CHAPTER ELEVEN

MALPRACTICE AVOIDANCE

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MARK JOHNSON is an elected Fellow in the American College of Trial Lawyers. He has been listed in every edition of The Best Lawyers in America since 1995. Best Lawyers Publishing named him Seattle's Plaintiffs' Legal Malpractice Lawyer of the Year for 2011, 2013 and 2015. He is a member of the Washington State Association for Justice. In 2008-2009 he was President of the Washington State Bar Association. From 2012-2014 he was the President of LAW Fund, a nonprofit corporation that raises money from lawyers and judges to support Washington's civil legal aid organizations through its annual Campaign for Equal Justice. He is currently a member of the board of trustees of The Legal Foundation of Washington, a not-for-profit organization created at the direction of the Washington Supreme Court to administer Washington's Interest on Lawyer's Trust Accounts (IOLTA) program and other sources of civil legal aid funding and to distribute those funds to over 20 pro bono civil legal aid organizations across Washington.

Mark is a partner at Johnson Flora Sprangers PLLC in Seattle. He limits his practice to the representation of plaintiffs in serious injury and medical and legal malpractice cases.

WASHINGTON LAW OF LAWYER LIABILITY

STATUTE OF LIMITATIONS

The statute of limitations for malpractice actions against attorneys in Washington is three years from the date the client discovers, or in the exercise of reasonable diligence should have discovered, the facts which give rise to a cause of action - it is not necessary for the client to know that there has been malpractice (a violation of the standard of care). *Peters v. Simmons,* 87 Wn.2d 400, 403-06 (1976). The statute is tolled until the end of the continuous course of representation for the matter about which malpractice is alleged even if the client knows that malpractice has been committed. The statute is not tolled by continued representation on unrelated matters. *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 37 P.3d 309 (2001).

The determination of when representation ends is generally a question of fact, and "where there is unilateral withdrawal or abandonment, the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services." *Hipple v. McFadden*, 161 Wn. App. 550, 559, 255 P.3d 730 (2011) *review denied,* 172 Wn.2d 1009, 259 P.3d 1108 (2011).

A client is held to have constructive notice of all the elements of a claim upon entry of an adverse judgment in litigation. *Richardson v. Denend*, 59 Wn. App. 92, 795 P.2d 1192 (1990). As stated in a concurring opinion in *Duke v. Boyd,* 133 Wn.2d 80, 942 P.2d 351 (1997), "damages resulting from attorney negligence in litigation are embodied in the court's judgment. Parties are on notice, as a matter of law, from the entry of the judgment of any damages from the negligence..." *Id.* 94, 356.

ELEMENTS OF A CLAIM - NONCRIMINAL

The elements of a legal malpractice claim are those four associated with all negligence claims: 1) the existence of a duty; 2) failure to perform the duty by conduct deficient relative to the applicable standard of care; 3) proximate cause; and 4) damage. *Evans v. Steinberg,* 40 Wn. App. 585, 588 (1985).

ELEMENTS OF A CLAIM - CRIMINAL

In addition to the necessary elements required in a noncriminal legal malpractice lawsuit, the plaintiff in a criminal legal malpractice lawsuit must also establish (1) postconviction relief and (2) demonstrate his innocence by a preponderance of the evidence. *Piris v. Kitching*, 186 Wn. App. 265, 345 P.3d 13, (2015) *review granted,* 183 Wn.2d 1017, 355 P.3d 1153 (2015). [In legal malpractice actions arising out of representation in a criminal case the client bears the burden to prove actual (factual) innocence by a preponderance of the evidence. *Ang v. Martin*, 154 Wn.2d 477 (2005).]

The innocence requirement may not apply where an injured, non-innocent plaintiff in a malpractice suit received a higher sentence in his criminal case than he would have received had his defense lawyer exercised the requisite standard of care with regard to the sentencing. *Powell v. Associated Counsel for the Accused*, 125 Wn. App. 773, 777 (2005); *Powell v. Associated Counsel for Accused*, 131 Wn. App. 810, 129 P.3d 831 (2006), *as amended on reconsideration* (Sept. 7, 2006).

Division One held that the narrow exception to the factual innocence requirement of *Powell I and Powell II* does not apply to a plaintiff if the incorrectly calculated and imposed sentence falls within the standard range sentencing guidelines had the range

been correctly calculated in the first instance. *Piris v. Kitching*, 186 Wn. App. 265, 345 P.3d 13, (2015).

On review, *Piris v. Kitching*, 185 Wn.2d 856, 375 P.3d 627 (2016), the Court held that actual innocence is a necessary requirement to purse a criminal malpractice claim, stating there is only a very limited exception to that rule. Again in *Piris*, the term of confinement the defendant served was within the broad authority of the trial court [as the sentence imposed was within the standard sentencing range had the trial court calculated it correctly]. The Court stated that the argument for a *Powell* exception was inapplicable, but the Court specifically did not overrule *Powell*. Instead, the Court emphasized that *Powell* involved an unique and narrow set of circumstances where defense counsel and the court were evidently unaware of the class or level of crime to which the defendant plead guilty, and the trial court imposed a sentence of substantially more time than it was authorized to impose.

THE EXISTENCE OF AN ATTORNEY-CLIENT RELATIONSHIP

The determination of the existence of an attorney-client relationship is a question of fact. *Bohn v. Cody*, 119 Wn.2d 357, 363 (1992). The existence of the relationship "turns largely" on the client's *subjective belief* or *intention* that such a relationship exists and that the attorney is protecting the client's interests, *if* that belief is "reasonably formed based on the attending circumstances, including the attorney's words or actions." *Id.* (emphasis added). The same test applies to the scope of the relationship. The duty of care arises out of the existence of the relationship.

DUTY TO NON-CLIENTS

Washington is among the overwhelming majority of jurisdictions that do not require an attorney-client relationship for the imposition of a duty of care, although plaintiffs in such cases "must show that there is some other basis upon which (the attorney) owed them a duty." *Strangland v. Brock*, 109 Wn.2d 675, 679-82 (1987).

Under Washington law, there can be no duty to a non-client absent a threshold finding that the attorney's services were intended to benefit the plaintiff. *Trask v. Butler*, 123 Wn.2d 835 (1994). Thereafter, courts apply a multi-factor balancing test set forth in *Trask*. Applying *Trask*, the Supreme Court of Washington held that an attorney hired by a title insurer to represent its insured did not owe a duty to the non-client insurer. *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 311 P.3d 1 (2013) (representation was not intended to benefit the insurer). In an unpublished Division One opinion, the court cited *Stewart Title* and found that an alignment of interests, purportedly between the insurance company (a nonclient) who had retained the attorney to defend its insured, alone was insufficient to show that either the attorney or the client intended the insurer to benefit from the representation. *Doctors Co. v. Bennett Bigelow & Leedom, P.S.*, 2015 WL 3385264 (attorney hired by insurer to defend insured does not owe a duty of care to the insurer). Attorney did not owe primary beneficiary, and non-client, a duty of care to properly execute trust documents. *Linth v. Gay*, 190 Wn. App. 331, 360 P.3d 844 (2015).

THE STANDARD OF CARE

The standard of care to which a Washington lawyer is held is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable,

careful and prudent lawyer in the practice of law in the State of Washington. *Walker v. Bangs*, 92 Wn.2d 854, 859 (1979). Compliance with the standard of care is non-delegable and an attorney may not escape liability for negligence by attempting to delegate responsibilities mandated by the canons of professional ethics or his duty of care. *In re Droker*, 59 Wn.2d 707 (1962).

THE PROFESSIONAL CONDUCT GUIDELINES AND THEIR EVIDENTIARY VALUE IN A CIVIL ACTION

In *Hizey v. Carpenter*, 119 Wn.2d 251 (1992) the Supreme Court held that the RPCs may not be explicitly referred to by experts in a legal malpractice case, nor do they necessarily set the standard of practice. The expert may testify generally to ethical requirements, but must avoid specific reference to the CPRs and RPCs. *Id.* at 265.

Even though the RPCs may not be expressly referred to in a civil action based on negligence, an attorney may still be subjected to professional discipline for an act of negligence and the RPCs may be admissible in an action to disgorge fees based on the breach of a fiduciary duty.

THE DUTY TO INFORM

An attorney has a duty to disclose to her client all facts material to the representation. A fact is material if it is a matter to which a reasonable person would attach importance in determining his choice of action in the transaction in question. *State v. O'Connell*, 83 Wn.2d 797, 815 (1974); *Transcontinental Ins. Co. v. Faler*, 9 Wn. App. 610, 612-13 (1973); *Bowers v. Transamerica Title* Ins. Co., 100 Wn.2d 581, 588-90 (1983).

EXPERT TESTIMONY

Expert testimony is necessary in an action for legal negligence, unless the negligence is within the common knowledge of lay persons or the negligence is "obvious." *Walker v. Bangs*, 92 Wn.2d 854, 858 (1979).

QUESTIONS OF FACT AND LAW IN LEGAL MALPRACTICE CASES

Legal malpractice cases often require the finder of fact and/or the judge to decide or rule on issues as they should have been decided in the underlying action. *Chocktoot v. Smith*, 571 P.2d 1255, 1258 (Or. 1977). In *Daugert v. Pappas*, 104 Wn.2d 254, 257 (1985), the Washington State Supreme Court followed the weight of authority nationwide and held that an issue which presented a question of law in the underlying action retained its character in the legal malpractice case and was, therefore, for the court to decide.

CAUSATION AND DAMAGES

As in most negligence cases, causation in a legal malpractice case is usually an issue for the trier of fact. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 712-13 (1986). It is only when the facts are undisputed and inferences there from are plain and incapable of reasonable doubt or difference of opinion, causation is a question of law for the court. *Daugert v. Pappas*, 104 Wn.2d 254, 257 (1985); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d. 581, 590 (1983).

In *Martin v. Northwest Washington Legal Services*, 43 Wn. App. 405 (1986), the Court of Appeals affirmed a judgment against a legal services organization finding that the organization had negligently failed to seek a division of a military pension in a dissolution action and that such failure resulted in monetary damages to the client. The

defendant argued that its negligence was not a proximate cause of loss to the client. In support of this argument, the defendant alleged that the client caused or aggrieved her own damages by failing to seek relief under the Uniform Services Former Spouse's Protection Act (USFSPA). The *Martin* court held that the client proved her burden of causation by establishing that she "would have prevailed or achieved a better result" if her attorney had performed competently. The *Martin* court further held that there was substantial evidence in the record to support the finding of proximate cause, and that the client's conduct did not "rise to the level of a superseding cause." *Id.* at 410.

As in other negligence cases, "the law does not require that negligence of the defendant must be the sole cause of the injury complained of in order to entitle the plaintiffs to damages therefor." *Ward v. Arnold*, 52 Wn.2d 581, 584 (1958).

Until recently, Washington law required that the plaintiff prove the collectability of an underlying claim or debt when alleging that an attorney's negligence caused the loss of its value. *See*, *Tilly v. John Doe*, 49 Wn. App. 727, 732-33 (1987), *cert. denied*, 110 Wn.2d 1022 (1988). On October 9, 2014, in the case of *Schmidt v. Coogan* 181 Wn.2d 661, 335 P.3d 424 (2014), the Washington State Supreme Court reversed that rule and held that the issue of whether an underlying judgment or claim was collectible is an affirmative defense to be plead and proved by the negligent lawyer. *Id.* at 429.

In *Coogan*, the Court also addressed the issue of whether emotional distress damages are recoverable in a legal malpractice claim. In a fractured opinion the court held that damages for emotional distress are recoverable only "when emotional distress is foreseeable due to the particularly egregious (or intentional) conduct of an attorney or the sensitive or personal nature of the representation." *Id.* at 432.

A negligent attorney is not entitled to have the damages awarded to a successful malpractice plaintiff reduced by the amount stated in the negligent attorney's contingent fee contract. Such a reduction would necessarily fail to put the injured plaintiff in the position he or she would have occupied in the absence of negligence, because in virtually every case the injured plaintiff will be required to hire a second attorney to prosecute the malpractice action against the negligent attorney and will be required to pay that second attorney. *Shoemake v. Ferrer*, 143 Wn. App. 819, 828-829 (2008).

BREACH OF FIDUCIARY DUTY CLAIMS, FEE DISGORGEMENT CLAIMS AND CPA CLAIMS

The Fiduciary Relationship and Claims for Breach of Fiduciary Duty

As a matter of law, a fiduciary relationship exists between an attorney and a client. The fiduciary relationship is one of special trust and confidence and bestows upon an attorney the "highest" duty of fidelity, good faith and undivided loyalty. *In the Matter of Estate of Larson*, 103 Wn.2d 517, 520, 694 P.2d 1051 (1985); *Perez v. Pappas*, 98 Wn.2d 835, 839-840, 659 P.2d 475 (1983); *Liebergesell v. Evans*, 93 Wn.2d 881, 890, 613 P.2d 1170 (1980); *Transcontinental Ins. Co. v. Faler*, 9 Wn. App. 610, 612, 513 P.2d 864 (1973). It requires the "undeviating fidelity" of the lawyer to the client. No exceptions can be tolerated. *Van Dyke v. White*, 55 Wn.2d 601, 612-13, 349 P.2d 430 (1960). A breach of fiduciary duty may support a finding of negligence. *See Hansen v. Wightman*, 14 Wn. App. 78, 92-93, 538 P.2d 1238 (1975). The violation of a fiduciary duty gives rise to an independent cause of action for breach of fiduciary duty. *See Trask v. Butler*, 123 Wn.2d. 835, 843-844, 872 P.2d 1080 (1994); *Cotton v. Kronenberg*, 111 Wn. App., 258, 263-270, 44 P.3d 878 (2002), and; *Cummings v. Guardianship Services*, 128 Wn. App. 742, 802-804, 110 P.3d 796 (2005).

Fee Disgorgement Claims

A lawyer may not charge an unreasonable fee. RPC 1.5; *In re Disciplinary Proceeding Against Preszler*, 169 Wn.2d 19, 232 P.3d 1118, 1126 (2010). It is not a defense to a claim that a lawyer charged an unreasonable fee that the lawyer did not intend to charge an unreasonable fee. The required showing is that the lawyer acted with "knowledge" as defined in the ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Definitions, as acting with "the conscious objective or purpose to accomplish a particular result." *Id.*, 21-22. *See, also, In Re Brothers,* 149 Wn.2d, 575, 585, 70 P.3d 940, 944-945 (2003).

Attorney fee agreements that violate the RPCs are against public policy and unenforceable. *Holmes v. Loveless*, 122 Wn.2d 470, 475, 94 P.3d 338, 340 (2004). Whether an attorney's conduct violates a RPC is an issue of law for the court. *Id.*

An attorney's ethical obligation to refrain from charging an unreasonable fee continues throughout the term of the agreement and a fee agreement that is reasonable at the outset may become unreasonable over time. *Id.* at 477, 342. *See, also, Cotton v. Kronenberg,* 111 Wn. App. 258, 271-272, 44 P.3d 878, 885 (2002).

A trial court may deny or require disgorgement of fees for a breach of ethical duties to "discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type." *Eriks v. Denver*, 118 Wn.2d 451, 463, 824 P.2d 1207, 1213, *citing, In Re Eastern Sugar Antirust Litig.*, 697 F.2d 524, 533 (3rd Cir. 1982).

An attorney requesting fees bears the burden of proving the reasonableness of the fees. *In Re the Settlement/Guardianship of AGM and LLM, Minors,* 154 Wn. App. 58, 73-73, 223 P.3d 1276, 1283 (2010).

"A fee agreement between a lawyer and a client, revised after the relationship has been established on terms more favorable to the lawyer than originally agreed upon may be void or voidable unless the attorney shows that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts on which it is predicated."

Valley/50th Avenue LLC v. Stewart, 159 Wn.2d 736, 743-744, 153 P.3d 186, 189 (2007). In addition, since a modification of a fee agreement constitutes a business transaction with a client, the transaction is considered to be prima facie fraudulent. The attorney bears the burden of proving compliance with RPC 1.8. *Id.* at 745-746.

"A finding of causation and damages is not required to support an order of disgorgement." *Behnke v. Ahrens*, 172 Wn. App. 281, 294 P.3d 729 (2012) *review denied,* 177 Wn.2d 1003, 300 P.3d 415 (2013). *See also, Eriks v. Denver*, 118 Wn.2d at 462.

Courts have reduced, denied or disgorged in cases involving excessive compensation based upon a small amount of work relative to the fee charged, fee payments continuing for too long, modification of fee agreements, failure to disclose a conflict of interest and the failure to have contingent fee agreement in writing. *See*, e.g., *Re the Settlement/Guardianship of AGM and LLM, Minors,* 154 Wn. App. 58, 223 P.3d 1276 (2010); *see, e.g., Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992).

Fee disgorgement ordered by the trial court based on in-house counsel's purported violations of the RPCs exceeded the trial court's authority. *Chism v. Tri-State Const., Inc.*, 193 Wn. App. 818, 374 P.3d 193 (2016), *review denied*, 186 Wn.2d 1013,

380 P.3d 497 (2016) (distinguishing in-house counsel and wages from traditional attorney-client relationships and fees).

Consumer Protection Act Claims

An attorney may be subject to liability under the Consumer Protection Act ("CPA"). *Short v. Demopolis*, 103 Wn.2d 52, 65 (1984). The CPA makes it unlawful to engage in "unfair or deceptive acts or practices in the conduct of any trade or commerce...." RCW 19.86.020. CPA claims against attorneys apply only to the "entrepreneurial" aspects of the practice of law, i.e., how fees are calculated, billed, and collected and "how a law firm obtains, retains and dismisses clients." CPA claims do not apply to claims for malpractice and negligence as those "go to the competence and strategy of lawyers, and not to the entrepreneurial aspects of practice." *Eriks v. Denver*, 118 Wn.2d 451, 464, 824 P.2d 1207, 1214 (1992).

ERRORS IN LITIGATION

A malpractice action against a lawyer arising out of litigation requires that the plaintiff try both the underlying action and the malpractice case. (The "case within the case.") *Daugert v. Pappas*, 104 Wn.2d 254, 257 (1985).

To survive a summary judgment motion claiming the underlying claim is without merit, the plaintiff in a legal malpractice lawsuit must proffer enough evidence to establish the underlying case could have survived a summary judgment motion. *Slack v. Luke*, 192 Wn. App. 909, 370 P.3d 49 (2016).

DEFENSES

A plaintiff's contributory negligence is a defense to a legal malpractice action. *See*, *Hansen v. Wightman*, 14 Wn. App. 78, 86 (1975). Therefore, RCW 4.22.070 applies to legal malpractice claims. The statute provides in its pertinent part, that:

> In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW.

RCW 4.22.070.

The defense of non-party/third party fault in an action for professional negligence is an affirmative defense that requires that the defendants produce expert testimony on the standard of care. As stated by the Supreme Court in *Adcox v. Children's Orthopedic Hosp. and Medical Center,* 123 Wn.2d 15, 25-26, 864 P.2d 921 (1993):

> RCW 4.22.070 is not self-executing. It does not automatically apply to each case where more than one entity could theoretically be at fault. Either the plaintiff or the defendant must present evidence of another entity's fault to invoke the statute's allocation procedure. Without a claim that more than one party is at fault, and sufficient evidence to support that claim, the trial judge cannot submit the issue of allocation to the jury. Indeed, it would be improper for the judge to allow the jury to allocate fault without such evidence. If the plaintiff signals an intention to present evidence of fault solely against one defendant, as in this case, it is incumbent upon the defendant to provide proof that more than one entity was at fault. The Hospital failed to present any evidence of the possible negligence of Dr. Lush and Dr. Herndon. Instead, the Hospital chose the legal theory that there was no negligence in this case. Moreover, the Hospital did not even take a clear position on the issue of whether allocation of fault was required under Washington's statutes. The Hospital cannot now be heard to complain it was not afforded allocation.

In *Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 324 P.3d 743 (2014) *review denied*, 181 Wn.2d 1008, 335 P.3d 941 (2014), the Court expressly adopts the attorney judgment rule, which is an affirmative defense to a purported breach of duty. The case provides a detailed analysis of the attorney judgment rule in the summary judgment posture. [Previously this rule was referred to as 'judgmental immunity,' which provided that an attorney is not liable for good faith errors in tactical decision making (such as which witnesses to call, what evidence to present and how to present it), nor is an attorney liable for failing to pursue an unsettled area of the law. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 717 (1986); *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 394 (1968).]

A court-sanctioned withdrawal by counsel, days before trial was to begin, does not prevent a malpractice action predicated on counsel's allegedly improper withdrawal from the underlying case. *Schibel v. Eymann*, 193 Wn. App. 534, 372 P.3d 172 (2016), *review granted,* 186 Wn.2d 1009, 380 P.3d 497 (2016).

The equitable doctrine of judicial estoppel precludes a person who received discharge in bankruptcy of asserting a legal malpractice suit when he did not disclose the possibility of the malpractice lawsuit in his bankruptcy filings and schedules. *Urbick v. Spencer Law Firm, LLC*, 192 Wn. App. 483, 367 P.3d 1103 (2016), *as corrected* (Feb. 3, 2016).

LEGAL MALPRACTICE CLAIMS MAY NOT BE ASSIGNED

A client may not assign to an adversary, a legal malpractice claim in the litigation out of which the claim arose. *Kommavongsa v. Haskell,* 149 Wn.2d 288, 311 (2003). The prohibition against assignment of legal malpractice claims cannot be avoided by

having the client prosecute the action in his own name for the benefit of the adversary with the adversary having the right to control the agreement. *Kim v. O' Sullivan,* 133 Wn. App. 557 (2006). "A claim for legal malpractice is not assignable, directly or indirectly, to one's adversary in a proceeding from which that legal malpractice is alleged to have arisen." *Kenco Enterprises Nw., LLC v. Wiese*, 172 Wn. App. 607, 608, 291 P.3d 261, 262 (2013) *review denied,* 302 P.3d 180 (Wash. 2013).

A POTENTIAL LEGAL MALPRACTICE CLAIM MAY NOT BE SETTLED ABSENT ADVICE TO THE CLIENT TO CONSULT INDEPENDENT COUNSEL EVEN IF NO ALLEGATION OF MALPRACTICE HAS BEEN RAISED

In *In Re Greenlee*, 158 Wn.2d 259 (2006), the Washington State Supreme Court upheld a six month suspension of a lawyer based upon the attorney's failure to advise a client from whom the attorney obtained a release of malpractice liability even though there was no claim made or proved.

UNDER CERTAIN CIRCUMSTANCES DOCUMENTS GENERATED BY A LAW FIRM WHICH RELATE TO MALPRACTICE AND ETHICAL ISSUES IN THE REPRESENTATION OF A CLIENT MAY BE DISCOVERABLE IN A LEGAL MALPRACTICE CASE

In *Versuslaw, Inc., v. Stoel Rives LLP*, 127 Wn. App. 309 (2005), *rev. denied*, 156 Wn.2d 1008 (2006), the Court held that in certain circumstances, to be determined on a case-by-case basis, intra-firm communications between attorneys regarding malpractice and ethical issues may be discoverable in a legal malpractice action arising out of the representation. If the communications are probative with respect to a conflict between the client's interests and those of the firm, the documents and other communications are probably discoverable.

AN ADMINISTRATIVELY DISSOLVED CORPORATION MAY MAINTAIN A LEGAL MALPRACTICE LAWSUIT DESPITE BEING ADMINISTRATIVELY DISSOLVED AND

DESPITE NOT APPLYING FOR REINSTATEMENT WITHIN FIVE YEARS AFTER THE DISSOLUTION.

In *Burke v. Hill*, 190 Wn. App. 897, 361 P.3d 195, 2015 WL 6679548 (Wash. Ct. App. Nov. 2, 2015), the Court reversed the trial court's summary judgment order, which dismissed the corporation's suit against its former attorney, holding that a corporation who had been administratively dissolved and had not applied for reinstatement within the five year timeframe of RCW 23B.14.220 could maintain a legal malpractice suit. The Court stated in part that the five year reinstatement provision of RCW 23B.14.220 is not equivalent to a statute of limitations.

AN ATTORNEY WHO REPRESENTS AN INSURER IN COVERAGE CASES IS NOT AUTOMATICALLY PROHIBITED FROM REPRESENTING THAT INSURER'S INSURED WHEN THE INSURER DEFENDS UNDER A RESERVATION OF RIGHTS.

Division Two concluded that an attorney who had represented the insurance company in unrelated matters concerning coverage issues was not precluded from representing the insurer's insureds when the insurer defended under a reservation of rights. *Arden v. Forsberg & Umlauf, P.S.*, 193 Wn. App. 731, 373 P.3d 320 (2016), *review granted sub nom. Arden v. Forsberg Umlauf, PS*, 186 Wn.2d 1009, 380 P.3d 484 (2016).

2017 Annual WSBA Solo and Small Firm Conference: The Small Firm Revolution – Forging Your Path to the Future

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SEATTLE, WA

SATURDAY - JULY 15TH, 2017

Lawyers' Professional Liability Insurance and Claim Reporting

2

Claims-Made Attorney Professional Liability Insurance Policies

3

- In a claims-made policy, coverage is triggered by the date the lawyer first becomes **aware** of the possibility of a claim **and notifies** the insurer.
- A claims-made policy requires that the lawyer notify the insurer of a possible claim during the policy period in which the lawyer becomes aware of the claim or coverage may be denied.

Claims-Made Attorney Professional Liability Insurance Policies

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- The insurance policy in force on the date the lawyer gains knowledge of a possible claim is the policy that covers the claim.
- The policy period for a claims-made policy extends back to the date when the event giving rise to the claim occurred and provides coverage for that claim. ("prior acts" or "retroactive date") The prior acts/retroactive date set out in the policy is important.

Claims-Made Attorney Professional Liability Insurance Policies

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- So the keys are: The event giving rise to the claim must have occurred after the retroactive date and the claim must be reported during the policy period or extended reporting period.
- **DON'T HESITATE TO REPORT**
- **DON'T HESITATE TO REPORT**

Claims-Made Attorney Professional Liability Insurance Policies

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- During the policy period, has the firm initiated lawsuits or arbitration procedures to enforce the collection of unpaid fees for the firm?
  - If "yes", complete the Fee Suit Supplemental Applications.
- Does the firm plan on initiating lawsuits or arbitration procedures to enforce the collection of unpaid fees for the firm?

Claims-Made Attorney Professional Liability Insurance Policies

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- After inquiry, is any attorney in the firm aware of:
  - Any claims that have not yet been reported to the Company?
  - Any actual or alleged act, omission, circumstances, or breach of duty that has not yet been reported to the Company, and that a reasonable attorney would recognize might reasonably be expected to result in a claim being made against the firm, any predecessor firm, or against any attorney currently or formerly affiliated with the firm or any predecessor firm, regardless of whether any such claim would be meritorious?

Claims-Made Attorney Professional Liability Insurance Policies

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LAWYERS PROFESSIONAL LIABILITY POLICY...
THIS IS A CLAIMS MADE AND REPORTED POLICY. IT APPLIES ONLY TO THOSE CLAIMS THAT ARE BOTH FIRST MADE AGAINST AN INSURED AND REPORTED IN WRITING TO THE COMPANY DURING THE POLICY PERIOD. PLEASE REVIEW THIS POLICY CAREFULLY AND DISCUSS THIS COVERAGE WITH YOUR INSURANCE AGENT OR BROKER.

V. CONDITIONS

A. Notice
1. Notice of **Claims**
The **Insured**, as a condition precedent to the obligations of the **Company** under this Policy, shall as soon as reasonably possible after learning of a **Claim** give written notice to the **Company** during the **policy period** of such **claim**. The **Company** agrees that the **Insured** may have up to but not to exceed, sixty (60) days after the Policy expiration to report a **claim** made against the **Insured** during the **policy period** if the reporting of such **claim** is as soon as reasonably possible.

Claims-Made Attorney Professional Liability Insurance Policies

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2. Notice of Potential Claims
If during the **policy period** the **Insured** becomes aware of any act or omission that may reasonably be expected to be the basis of a **claim** against the **Insured** and gives written notice to the **Company** of such act or omission and the reasons for anticipating a **claim**, with full particulars, including but not limited to:
a. the specific act or omission;
b. the dates and persons involved;
c. the identity of anticipated or possible claimants;
d. the circumstances by which the **Insured** first became aware of the possible **claim**, then any such **claim** that arises out of such reported act or omission and that is subsequently made against the **Insured** and reported to the **Company** shall be deemed to have been made at the time such written notice was given to the **Company**.

Claims-Made Attorney Professional Liability Insurance Policies

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E. Assistance and cooperation of the **Insured**
1. The **Insured** shall cooperate with the **Company** and, upon the **Company's** request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving of evidence, obtaining the attendance of witnesses, and the conduct of suits and proceedings in connection with a **claim**.
2. The **Insured** shall assist in the enforcement of any right of contribution or indemnity against any person or organization who or which may be liable to any **Insured** in connection with a **claim**.
3. The **Insured** shall not, except at its own cost, voluntarily make any payments, assume or admit any liability or incur any expense without the consent of the **Company**.

Claims-Made Attorney Professional Liability Insurance Policies

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LAWYERS PROFESSIONAL LIABILITY POLICY

AMENDATORY ENDORSEMENT – EXTENDED REPORTING PERIODS WASHINGTON

It is understood and agreed that Extended Reporting Periods Subsection F. Elimination of right to any extended reporting period is deleted in its entirety.

All other terms and conditions of the Policy remain unchanged.

Claims-Made Attorney Professional Liability Insurance Policies

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Policy May Provide Coverage for:

- Disciplinary Proceedings
- Subpoena Assistance
  - Help in responding to a subpoena
  - Company will retain an attorney to provide advice
  - Prepare the insured for sworn testimony
  - Represent insured at insured's depositions
  - Such fees incurred/paid may be in addition to the limits of liability and not subject to the deductible.

Washington's Law of Lawyer Liability

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Including the Law Related to Lawyer Professional Liability, Fiduciary Duty Based Claims and Claims Based on Charging an Unreasonable Fee.

Washington Law of Lawyer Liability

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- **Statute Of Limitations**
  - 3 years from date of discovery of the facts comprising the cause of action.
    - *Peters v. Simmons,* 87 Wn.2d 400, 403-06 (1976).

Washington Law of Lawyer Liability

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- **Statute Of Limitations Tolled During Continuous Course Of Representation.**
  - *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 37 P.3d 309 (2001).

Washington Law of Lawyer Liability

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- **Elements Of A Claim - Civil Malpractice**
  - Existence of a duty **(Duty)**
  - Failure to perform the duty **(Breach)**
  - Proximate cause **(Causation)**
  - Damage **(Damages)**

Evans v. Steinberg, 40 Wn. App. 585, *588* (1985).

Washington Law of Lawyer Liability

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- **Elements Of A Claim - Criminal Malpractice**
  - Existence of a duty **(Duty)**
  - Failure to perform the duty **(Breach)**
  - Proximate cause **(Causation)**
  - Damage **(Damages)**
  - Successful postconviction relief
  - Demonstrate innocence by a preponderance of the evidence

Piris v. Kitching, 185 Wn.2d 856, 375 P.3d 627 (2016).

Washington Law of Lawyer Liability

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- **Duty - The Attorney-Client Relationship**
  - The client's subjective belief governs the existence of the relationship and the scope of the duty

    Bohn v. Cody, 119 Wn.2d 357, 363 (1992).
- **Duty To Non-Clients**
  - Multi-factor balancing test

    Trask v. Butler, 123 Wn.2d 835 (1994).
- **The Standard Of Care**
  - The reasonably prudent lawyer in the same or similar circumstances

    Walker v. Bangs, 92 Wn.2d 854, 859 (1979).

Washington Law of Lawyer Liability

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- **The Duty To Inform**
  - All facts material to the representation

State v. O'Connell, 83 Wn.2d 797, 815 (1974).

- **Compliance With The Standard Of Care Is Non-Delegable**
  - May not escape liability for negligence by attempting to delegate responsibilities

In re Droker, 59 Wn.2d 707 (1962).

- **Expert Testimony**
  - Required to establish the standard of care and breach, unless common knowledge

Walker v. Bangs, 92 Wn.2d 854, 858 (1979).

Washington Law of Lawyer Liability

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- **Questions Of Fact And Law In Legal Malpractice Cases**
  - Decide issues as they should have been decided in the underlying case

Daugert v. Pappas, 104 Wn.2d 254, 257 (1985).

Washington Law of Lawyer Liability

21

- **Defenses**
  - Contributory negligence
  - Non-party / third-party fault
  - Attorney judgment Rule
    - Higher burden for tactical decisions?
  - Issue of whether an underlying judgment or claim was collectible

Washington Law of Lawyer Liability

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- **Important Case:**
  - *Versuslaw, Inc., v. Stoel Rives LLP*, 127 Wn. App. 309 (2005), *rev. denied*, 156 Wn.2d 1008 (2006).
    - ➢ May a law firm assert an adverse privilege against an existing client?

Washington Law of Lawyer Liability

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- **The Fiduciary Relationship**
  - Exists as a matter of law
  - Special Trust and confidence
  - "Highest" duty of fidelity, good faith, undivided loyalty, and full disclosure

Washington Law of Lawyer Liability

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- **A Breach of the Fiduciary Duty**
  - Gives rise to an independent action.
  - May support legal malpractice action.
  - Fee disgorgement may be an appropriate remedy - **no causation required**.

Washington Law of Lawyer Liability – CPA Claims Against Attorneys

25

- CPA claims apply to the "entrepreneurial aspects" of the practice of law.
- Entrepreneurial aspects:
  - Relate to how the price of legal services is determined, billed, and collected;
  - Relate to the way a law firm obtains, retains, and dismisses clients.
- Claims for malpractice are not subject to the CPA.

Short v. Demopolis, 103 Wn.2d 52, 691 P.2d 163 (1984).

Washington Law of Lawyer Liability – Fees and Claims for Fee Disgorgement

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RPC 1.5 – FEES.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent; and

(9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

Washington Law of Lawyer Liability – Fees and Claims for Fee Disgorgement

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- Fee agreements that violate the rules of professional conduct are against public policy and are unenforceable.
- A fee agreement that was reasonable at the outset may become unreasonable over time - an attorney has an obligation to avoid charging an excessive fee throughout the life of the agreement.

Washington Law of Lawyer Liability – Fees and Claims for Fee Disgorgement

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- Whether a lawyer has violated a RPC is a question of law.

Eriks v. Denver, 118 Wn.2d 451, 824 P.2d 1207 (1992).

Washington Law of Lawyer Liability - Conflicts

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- Conflict RPCs 1.7-1.11
- Key RPCs
  - 1.7 Conflict of Interests: Current Clients
  - 1.8 Conflict of Interests: Current Clients: Specific Rules
- *LK Operating, LLC v. Collection Grp., LLC*, 331 P.3d 1147 (2014).
  - An attorney-client business transaction is prima facie fraudulent.
  - The burden of proving compliance with RPC 1.8(a) rests with the lawyer and the lawyer must prove strict compliance with RPC 1.8(a).

Washington Law of Lawyer Liability – Fees and Claims for Fee Disgorgement

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- **RPC 1.8, Comment 1:**
  - …"It [RPC 1.8] does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee." …
- RPC 1.8 applies to modifications of fee agreements.
  - *See, Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002).

Washington Law of Lawyer Liability – Fees and Claims for Fee Disgorgement

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- *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 423, 754 P.2d 120 (1988).
  - Modifications of a fee agreement require particular attention and scrutiny.
  - Modifications are void or voidable until the attorney establishes the modification was:
    - fair and reasonable;
    - free from undue influence; and
    - made after a fair and full disclosure of the facts upon which it is predicated.

Washington Law of Lawyer Liability - Fees

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RCW 4.24.005: TORT ACTION – ATTORNEYS' FEES – DETERMINATION OF REASONABLENESS.

Any party charged with the payment of attorney's fees in any tort action may petition the court not later than forty-five days of receipt of a final billing or accounting for a determination of the reasonableness of that party's attorneys' fees. The court shall make such a determination and shall take into consideration the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) Whether the fee is fixed or contingent;

(9) **Whether the fixed or contingent fee agreement was in writing and whether the client was aware of his or her right to petition the court under this section;**

(10) The terms of the fee agreement.

Washington Law of Lawyer Liability - Fees

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RCW 7.70.070 - ATTORNEYS' FEES. (MEDICAL MALPRACTICE.)

The court **shall**, in any action under this chapter, determine the reasonableness of each party's attorneys fees. The court shall take into consideration the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar legal services;
(4) The amount involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) Whether the fee is fixed or contingent.

Washington Law of Lawyer Liability - Fees

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SPR RULE 98.16W – ESTATES – GUARDIANSHIP - SETTLEMENT OF CLAIMS OF MINORS AND INCAPACITATED PERSONS:

- (a) Approval of Settlement Required. In every settlement of a claim, whether or not filed in court, involving the beneficial interest of an unemancipated minor or a person determined to be disabled or incapacitated under RCW 11.88, the court shall determine the adequacy of the proposed settlement on behalf of such affected person and reject or approve it. If a suit for recovery on behalf of the affected person has been previously maintained, then the petition shall be filed in that county, or if no such suit exists, then in the county where the affected person resides, unless either court orders otherwise.
- *In re Settlement/Guardianship of AGM*, 154 Wn. App. 58, 223 P.3d 1276 (2010).