MALPRACTICE AND CLIENT DISSATISFACTION

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

COMMON AREAS OF LEGAL MALPRACTICE EXPOSURE FOR MATRIMONIAL LAWYERS IN NEW YORK

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While all lawyers must be concerned about the potential for a legal malpractice claim, matrimonial lawyers have some unique concerns. The American Bar Association statistics tell us that the percentage of legal malpractice claims against matrimonial lawyers stays steady at approximately 7.5% over the years. Therefore, while claims against lawyers in other areas of the law may be driven by the economy and other trends, this is generally not so with respect to matrimonial lawyers.

Matrimonial lawyers face notable challenges in their practice because of the highly emotional issues with which they deal. Clients are by and large involved in a personal crisis on some level, and nothing creates higher stakes than a person's home, children and standard of living. Accordingly, matrimonial lawyers are on the side lines of, and often in the line of fire in, disputes between some very unhappy people. While most legal disputes come to an end, the singular nature of a matrimonial dispute can keep it alive well after it should have resolved, and often well after the legal proceedings are over. What often creates the basis of a legal malpractice claim is a transfer of the negative focus from the family member to the attorney. However, knowledge of common claims and defenses can protect a matrimonial lawyer from exposure.

A. Client Selection and Proper Retention

Matrimonial attorneys should choose their clients carefully. Many times, legal malpractice claims arise in situations where a client has a series of attorneys. Multiple attorneys can evidence a very difficult client, or a client who does not want to pay for legal services. Another issue to keep in mind when the client has had prior attorneys is the successor counsel rule, pursuant to which "the introduction of new counsel serves as an intervening cause in a legal malpractice claim, severing the chain of causation between the negligent actions of [the prior] attorney and a plaintiff's injuries, so long as new counsel has sufficient opportunity to protect the plaintiff's rights." *Schutz v. Kagan Lubic Lepper Finkelstein & Gold, LLP*, 2013 U.S. Dist. LEXIS 93762 (S.D.N.Y. July 2, 2013). Thus, the determination of whether to accept the case should include an analysis of the status of the case, such as whether any statutes of limitations will soon expire, and, to the extent possible, of prior counsel's handling of the case.

Foldes v Dane, 2009 N.Y. Misc. LEXIS 3872 (N.Y. Sup. Ct. Jan. 16, 2009)(motion to dismiss for failure to state a cause of action granted as to first matrimonial attorney, but denied as to subsequent counsel, where both attorneys allegedly failed to notify Taxi and Limousine

Commission ("TLC") of restraining order enjoining husband from selling tax cab medallion, but subsequent attorney had five months following his retention to notify TLC and possibly prevent sale of the medallion).

The proper retention of clients is also important. Retainer agreements should be specific about the scope of the retention, the fees and expenses to be charged to the client, and arbitration agreements. As most of these issues are standardized in New York for matrimonial attorneys, the issue to focus upon is the scope of retention. It is important to manage client expectations right from the beginning, and the retainer agreement is often the most important exhibit in the defense of a legal malpractice claim.

Bixby v. Somerville, 62 A.D.3d 1137, 880 N.Y.S.2d 205 (3d Dep't 2009) (legal malpractice claim based on assertions that the law firm negligently assigned plaintiff's case to an associate was dismissed, because the retainer agreement stated that the firm reserved the right to assign the legal work to any attorney in the firm).

B. Dissatisfaction with the Result of the Matrimonial Matter

Client dissatisfaction with some aspect of the outcome of the matrimonial proceeding is fertile ground for a malpractice claim. Sources of such dissatisfaction include, but are by no means limited to, results pertaining to equitable distribution, child support and other financial terms of the underlying proceeding. To establish the legal malpractice claim, the former client must establish that the attorney acted negligently, or "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession," and that "but for" the attorney's malpractice, the claimant would have prevailed in the underlying action, would have received a more advantageous result or would not have sustained some actual and ascertainable damage. *McCoy v. Feinman*, 99 N.Y.2d 295, 301, 755 N.Y.S.2d 693, 697 (2002); *Pellegrino v. File*, 291 A.D.2d 60, 738 N.Y.S.2d 320 (1st Dep't 2002).

In such actions, while the former client is likely to focus his or her claim on one particular area of the underlying proceeding, the court will likely examine the underlying outcome with a broader brush, to determine whether the defendant attorney achieved a favorable overall result for the plaintiff. If so, the court is more likely to deny the plaintiff's claim.

Sevey v Friedlander, 83 A.D.3d 1226, 920 N.Y.S.2d 831 (3d Dep't 2011) (while plaintiff was dissatisfied with some of the financial terms of the judgment of divorce, the court held that "[d]efendants established that the settlement was, in many regards, financially favorable to plaintiff," including: a reduction in child support; a four year cap on spousal maintenance for the long-term marriage; a stipulated income that did not include plaintiff's bonus money, despite plaintiff's potentially damaging conduct in purchasing a luxury car while the divorce case was pending. The court held that plaintiff's contention that he would have received a more favorable result if he had proceeded to trial was "entirely speculative.").

Kluczka v. Lecci, 63 A.D.3d 796, 798, 880 N.Y.S.2d 698, 700 (2d Dep't 2009)(while plaintiff alleged that attorney committed malpractice by recommending that he enter into stipulation without obtaining appraisals of certain property or his pension, the court held that the

attorney had made a prima facie showing of entitlement to summary judgment "by demonstrating that the stipulation in the underlying divorce action was a provident agreement which provided both parties with benefits, and that his allegedly negligent failure to obtain appraisals did not cause the plaintiff to incur any damages." Further, "[i]n opposition, the plaintiff failed to raise an issue of fact as to whether he incurred damages by submitting evidentiary proof that, but for the defendant's alleged negligence, he would have been able to negotiate a more favorable settlement.").

C. Litigation Strategy, Including Presentation of Evidence and Experts

Former clients will sometimes pursue legal malpractice claims on the grounds that the attorney failed to properly pursue the matrimonial matter, such as, for example, a poor litigation strategy, a failure to present certain evidence, a failure to call certain witnesses, or a failure to identify or produce an expert. However, provided the lawyer's decisions can be defended as proper exercises of judgment, the claims will generally be rejected pursuant to the professional judgment rule, and also, perhaps, as improperly speculative.

Bixby v. Somerville, 62 A.D.3d 1137, 880 N.Y.S.2d 205 (3d Dep't 2009) (former client challenged some "strategic choices" and cited certain "alleged missteps" during the course of the representation. The court dismissed the claim, finding that the attorney "assertively placed a cogent theory before the court and, with few exceptions, proper and timely objections were made, and appropriate and relevant questions were asked on direct and cross-examination. Generally, where allegations involve errors in the exercise of an attorney's professional judgment in areas such as strategy, the selection of appropriate evidence or argument, they are not actionable as malpractice).

Boone v. Bender, 74 A.D.3d 1111, 904 N.Y.S.2d 467 (2d Dep't 2010)(the lawyer's reasonable exercise of judgment in pursuing a settlement did not constitute malpractice, and the plaintiff's allegations, in effect, that the lawyer did not zealously advocate on her behalf, and that the settlement provided her with less monetary relief than that which she would have received after a trial, were speculative and conclusory).

Antokol & Coffin v. Myers, 30 A.D.3d 843, 819 N.Y.S.2d 303 (3d Dep't 2006)(former client's claim that testimony of intended expert, who was precluded because of untimely expert disclosure, would have resulted in a higher valuation of family business, was rejected as "pure conjecture").

D. Settlement

Most of the case law issued with respect to legal malpractice claims against matrimonial lawyers arises from clients who are disappointed in the terms of settlement. Under the law of New York, a claim for legal malpractice in a matter involving a settled case, is only allowed if such settlement was effectively compelled by the mistakes of counsel. The best defense to these claims is that the client allocuted on the record that he agreed with the terms of the settlement, and that he was happy with the services of his attorney.

Schloss v. Steinberg, 100 A.D.3d 476, 954 N.Y.S.2d 37 (1st Dep't 2012) (plaintiff's legal malpractice claim dismissed because she acknowledged, during allocution on the record, that she understood and agreed with settlement terms, and understood that it was final and binding).

Boone v. Bender, 74 A.D.3d 1111, 904 N.Y.S.2d 467 (2d Dep't 2010) (legal malpractice claim dismissed because the open-court stipulation established that plaintiff was satisfied with the lawyer's representation of her, that she discussed terms of the matrimonial settlement, understood she had the right to a trial if she did not settle and that she was entering the settlement voluntarily and of her own free will).

Katebi v. Fink, 51 A.D.3d 424, 857 N.Y.S.2d 109 (1st Dep't 2008) (legal malpractice complaint against matrimonial attorney dismissed because documentary evidence demonstrated that plaintiff allocuted on the record that she did not wish to proceed with the trial because she wanted nothing further to do with her husband, that she knew she was forgoing the right to pursue additional funds allegedly dissipated by her husband and that she was satisfied with the services provided by her attorney).

E. Fee Disputes

Fee disputes are also fertile ground for legal malpractice claims. A counterclaim for legal malpractice is extremely common when a lawyer sues his client for fees. This is especially so in a situation where the client is not perfectly satisfied with the result of the representation, which likely describes most matrimonial clients. Given the high likelihood of a malpractice counterclaim in response to a fee claim, the decision to pursue the fee claim should not be taken lightly. The decision should include a thorough, independent review of the file, for a frank assessment of the handling of the underlying matter and a determination of the possibility of exposure to a legitimate legal malpractice claim.

Perhaps the single best strategy to pursue to attempt to avoid, or defeat, the malpractice counterclaim is to wait until after the statute of limitations for the malpractice claim has run before commencing the fee action. The statute of limitations for a cause of action for legal malpractice is three years, measured from the date of the alleged malpractice, CPLR 214(6), while the limitations period for a breach of contract claim is, of course, six years. CPLR 213(2). The determination of whether the malpractice claim is time-barred must include consideration of the continuous representation rule, pursuant to which the statute of limitations will be tolled "where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." *Zorn v. Gilbert*, 8 N.Y.3d 933, 934, 834 N.Y.S.2d 702 (2007). For the doctrine to apply, there must be a "clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney," with a "mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." *Debevoise & Plimpton LLP v. Candlewood Timber Group LLC*, 102 A.D.3d 571, 572, 959 N.Y.S.2d 43, 44 (1st Dep't 2013). Of note, the statute of limitations will be tolled by the continuous representation doctrine against a law firm where the attorney handling the case leaves the law firm and continues to handle the case at a different law firm. This rule is supported by the sound policy consideration that a client cannot be expected to

jeopardize the relationship with the attorney handling his or her case during the period that the attorney continues to represent him.

Kvetnaya v. Tylo, 49 A.D.3d 608, 854 N.Y.S.2d 425 (2d Dep't 2008)(while cause of action for legal malpractice accrued when the matrimonial attorney allegedly failed to advise the plaintiff of her equitable distribution rights and failed to disclose a conflict of interest, pursuant to the continuous representation doctrine the statute of limitations was tolled until at least the date on which the special referee signed the judgment of divorce).

Waggoner v. Caruso, 68 A.D.3d 1, 886 N.Y.S.2d 368 (1st Dep't 2009)(statute of limitations tolled by continuous representation doctrine as to law firm where departing attorney continued to represent plaintiffs in same matter at a different law firm, even though attorney left firm nearly six years before action was commenced).

The determination must also include consideration of CPLR 203(d), pursuant to which, where a defense or counterclaim is asserted, "if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed."

Debevoise & Plimpton LLP v. Candlewood Timber Group LLC, 102 A.D.3d 571, 959 N.Y.S.2d 43 (1st Dep't 2013)(defendants' malpractice counterclaim not time-barred insofar as defendants seek to set off their malpractice damages against any recovery plaintiff might obtain)(citing CPLR 203(d)).

It is important to remember that in legal malpractice claims brought after the lawyer and client have arbitrated or litigated the reasonableness of fees, a defense of collateral estoppel or res judicata may arise. As a general rule, the determination that a lawyer is entitled to any amount of fees is an implicit ruling that there was no legal malpractice.

Wallenstein v. Cohen, 45 A.D.3d 674, 845 N.Y.S.2d 428 (2d Dep't 2007) (determination by arbitrator fixing value to the lawyer's services necessarily determined that no malpractice occurred).

Afsharimehr v. Barer, 303 A.D.2d 432, 755 N.Y.S.2d 888 (2d Dep't 2003) (award in prior fee action barred subsequent legal malpractice action).

Koppelman v. Liddle, O'Connor, Finkelstein & Robinson, 246 A.D.2d 365, 668 N.Y.S.2d 29 (1st Dep't 1998) (when a client does not prevail in an action against lawyer for the value of professional services, a later action for legal malpractice is barred because the prior ruling implicitly finds that there was no malpractice).

F. Claims By Non-Clients

New York applies a strict privity requirement to legal malpractice claims. As such a non-client cannot sue for legal malpractice, absent acts of collusion, fraud, malicious acts or other similar circumstances. Occasionally, a non-client will insist that he was actually a client, which is why it is important, in declining a case, to send a letter to a potential client whom the matrimonial lawyer has consulted, explaining that no attorney-client relationship will be formed. (A plaintiff's unilateral beliefs do not confer upon him the status of client. Rather, a plaintiff must introduce evidence that the lawyer caused or allowed him to believe he was a client.) Also, it is important when the attorney-client relationship ends with a client, for any reason, to document by letter the termination of the relationship.

There are a few narrow exceptions to the privity rule that may have application in the matrimonial arena:

Schneider v. Finmann, 15 N.Y.3d 306, 907 N.Y.S.2d 119 (2010) (in the case of a deceased client, privity will exist between the lawyer and the personal representative of the client's estate.) It is important to remember that such exception is granted for legal estate planning claims. However, plaintiffs will attempt to use this exception to skirt privity requirements in other types of claims.

Venecia V. v. August V., 113 A.D.3d 122, 977 N.Y.S.2d 199 (1st Dep't 2013) (a parent may assert legal malpractice as an affirmative defense to the fee claim of an attorney for a child).

Non-clients will also seek to sue lawyers for breach of New York Judiciary Law §487. This is especially prevalent in claims against matrimonial attorneys because clients project a lot of negative emotion upon the lawyers for their ex-spouse. A violation of Judiciary Law §487 requires a showing of the intent to deceive the court or any party in a litigated matter, or a chronic, extreme pattern of legal delinquency. The evidentiary bar is very high, but it is a popular claim because it provides for treble damages.

Dupree v. Voorhees, 68 A.D.3d 807, 891 N.Y.S.2d 124 (2d Dep't 2009) (Judiciary Law §487 claim by wife against lawyers for her ex-husband for misrepresenting facts to the court, and which caused her to incur unnecessary legal fees, held to withstand dismissal motion. A claim for vicarious liability against such lawyer's partner also upheld because any wrongful act would have been committed with reasonable scope of the law partnership's business).