credited with designing efficiencies in the claims platform to address and process claims in adherence to Ironshore standards. Ironshore’s integrated claims structure aligns third-party administrators and internal resources with a dedicated, personalized approach to claims management and fair resolution.

Prior to joining Ironshore, he served for more than 22 years with AIG; most recently in the roles of Vice President of Claims and President of AIG Worldwide Financial Lines. He also co-founded and was President and Chief Operating Officer of Axcelera/Global Specialty Risk in January of 2000.

On April 10, 2014, Penn State University Liberal Arts Alumni Society honored Mike with the 2014 Outstanding Liberal Arts Alumni in Business Award. The Outstanding Liberal Arts Alumni in Business Award recognizes Penn State Liberal Arts alumni for success in the business community and influence as leaders.

On September 19, 2014, Mike received the Claims Executive of the Year Award. This award is sponsored by major insurance companies and brokers; the award recognizes years of service and contribution to the insurance industry, and the example of leadership and professionalism set for their peers and colleagues. A charity of the honoree’s choosing is selected to receive the proceeds from the event. Mike’s chosen charity was: Services for the Developmentally Challenged, which provides quality, personalized care to individuals with intellectual and developmental disabilities.

Mr. Mitrovic holds a B.A from Pennsylvania State University, an M.A. from New York University and a Masters in International Affairs from Columbia University. He received a J.D from the University Of Richmond School Of Law.
Leon B. Piechta

Leon Piechta is a partner at Tompkins, McGuire, Wachenfeld & Barry, LLP. He has defended a wide variety of professionals – including lawyers, health care professionals, accountants, brokers and agents – from allegations of malpractice. He also represents attorneys and judges in disciplinary matters. Leon’s primary and excess insurer clients often involve him in coverage disputes, and have him defend direct and third-party lawsuits. He defends corporate directors and officers, and prosecutes and defends personal injury and Law Against Discrimination lawsuits. Over the course of his career, Leon has litigated a number of significant products liability actions.

Leon has tried cases to verdict in New Jersey's state and federal courts, and in the courts of Pennsylvania, New York, Florida, Texas, Illinois, Ohio, South Carolina and Montana.

Leon is an honors graduate of Seton Hall University and Seton Hall Law School. He has been admitted in New Jersey since 1977, and in the Third Circuit since 1981. He is a member of the American, New Jersey State and Essex Bar Associations; the NJDA (President & Chairman of the Board, 1987-89) and DRI (Recipient, Exceptional Performance as Trial Attorney, 1988); the Federation of Defense & Corporate Counsel; and the American Bar Foundation.

Leon has Chaired the Malpractice Insurance Committee of New Jersey State Bar Association since 2013.
JOHN L. SLIMM

John L. Slimm is senior counsel with Marshall, Dennehey, Warner, Coleman & Goggin in Mount Laurel, New Jersey. He concentrates his practice in the defense of legal malpractice actions and complex litigation at the trial and appellate levels, with an emphasis in the defense of professionals. Mr. Slimm is admitted to practice in New Jersey, New York, and before the Third Circuit Court of Appeal, and the United States Supreme Court. He is a member of the American and New Jersey State Bar Associations, the New Jersey Defense Association, and the International Association of Defense Counsel. Mr. Slimm was appointed to the New Jersey Supreme Court Committee to revise the rules regarding the entire controversy doctrine as it applies to malpractice actions. Mr. Slimm is a Fellow in the American College of Trial Lawyers.

Mr. Slimm has lectured for the New Jersey ICLE, the American Bar Association, PLUS, and various Bar Associations. His articles have appeared in professional journals, including the New Jersey Law Journal, the Defense Digest, and the Pennsylvania Law Weekly.

Mr. Slimm received his J.D. from Notre Dame Law School. He served as law clerk to the Honorable Thomas F. Dalton, J.S.C., Superior Court of New Jersey.