

New York

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Legal malpractice cases in New York are subject to the same traditional tort analysis as other negligence cases. The client complaining of his or her attorney's mishandling of the case resulting in malpractice must be able to prove 1. The existence of an attorney client relationship which creates a duty of care owed by the attorney to the client, 2. breach of the duty of care by an act or omission on the part of the attorney, 3. proximate causation and 4. actual pecuniary damages.

Duty of Care

In order to be able to successfully bring an action of legal malpractice against an attorney the client must first establish the existence of an attorney client relationship.¹ In determining whether or not an attorney client relationship existed between the parties the court must look to the actions of the parties.² "It is necessary to look at the words and actions of the parties to ascertain" if an attorney client relationship was formed.³ The unilateral belief of the "client" plaintiff is insufficient in and of itself to establish an attorney/client relationship.⁴

Breach of Duty

If the client establishes that an attorney client relationship existed, the client must then prove that the attorney failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession.⁵ An error of judgment by an attorney does not rise to the level of malpractice.⁶ Selection of one reasonable course of action among several reasonable courses of action does not constitute malpractice.⁷

Proximate Causation

The client may prove that the attorney's acts and/or omissions were the proximate cause by proving that "but for" defendant attorney's failure to exercise ordinary reasonable skill and knowledge there would have been a more favorable outcome in the underlying proceeding.⁸ Therefore, plaintiff client must be able to prevail in the "trial within a trial". Since plaintiff client must prove that there would have been a more favorable outcome plaintiff client must prove that he or she would have prevailed in the underlying matter had the attorney not committed malpractice. Plaintiff client must be able to prove all of the elements of the underlying case by a preponderance of the credible evidence in order to be able





New York

to then prove that the attorney's acts and/or omissions were the proximate cause of the damages sustained.

Damages

In other cases involving the tort of negligence the plaintiff is allowed to prove both pecuniary and nonpecuniary damages. However, it is well settled in New York that in legal malpractice cases arising out of both civil and criminal underlying matters the client plaintiff is limited to a recovery only for pecuniary damages.⁹ Nonpecuniary damages relating to physical and psychological injuries allegedly sustained as the result of an attorney's malpractice are not recoverable.¹⁰

Statute of Limitations

The statute of limitations for legal malpractice actions is statutory. CPLR 214(6) sets the time period within which a plaintiff must commence a lawsuit seeking damages for legal malpractice at 3 years. The time starts to run from the date of the act or omission constituting the malpractice.¹¹ The claim accrues at this time regardless of the client's awareness of the malpractice.¹² It has also been held that the statute of limitations is tolled during a period of continuous legal representation after the act or omission constituting malpractice was committed.¹³

The cause of action accrues if and when the attorney client relationship terminates.¹⁴ Claims against attorneys alleging breach of contract which carries a 6 year statute of limitations are really legal malpractice claims and are subject to the 3 year period accordingly.¹⁵

Affirmative Defenses

All affirmative defenses to plaintiff's allegations of legal malpractice must be pleaded in the attorney defendant's Answer. CPLR 3018(b). As with all affirmative defenses, the attorney defendant asserting the affirmative defense has the burden of proving the affirmative defense; client plaintiff need not disprove the affirmative defense.

The affirmative defense of comparative negligence is sometimes available to the attorney defendant. In order to succeed with this defense the attorney defendant must show that the client did or failed to do something that hindered the attorney from performing his or her duties toward the client.¹⁶

The affirmative defense of futility may also be available. The attorney client must be able to prove that his or

her failure to perform an act alleged to constitute legal malpractice would have been futile.

Privity may also be raised as an affirmative defense in some cases. Generally, a third party without privity cannot maintain an action against an attorney absent fraud, collusion, malicious acts or other special circumstances.¹⁷ However, for legal malpractice in estate planning privity or a relationship sufficiently approaching privity will exist between the personal representative of the estate and the estate planning attorney.

Settlement

Generally, a plaintiff is barred from bringing a legal malpractice action after signing a written settlement agreement in the underlying action. However, the rule is not universal. Plaintiffs who can demonstrate that the settlement was compelled by the malpractice and was diminished by same may still recover.¹⁸ A client's voluntary plea of guilty in a criminal action precludes the client from bringing an action for legal malpractice against the attorney representing him in the underlying criminal matter.¹⁹

Expert Opinions

The client plaintiff is generally required to come forward with expert evidence regarding the standard of care applicable to the attorney's representation. However, this requirement may be dispensed with where the "ordinary experience of the fact finder provides a sufficient basis for judging the adequacy of the professional service."²⁰

1 Volpe v. Canfield, 237 A.D.2d 282

2 McLenithan v. McLenithan, 273 A.D.2d 757

3 C.K. Indus. Corp. v. C.M. Indus. Corp. 213 A.D.2d 846

4 See Volpe and McLenithan, supra

5 AmBase Corp. v. Davis Polk & Wardwell, 8 N.Y.3d 428

6 Rosner v. Paley, 65 N.Y.2d 736

7 Byrnes v. Palmer, 18 App. Div.1

8 Stein v. Chiera, 130 A.D.3d 912

9 Dombrowski v. Bulson, 19 N.Y.3d 347

10 Dawson v. Schoenberg, 129 A.D.3d 656

11 Shumsky v. Eisenstein, 96 N.Y.2d 164

12 Johnson v. Proskauer Rose LLP 129 A.D.3d 59

13 Aseell v. Jonathan E. Kroll & Associates, PLLC, 106 A.D.3d 1037

14 Grace v. Law, 24 N.Y.3d 203

15 Gelfand v. Oliver, 29 A.D.2d 736

16 Whitney Group LLC v. Hunt-Scanlon Corp. 106 A.D.3d 671

17 Estate of Schneider v. Finmann, 15 N.Y.3d 306

18 Angeles v. Aronsky, 109 A.D.3d 720

19 Kaplan v. Khanna, 48 Misc 3d 665

20 Estate of Nelvelson v. Carro, Spanbock, Kaster & Ciuffo, 259 A.D.2d 282