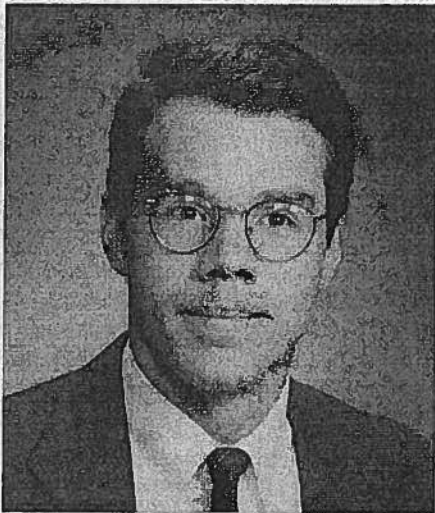

Understanding Legal Malpractice

By Michael F. Skolnick and Richard Masson



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Legal malpractice claims threaten every attorney. An increasing number of us can expect to be sued during our professional lives. While most insurers report only gradual increases in the number and size of legal malpractice claims, the same insurers report that it is becoming progressively more expensive to resolve such issues.¹

Malpractice claims can be intimidating and demoralizing. The vast majority of attorneys strive on a daily basis to practice competently and effectively on behalf of their clients. When clients sue them, attorneys often feel betrayed and bewildered. Knowing the basics of malpractice law may help prevent a lawsuit against you. If the

unspeakable occurs and you are sued, some background knowledge can help ease your burden by making your defense more clear.

This article presents an overview of legal malpractice law in Utah and some related principles of basic risk management. The term "legal malpractice" as used in this article covers actions for professional negligence, breach of fiduciary duty, breach of contract and other statutory and common law causes of action. It does not include violations of the Utah Rules of Professional Conduct, which may subject an attorney to discipline by the Utah State Bar, but do not by themselves give rise to a cause of action for legal malpractice.² Nevertheless, courts have found such ethical standards relevant to the stan-

dard of care in legal malpractice actions.³

PROFESSIONAL NEGLIGENCE

Three distinct causes of action are available in Utah for an attorney's malpractice: (1) the tort of malpractice (professional negligence); (2) breach of fiduciary duty; and (3) breach of contract. Professional negligence is the most common vehicle for malpractice claims in Utah.⁴ The four elements of a tort malpractice claim are: (1) an attorney-client relationship; (2) a duty of care owed by the attorney to the client arising from that relationship; (3) a breach of the duty; and (4) proximate causation of actual damage to the plaintiff.⁵

THE ATTORNEY-CLIENT RELATIONSHIP

An attorney-client relationship can arise from an express contract or by an implied in fact contract based on the conduct of the parties.⁶ In order to determine whether an attorney-client relationship exists, courts must consider who the attorney claimed to have represented in his own pleadings or other self-generated documents, whether an employment contract or retainer agreement exists and the parties' admissions about the relationship.⁷

An attorney-client relationship may be proved by showing that the client sought and received the advice of the lawyer in matter pertinent to the lawyer's profession. The client's mere belief, however, that an attorney-client relationship exists, unless reasonably induced by representations or conduct of the attorney, is not sufficient to create the relationship.⁸ Payment of attorney fees does not by itself determine whether an attorney-client relationship exists, but is only one indicia of such a relationship.⁹

The attorney-client relationship would seem to be the most straight-forward of the four elements of a tort malpractice claim. The relationship is, however, not always as simple as it looks. Take, for instance, the increasingly prevalent practice of office sharing, where an attorney rents an office from a law firm or in concert with a number of solo practitioners. If one attorney in the office sharing relationship gets sued, the other attorneys in the relationship may assume that they are not exposed to the claim. That is not necessarily true.

No matter the understanding of the relationship among the attorneys, a *de facto* partnership may exist for the purposes of liability to a client.¹⁰ In order to safeguard against a *de facto* partnership (and hence establishment of an attorney-client relationship with your office sharing attorneys' clients) avoid acts or omissions that could lead a client to reasonably believe that he was being represented by an entity rather than the individual attorney.

Use of a joint name on letterheads and pleadings can lead to joint liability. Prudence dictates that attorneys practicing in any kind of association or non-partnership arrangement should expressly specify on their letterhead and in their pleadings the nature of the entity. Retainer agreements should reiterate the legal nature of the entity

and should also delineate to what extent the client will receive the services and assistance of other attorneys in the association.¹¹

Attorneys should define the scope of the attorney-client relationship at the outset of each case by sending clear and precise engagement letters. If representation is declined, a rejection letter should be sent as soon as possible, warning the client of the applicable limitation period. Finally, avoid the practice of "ghost-writing" pleadings for friends that want to handle a case *pro se*. An attorney-client relationship may be formed, with all of its attendant obligations.¹²

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DUTY OF CARE

An attorney is required to possess the legal knowledge and skills common to members of his profession, and to represent his client's interests with competence and diligence.¹³ An attorney, however, is not required to know all the law, nor to second guess the trial judge.¹⁴ If an attorney holds himself out as a specialist in a particular field of law he has a duty to have the knowledge and skill ordinarily possessed, and to use the care and skill ordinarily used, by reputable specialists practicing in the same field, in the same or a similar locality and under similar circumstances.¹⁵

Unfortunately, attorneys sometimes take cases that deal with areas of law in which they have little skill or knowledge. Consequently, the attorney may end up spending either too much time with the case trying to learn the details of the applicable law, make substantial errors due to lack of experience or knowledge, or may not pay the case the proper amount of attention. In any event, the attorney may ultimately end up hurting the client.¹⁶

Sometimes attorneys become overwhelmed by their case load and lose track of important dates, like filing deadlines.¹⁷ It is important for an attorney with a high-volume practice to keep it manageable. Malpractice claims often result from administrative error.¹⁸ Many administrative errors

can be easily solved by instituting a docking and scheduling system. Not only will such a case management system be helpful to the attorney, but it will also make the client feel more confident in the attorney's representation. Insurance underwriters look for these types of case management systems when underwriting legal malpractice risks.

Where the attorney is charged with an error regarding law, the applicable law is the law in the relevant jurisdiction that existed at the time the attorney's services were rendered.¹⁹ In *Watkiss & Saperstein v. Williams*, the Utah Supreme Court upheld the trial court's dismissal of plaintiff's legal malpractice claim despite the fact that the defendant law firm failed to file a timely complaint in the underlying case. The court found that at the time the law firm filed the complaint, the firm was correctly following applicable District of Columbia law regarding the triggering of the statute of limitations. The Court concluded the law firm could not be required to anticipate changes in the law, even where the change ultimately time-barred its clients' complaint.²⁰

Ambiguities in the duty of care can arise in several common situations. One of these is the so called "tripartite relationship" that occurs when an insurance company hires an attorney to defend its insured against a claim. The attorney should be aware of several potential conflicts. One conflict is where a coverage dispute exists. If the insurance company has taken on the defense under a so called "reservation of rights" the attorney hired to defend the case must be careful to avoid giving advice on the coverage issue. A coverage issue should not present a conflict of interest if counsel limits his role to defending the liability claim.²¹

Another ambiguous situation occurs when an attorney is hired by an insurance company to represent the insurance company in performing some task which foreseeably benefits the insured. In this case the attorney is the employee or agent of the company, not the insured. No attorney-client relationship exists between the attorney and the insured, and consequently there is no corresponding direct duty of care.²² Of course, the insurance company still has a contractual obligation and duty of care to its insured. Thus, if its attorney commits legal malpractice, the company may be liable to the insured. Prudence dic-

tates that the attorney make absolutely clear to the insured that she represents the insurance company only.

EXPERT TESTIMONY

In order to prevail on an attorney malpractice claim a plaintiff must define the applicable standard of care and prove the attorney violated that standard. Ordinarily this must be done through expert testimony.²³ Summary judgment may be granted based upon plaintiff's failure to designate an expert witness to define the applicable standard of care. Without such an expert, the trier of fact would arguably be unable to determine whether a breach occurred. This principle should apply in a bench trial as well as a jury trial, inasmuch as the alleged malpractice might involve an area of practice in which the court has little or no experience.²⁴

In *Preston & Chambers v. Koller*,²⁵ the Utah Court of Appeals confirmed that in order to prevail on all but the most obvious malpractice claims, a plaintiff must provide expert testimony on the applicable standard of care. Cases where such testimony is not required include those where the propriety of defendant's conduct is "within the common knowledge and experience of the layman." A typical example is failing to file a lawsuit within the applicable limitation period.

Plaintiffs have resorted to creativity in showing breach of the standard of care. In *McGuinness v. Barnes*,²⁶ the New Jersey Supreme Court upheld a trial court's denial of a motion in limine by a defendant attorney in a malpractice case. The plaintiff had sued his attorney for allowing a statute limitation to run on the client's medical malpractice claim. The client asserted that the attorney failed to obtain certain hospital records, failed to obtain an expert witness, and failed to procure a New York lawyer to institute suit in a New York court.

After representing the client, the attorney participated as a panelist in two CLE programs in which the attorney stated that attorneys handling medical malpractice cases should always obtain hospital records and use their best efforts to find an expert witness willing to testify on plaintiff's behalf. During trial the client attempted to use the attorney's comments to impeach the testimony of the attorney's expert witness that defendant had met the applicable standard of care. The court denied the

attorney's motion to bar the plaintiff's use at trial of the defendant's comments, holding that his speech was not privileged.

PROXIMATE CAUSE

In a legal malpractice action the client must prove a better result would have been obtained in the underlying matter if the attorney had exercised reasonable care. This concept is commonly referred to as the "case within the case."²⁷ The case within the case concept is linked to the fourth element of the attorney malpractice case: proximate causation of damages. A client does not have a malpractice claim against his or her attorney unless the attorney's malpractice resulted in loss of a viable claim or otherwise caused damage.

"Summary judgment may be granted based upon plaintiff's failure to designate an expert witness to define the applicable standard of care."

In *Williams v. Barber*,²⁸ the Utah Supreme Court held:

Generally speaking, incurring liability through a breach of duty does not necessarily result in damages. The adoption [of such a rule] would require this court to either ignore the requirement of proximate cause with respect to a finding of damages in tort or expand the concept of liability beyond its commonly held meaning.²⁹

For purposes of proving proximate cause in a legal malpractice case the plaintiff must objectively show that absent the attorney's negligence, the underlying action would have been successful. In *Harline v. Barker*,³⁰ the Utah Supreme Court explained this means establishing what the result of the underlying action *should have been*, which is an objective standard, not what a particular judge or jury would have decided, which is a subjective standard.³¹

In *Harline*, the defendant attorneys successfully argued that they were not the proximate cause of plaintiff Harline's denial of discharge in bankruptcy. The Supreme Court held that the bankruptcy court's deter-

mination that Harline had acted fraudulently and should be denied discharge precluded Harline from relitigating the cause of his denial of discharge in the malpractice action.

Another available defense in the area of causation is comparative fault of the plaintiff. In *Western Fiberglass Inc. v. Kirton, McConkie and Bushnell*,³² the Utah Court of Appeals held that evidence supported the finding that a client who had sued the defendant law firm for failure to perfect a security interest was himself fifty percent negligent. The evidence showed that the client disregarded the law firm's advice to be represented by counsel during closing of the deal from which the accounts receivable arose and relied on the other side's counsel to complete the paperwork.

DAMAGES

The type and amount of damages recoverable in a legal malpractice action will depend upon the nature of the underlying case. The trier of fact must determine what the client in the underlying case lost. Damages, however, cannot be based upon speculation or conjecture. They can only be awarded if "there is a basis in the evidence upon which reasonable minds acting fairly thereon could believe with reasonable certainty that the plaintiff suffered injury and damage and also that it was proximately caused by the negligence of the defendant."³³

Although it may be difficult for plaintiff to prove actual damages in a legal malpractice action, damages for attorneys defending such claims are guaranteed. An attorney's loss in terms of time, costs, and higher insurance premiums has been estimated to average close to \$50,000.³⁴ Regardless of whether the plaintiff manages to prove damages, an attorney still suffers significant damage from undergoing the ordeal of a malpractice action.

This underscores the advisability of avoiding a fertile area for generating malpractice claims: fee recovery lawsuits. Fee recovery lawsuits frequently generate attorney malpractice counterclaims. The common plaintiff rationale seems to be that if I countersue for malpractice, the fee claim may go away. Unfortunately this often proves true. By the time the attorney has satisfied her deductible, wasted many billable hours assisting in her defense and is facing a possible increase in malpractice

rates because of the insurance company's defense costs, it becomes clear that it would have been more economical to write off the fee.³⁵

Another key to avoiding malpractice claims is frequent communication with your client. New developments should be communicated to the client quickly, whether bad or good. In the oft repeated words of one Salt Lake practitioner, "if you're going to eat a little crow, eat it while its young." When calling to impart bad news to the client, be ready with constructive suggestions about addressing the problem.

BREACH OF FIDUCIARY DUTY

In addition to the tort of malpractice a separate cause of action may exist for breach of fiduciary duty. In *Kilpatrick v. Wiley, Rein and Fielding*,³⁶ the Utah Court of Appeals explained that legal malpractice claims based upon negligence concern violations of the standard of care; legal malpractice claims based upon breach of fiduciary duty concern violations of the applicable standard of conduct. The fiduciary duty of an attorney hired solely to represent the interest of a client is of the highest order and the attorney must not represent interests adverse to those of the client; the attorney must adhere to high standards of honesty, integrity and good faith in dealing with his client, and is not permitted to take advantage of his position or superior knowledge to impose upon the client, nor to conceal facts or law, nor in any way deceive the client.³⁷

In a legal malpractice action based on breach of fiduciary duty, the client must show that if the attorney had adhered to ordinary standards of professional conduct and had not breached fiduciary duties, the client would have benefited. The same standard of causation applies whether the alleged breach is a negligent act, a fiduciary breach or even a contractual breach.³⁸

BREACH OF CONTRACT

The Utah Court of Appeals has recognized that legal malpractice actions based on breach of contract are conceptually distinct from those based on negligence or breach of fiduciary duty.³⁹ A dearth of case law exists in Utah for legal malpractice actions alleging breach of contract. A breach of contract action by a client against her attorney is based upon breach of promise by the attorney. The client must

show breach of promise as well as the other ingredients of a contract cause of action: foreseeability, causation and damages.⁴⁰ Damages for breach of contract include losses directly resulting from the breach if such losses were reasonably within the contemplation of the parties at the time they entered into the contract.⁴¹ A malpractice suit based upon breach of contract is usually asserted by a client seeking to take advantage of the longer prescriptive period for contract actions.⁴²

RIGHT TO JURY TRIAL

One disturbing aspect of attorney malpractice cases – given the current disdain in which the public generally holds attorneys – is exposure to trial by jury. In *Harline v. Barker*, the Utah Supreme Court reduced the scope of cases in which legal malpractice plaintiffs are entitled to jury trials. The defendant attorneys in *Harline* obtained summary judgment on the ground that regardless of any malpractice they allegedly committed, the plaintiff Harline would have lost his bankruptcy discharge because of his own fraud upon the court – an efficient, intervening cause of the bankruptcy court's denial of his bankruptcy discharge.

"The fiduciary duty of an attorney hired solely to represent the interest of a client is of the highest order and the attorney must not represent interests adverse to those of the client . . ."

On appeal the Utah Supreme Court stated that only a bankruptcy judge could have decided the issues in the underlying suit. Accordingly the malpractice plaintiff would not be entitled to have a lay jury in the malpractice action decide what the outcome of the underlying suit would have been, absent the attorney's negligence.⁴³ This principal would presumably apply to other underlying cases where trial by jury is unavailable, for instance domestic cases or an appeal.

STATUTE OF LIMITATIONS

Legal malpractice actions based on professional negligence must be filed within

four years of the time the cause of action accrues.⁴⁴ Actions based on breach of fiduciary duty must also be filed within four years.⁴⁵ The cause of action accrues when the act complained of is discovered or, in the exercise of reasonable care, should have been discovered. In determining the date of accrual:

[The trial court] must explore the particular facts of the action and make the following determinations: when the injured party became aware, or should have become aware, of the extent and seriousness of his or her alleged legal problem; whether the injured party was aware, or should have been aware, that the damage or injury alleged was related to a specific legal transaction or undertaking previously rendered to him or her; and whether such damage or injury would put a reasonable person on notice of the need for further inquiry as the cause of damage or injury.⁴⁶

LIABILITY TO THIRD PARTIES

An attorney, while performing his obligations to his client, is not liable to third parties in the absence of fraudulent or malicious conduct.⁴⁷ In *Atkinson v. IHC Hospitals, Inc.*, the Utah Supreme Court held that an attorney who had a contractual duty to represent a medical malpractice defendant had no corresponding duty under a third-party liability theory to assure that a settlement for plaintiffs was sufficient to fit their needs.⁴⁸ Although declining to impose third party liability, the *Atkinson* court did discuss the theory of third party liability and situations in which it might apply. The court stated that in order to establish a cause of action under a third party liability theory, plaintiff must:

[A]llege and prove that the intent of the client to benefit the non-client was a direct purpose of the transaction or relationship. In this regard, the test for third party recovery is whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party.⁴⁹

Cases where third party liability has been found include drafting and administering wills and estates; fraudulent misrepresentations; creditors of a corporation in receivership; purchasers at a foreclosure sale where attorneys conducted the sale improperly; and giving a legal

opinion on a bond.⁵⁰

Attorneys may also be liable to third parties for committing acts that subject them to other causes of action. Recent Utah claims include alleged violations of the Fair Debt Collection Practices Act (for a wrongful garnishment), alleged breach of peace and trespass (for assisting a client in a nonjudicial repossession of personal property) and alleged violations of the Racketeer Influenced and Corrupt Organizations Act (for assisting a bank client in an allegedly unlawful foreclosure). These types of claims can be especially problematic from a defense standpoint if they fall outside the attorney's malpractice insurance coverage.

CONCLUSION

Legal malpractice suits are an increasingly prevalent and expensive part of practicing law. Every attorney is a potential target. Attorneys, fortunately, can decrease their vulnerability by knowing and understanding what malpractice entails, and then taking simple preventative measures to avoid suit. In the end, however, the best way to avoid a legal malpractice suit, in addition to complying with the applicable standard of care, is to treat clients courteously, communicate regularly, and treat them the way you would want to be treated.

¹Legal Malpractice in the 1990s, American Bar Association's Standing Committee on Lawyers' Professional Liability.

²Tanasee v. Snow, 929 P.2d 351, 355 (Utah App. 1996).

³50 ALR 5th 301. In fact, the American Law Institute may soon adopt The Restatement (Third) of the Law Governing Lawyers. The Restatement would act as a source for determining the duty of care in malpractice suits. Violation of the standard of care set forth in the Restatement could result in legal malpractice liability. Nancy L. Marshall and Patricia A. Lynch, "Lowering the Bar", *ABA Journal*, Nov. 1997.

⁴Kilpatrick v. Wiley, Rein and Fielding, 909 P.2d 1283, 1290 (Utah 1996).

⁵Harline v. Barker, 912 P.2d 433, 439 (Utah 1996).

⁶Margulies v. Upchurch, 696 P.2d 1195, 1200 (Utah 1985).

⁷Atkinson, v. IHC Hospitals, Inc., 798 P.2d 733, 735 (Utah 1990).

⁸Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 727 (Utah App. 1990).

⁹Id. at 728.

¹⁰Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §5.3 (4th ed. 1996).

¹¹See id. §5.3.

¹²Elizabeth Cohen, "Afraid of Ghosts", *ABA Journal*, Dec. 1997, at 80.

¹³Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982).

¹⁴Young v. Bridwell, 437 P.2d 686, 690 (Utah 1968).

¹⁵Model Utah Jury Instruction 7.45.

¹⁶John Gibeaut, "Avoiding Trouble at the Mill", *ABA Journal*, Mar. 1997, at 48.

¹⁷Id. at 49.

¹⁸Legal Malpractice in the 1990s, American Bar Association's Standing Committee on Lawyers' Professional Liability.

¹⁹Watkins & Saperstein v. Williams, 931 P.2d 840, 846 (Utah 1996).

²⁰See also, Jensen v. Sharp, 858 P.2d 987, 989 (Utah 1993).

²¹Mallen & Smith, *supra* note 10, at §28.18.

²²Atkinson, 798 P.2d at 735.

²³Wycalis v. Guardian Title of Utah, 780 P.2d 821, 826 n. 8 (Utah App. 1989), *cert. denied*, 789 P.2d 33 (1990).

²⁴Mallen & Smith, *supra* note 10, at §32.16.

²⁵943 P.2d 260 (Utah App. 1997).

²⁶683 A.2d 862 (N.J. Sup. L. 1994).

²⁷Paul D. Rheingold, "Legal Malpractice: Plaintiff Strategies", *Litigation*, Winter 1989, at 13. (The case within the case concept generally makes legal malpractice cases more time consuming and expensive than other tort suits.)

²⁸765 P.2d 887, 889 (Utah 1987).

²⁹Id. at 889.

³⁰Harline, 912 P.2d at 433.

³¹Id. at 440.

³²789 P.2d 34, 36 (Utah App. 1990).

³³Dunn v. McKay, Burton & Thurman, 584 P.2d 894, 896 (Utah 1978).

³⁴Gibeaut, *supra* note 16, at 48.

³⁵Mallen & Smith, *supra* note 10, at §2.13, *see also* Watkins, 931 P.2d at 841.

³⁶909 P.2d 1283 (Utah App. 1996).

³⁷Id. at 1290.

³⁸Id. at 1291.

³⁹Id. at 1290.

⁴⁰Roy R. Anderson and Walter W. Steele, Jr., "Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle", 47 *SMU Law Review* 235 (1994).

⁴¹Id. at 255.

⁴²Mallen & Smith, *supra* note 10, at §8.5.

⁴³Harline, 912 P.2d at 440.

⁴⁴Merkley v. Beaslin, 778 P.2d 16 (Utah App. 1989).

⁴⁵United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 890 (Utah 1993).

⁴⁶Merkley, 778 P.2d at 19.

⁴⁷Atkinson, 798 P.2d at 735-36.

⁴⁸Id. at 736.

⁴⁹Id. at 735, *citing* Flaherty v. Weinberg, 492 A.2d 618, 625 (Md. 1985).

⁵⁰Atkinson, 798 P.2d at 736.

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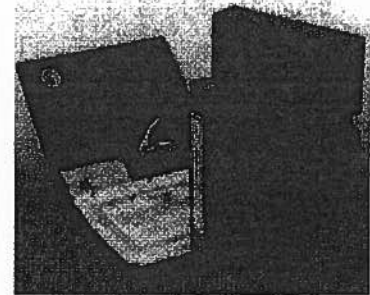
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