Defending a Legal Malpractice Claim

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Chapter 7

DEFENSES AND OBSTACLES TO RECOVERY

A. Contributory Negligence, Comparative Negligence, and Comparative Fault

The Shift to Comparative Principles. The adoption of comparative principles (particularly, "comparative negligence" and "comparative fault") was the most important doctrinal innovation in American tort law in the twentieth century. In many jurisdictions, this change not only altered the two most important defenses based on plaintiffs' conduct ("contributory negligence" and "assumption of the risk"), but catalyzed a host of related changes throughout the law of injury compensation (including a re-thinking of the rules on joint-and-several liability). Basic law school courses cover the full story of this transformation. However, because tort defenses based on the plaintiff's conduct are often asserted in legal malpractice cases—which usually are said to "sound in tort"—the broad outlines of the shift to comparative principles are recounted below, albeit in simplified form.

Common-Law Contributory Negligence. Contributory negligence refers to the plaintiff's unreasonable conduct that contributes to the production of the plaintiff's harm. A century ago, the law on contributory negligence had two important characteristics. First, the defense was total. Any negligence on the plaintiff's part wholly barred recovery. Second, the...
defense only applied in negligence cases. Thus, contributory negligence was a potent, but limited, defense. A small amount of plaintiff's carelessness was enough to wholly save a negligent defendant from liability, but a great deal of plaintiff's negligence was irrelevant in an intentional-tort action. In the second half of the twentieth century, the two important characteristics of contributory negligence—total defense and applicability only to negligence—were greatly altered.

**Comparative Negligence.** Generally in the 1970s, most states replaced contributory negligence with either a "pure" or "modified" scheme of comparative negligence. Under pure comparative negligence, carelessness on the part of the plaintiff reduces, but does not bar, recovery. A plaintiff responsible for 10% of the negligence which causes the plaintiff's harm can recover 90% of those losses; a plaintiff 85% responsible can recover 15% of the losses. Under pure regimes, the reduction in recovery corresponds exactly to the plaintiff's percentage of the total negligence.

In contrast, states with modified comparative negligence regimes impose a 50% threshold. If the plaintiff is less negligent than the defendant (i.e., responsible for less than 50% of the total negligence), reduced recovery is permitted. For example, a plaintiff responsible for 35% of the total negligence can recover 65% of his or her losses. In contrast, if the plaintiff is more negligent than the defendant (i.e., responsible for more than 50% of the total negligence), no recovery is allowed. Illustratively, in a case where an insurance company sued the attorney it had retained to defend its insured, the jury had found the insurance company 97% comparatively negligent. The appellate court upheld that finding because there was evidence that the plaintiff insurance company had erred in "not making it clearer to *** [the defendant attorney] that it expected him to locate and call *** [certain} witnesses, not making any effort on its own to locate them or attending more closely to the case, and not giving adequate investigation and consideration to settlement possibilities." A judgment for the defendant attorney was therefore affirmed, even though the attorney was 3% negligent, because the state had a modified comparative negligence system.

In cases where the plaintiff and defendant are equally at fault (i.e., they share 50%-50% responsibility for the negligence) the result under modified comparative negligence depends on how the 50% threshold is framed by state law. If state law bars recovery by plaintiffs whose negligence is "greater than or equal to" the defendant, a plaintiff equally at fault with the defendant cannot recover. If the law only prohibits recovery by a plaintiff "more at fault than" the defendant, the equally negligent plaintiff may recover 50% of the losses sustained. In one case, the client was found to be 50% comparatively negligent because it had failed to keep the defendant lawyer apprised of relevant facts and failed to follow counsel's advice. The court ruled that no recovery for legal malpractice was

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permitted because under Utah law, "[t]o recover damages, defendant's negligence must be greater than plaintiff's."2

Difficult questions arise when there is more than one defendant in a case. Volumes have been written on how the 50% threshold requirement under a modified regime should be applied in cases where there are multiple tortfeasors. For example, if the plaintiff is 40% comparatively negligent, and two defendants are each 30% negligent, is the negligence of the two defendants added together for the purposes of determining whether the plaintiff was the more negligent party? That is often the case, but it is not possible to generalize. Consulting local law is essential. Similar questions arise with respect to modified comparative fault regimes (discussed below).

**Comparative Fault.** "Comparative negligence" was replaced in many states, generally in the 1980s or 1990s, by "comparative fault," which broadens the reach of the defense based on the plaintiff's negligence. Under comparative fault (which is sometime called "comparative responsibility"), "fault" is defined to encompass more than just negligence. Typically, "fault" includes negligence, recklessness, strict-liability conduct, and post-accident failure to mitigate damages, but not intentionally tortious conduct. In a given case, fault on the part of the plaintiff is compared with fault on the part of the defendant, and recovery is allowed on either a "pure" or "modified" basis. For example, a client more at fault than the lawyer will be allowed partial recovery of damages under pure comparative fault systems, but nothing under modified comparative fault systems.3

**Assumption of Risk.** Where comparative principles apply, assumption of the risk implied from the plaintiff's conduct is ordinarily treated as equivalent to carelessness on the part of the plaintiff. (That form of assumption of the risk is said to be "merged" into comparative negligence or comparative fault.) "Express assumption of the risk" (such as a valid written advance release from liability) and assumption of inherent risks in an endeavor (often called "primary assumption of the risk") continue to be treated as full defenses. Advance waivers of malpractice liability might be thought of as express assumption of the risk, but such waivers are seldom valid. See Part H of this Chapter. Primary assumption of the risk is rarely discussed in legal malpractice cases.

**Three Contemporary Regimes.** Today, four states (Alabama, North Carolina, Virginia, and Maryland) and the District of Columbia still have common-law contributory negligence.4 When a choice of law is available and necessary, it is worth considering whether urging the court to apply the law of one of these jurisdictions (if that is plausible) might confer

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2. Western Fiberglass, Inc. v. Kirton, McConkie and Bushnell, 789 P.2d 34, 36 (Utah Ct. App. 1990) (finding the plaintiff 50% comparatively negligent).
3. Wilson v. Pickens, 196 S.W.3d 138 (Tenn. Ct. App. 2005) (reversing an award to a malpractice client who was "at least 50% at fault").
advantages on a defendant. The remaining forty-six states have either pure or modified comparative negligence or pure or modified comparative fault.

In a legal malpractice case, it is important to first ask whether carelessness by the plaintiff is a defense to the cause of action being asserted. Negligent conduct by the plaintiff can normally be asserted as a defense to a claim based on recklessness or negligence, but not as a defense to a breach of contract or an intentional tort claim. (Whether negligence is a defense to a breach of fiduciary duty claim may depend upon whether the breach of fiduciary duty was intentional as opposed to negligent, although some states look at the issue in other ways). Second, if the defense applies, it is critical to ascertain which regime governs under applicable state law: contributory negligence, comparative negligence, or comparative fault.

In states that have adopted comparative principles, lawyers and judges still sometimes talk about “contributory negligence,” using that term as a generic reference to carelessness on the part of the plaintiff. Similarly, in comparative fault states, practitioners and jurists may still speak of “comparative negligence,” with no intention of suggesting that the defense is limited to negligence cases. Consequently, it is important to interpret these legal terms in context.

1. Conduct Contributing to the Plaintiff’s Harm

Many cases raise issues of whether recovery in a legal malpractice action is barred or reduced by carelessness on the part of the plaintiff which contributes to the production of the harm. For example, in Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, L.L.P., the issue before the New York court was whether a client had “a cause of action for legal malpractice where that client signed *** [an erroneously] revised settlement stipulation without reading it, relying on its attorney’s misstatement that the stipulation was changed to correct only one typographical error.” At the time, New York followed comparative fault. Not surprisingly, the court held that the client’s “failure to read *** the stipulation in its entirety and to notice changes other than the typographical changes their attorney had represented to be the only changes to the stipulation *** [did] not defeat their cause of action against their attorneys for professional negligence.” The court noted that the “culpable conduct of a plaintiff client in a legal malpractice action may be pleaded by the defendant attorney, by way of affirmative defense, as a
mitigating factor in the attorney's negligence," but then cited an earlier case which had vacated a 35% reduction in recovery where an attorney's erroneous advice to a client made it improper to hold that a client contributorily negligent for failing to apply for rezoning and for failing to pay taxes on certain property.\textsuperscript{8} Interestingly, \textit{Arnav Industries} actually involved two errors. The one, discussed above, related to the erroneous stipulation that was not carefully reviewed by the client, which caused millions of dollars in losses. The other related to the filing of the stipulation in the wrong county, which led a bankruptcy court to invalidate a $100,000 payment under the stipulation as an impermissible preference, causing the client to suffer losses in that amount. It is easy to see that even if the plaintiff's alleged comparative fault had caused part of the first multi-million dollar loss, it had nothing to do with the misfiling and therefore should not reduce recovery for the $100,000 lost as an impermissible preference.

\section*{Problem 7-1}
\textbf{The Lawyer as Client}

Charles Cortez, a licensed lawyer, hired another lawyer, Leo Lehman to defend him in a suit brought against Cortez on a bond. Cortez advised Lehman that he had several defenses, including a "complete defense" on the merits, which he explained in detail to Lehman. As a result of negligence, Lehman failed to assert the complete defense in pleadings which raised several other defenses. Before the pleadings were filed, Cortez reviewed the pleadings in detail, as well as the cases cited therein. Cortez either knew or should have known that the "complete defense"—which might or might not have been successful—was not asserted in the pleadings. Allegedly as a result of Lehman's negligence, Cortez suffered an adverse judgment. The "complete defense" could not be raised on appeal since it had not been urged in the trial court, and the appeal was unsuccessful. Cortez then sued Lehman for malpractice to recover his losses. Lehman argued that recovery was barred by Cortez's own negligence. Please address the following questions:

(a) What issues must be resolved in order to determine whether the malpractice action will be successful?

(b) How does the sophistication of Cortez affect comparative fault if that principle is relevant?

\textsuperscript{8} 751 N.E.2d at 930 n.2.
2. Avoidable Consequences and Failure to Mitigate

Throughout the law, a plaintiff has a duty to mitigate damages. Under tort principles, the duty to mitigate is sometimes referred to as the "avoidable-consequences rule." According to that rule, a negligent plaintiff cannot recover compensation for losses that the plaintiff could have avoided by exercising reasonable care after the harm occurred. Thus, in personal injury cases an injured plaintiff must seek medical treatment if a reasonable person would do so to mitigate physical problems that might otherwise get worse. Similar principles apply in legal malpractice cases.

BORLEY STORAGE AND TRANSFER CO., INC. v. WHITTED
Supreme Court of Nebraska
271 Neb. 84, 710 N.W.2d 71 (2006)

STEPHAN, J.

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Borley Storage was a family business operated by Harry Borley and Maxine Borley. On December 10, 1982, Borley Storage entered into an agreement to sell its business to Borley Moving and Storage, Inc. (Borley Moving). Borley Moving was a new entity formed by the longtime manager of Borley Storage, Dennis Bauder, and his wife, Wanda Bauder, who were the sole shareholders of the new corporation. Borley Moving had no assets prior to the sale.

Whitted represented Borley Storage in the seller-financed transaction and prepared all of the documents related to the sale of the business. *** Borley Moving agreed to pay a purchase price of $250,000 ***. Payments were to begin on February 1, 1983, and continue through January 1, 1993. The purchase agreement also provided that the Bauders would execute a promissory note for the purchase price. A promissory note dated January 3, 1983, in the amount of $250,000 payable to Borley Storage was executed by Dennis Bauder, by Wanda Bauder, and by Dennis Bauder in his capacity as president of Borley Moving. The note provided that the said parties "jointly and severally" promised to pay the principal amount with interest *** in 119 monthly installments commencing on February 1, 1983. It further provided that "[i]f the makers' [sic] fail to pay any installment when due, then the entire unpaid principal balance, together with accrued interest, shall at the option of the holder, immediately become due and payable without notice."

Pursuant to the purchase agreement and to provide security for the transaction, Borley Moving granted Borley Storage a security interest in the personal property, rolling stock, and accounts receivable associated with the business. Borley Moving also granted Borley Storage a first deed of trust in certain real property. Whitted prepared and filed a mortgage and a financing statement to perfect the security interests in the personal property and accounts receivable. The financing statement was filed on
July 12, 1983. *** [T]his security interest lapsed on July 12, 1988, 5 years after its filing, because no continuation statement was timely filed.

Borley Moving defaulted on the purchase agreement in 1991, and Borley Storage thereafter attempted to recover by foreclosing on the real estate and recovering the collateral. Borley Moving filed bankruptcy in 1993. The bankruptcy court approved a reorganization plan in 1995, and Borley Storage's claim was valued at $308,000. Approximately $140,000 was secured by the real estate and rolling stock. However, because a second creditor had filed a financing statement with respect to the personal property and Borley Storage failed to file a continuation statement prior to the expiration of the 5-year period, Borley Storage lost its priority with respect to the personal property and accounts receivable. Instead, the second creditor received approximately $64,000 based on its secured interest. Borley Storage never sought recovery from the Bauders on the promissory note.

In this malpractice action, Borley Storage alleged that Whitted negligently failed to file or advise its officers of the need to file the continuation statement necessary to preserve the priority of its security interest in the personal property and accounts receivable associated with the business, thus depriving Borley Storage of security valued at $106,000. Whitted denied that he was negligent, and he alleged as an affirmative defense that Borley Storage failed to mitigate its claimed damages. After trial, a jury entered a verdict in favor of Whitted. ***.

Several of the issues presented in this appeal relate to the undisputed fact that Borley Storage did not make a claim against the Bauders on the promissory note which the Bauders executed personally in connection with their purchase of the business. ***. Barley Storage contends that the district court erred in receiving certain evidence on, and instructing the jury with respect to, the affirmative defense of mitigation of damages. Barley Storage argues that as a secured creditor, it had a right to choose whether to sue on the promissory note or proceed against the collateral. ***. Borley Storage contends that it “clearly elected to recover its collateral, and did not then, nor has it since, ever sought a dollar judgment against any maker of the note.” ***.

It characterizes the instant action for attorney malpractice as "merely an extension" of its efforts to recover the value of its collateral and argues that Whitted, who is alleged to have caused the loss of collateral, should not be permitted "to dictate the manner in which the secured creditor seeks to recover its losses upon default." ***.

*** [I]t is clear that the lapse of the security interest in 1988 did not automatically result in any damage to Borley Storage. Had the Bauders,
as co-makers, made timely payments on the note, the lapse of the security interest would have been of no consequence. ***. The loss of the security interest deprived Borley Storage of one of its remedies in the event of default by Borley Moving, but it did not extinguish the alternative remedy of enforcing the Bauders' personal liability on the note. ***.

Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury. ***. A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts. ***. A plaintiff's duty to mitigate damages arises only after a defendant's negligence. ***.

Borley Storage next assigns error with respect to the receipt into evidence of two financial statements signed by Dennis Bauder reflecting his assets and liabilities in 1990 and 1991. ***.

***. Here, the Bauders' financial ability to satisfy a judgment on the promissory note was relevant to the issue of whether it would have been reasonable for Borley Storage to pursue such a claim in mitigation of its damages. *** [T]he district court did not abuse its discretion in declining to exclude the financial statements ***.

*** [W]e conclude that there was no reversible error, and the judgment of the district court *** should therefore be affirmed.

Affirmed.

Notes on Mitigation

1. Duty to Appeal Before Suing for Malpractice? In a matter relating to a litigation error, must the plaintiff appeal an adverse judgment before suing for malpractice in order to mitigate damages? In Hewitt v. Allen, 10 the Nevada Supreme Court said:

If an appeal would be a futile gesture, that is, the appeal would most likely be denied, then litigants should be able to forgo an appeal, or dismiss a pending appeal, without abandoning their legal malpractice actions ***.

*** [T]he defendants in the legal malpractice action are able to assert, as an affirmative defense, that the proximate cause of the damages was not the attorney's negligence, but judicial error that could have been corrected on appeal. *** [B]ecause the issue is raised in the context of an affirmative defense, the attorney defendant has the burden of proof to establish that an appeal would have been

10. 43 P.3d 345 (Nev. 2002).
successful. Finally, whether an appeal is likely to succeed is a question of law to be determined by the trial court.¹¹

2. Duty to Appeal Rather Than Settle? A related question is whether a voluntary settlement of the underlying case bars a client from suing a lawyer for malpractice in the handling of the case. The Fifth Circuit, predicting Louisiana law, found that there is no *per se* bar arising from settlement. The court wrote:

[S]uch an immutable rule could cause the client to miss a favorable but fleeting opportunity to make a financially favorable settlement; and settlement may often be a better method of damage mitigation than is appeal. We cannot imagine that Louisiana's highest court would impose such a rigid, blanket requirement.¹²

If a malpractice plaintiff need not appeal, what proof of reasonableness should be required of a plaintiff who settles before a lawyer can be held liable for the costs of the settlement? Chapter Nine Part C discusses the obstacles for settling clients who challenge their lawyers' conduct.

3. Reduction by the Amount That Would Have Gone to a Contingent Fee? Suppose that malpractice occurs in the course of contingent-fee representation. In a subsequent malpractice suit, should the client's recovery be reduced by the amount that would have gone to pay the lawyer's contingent fee if the work had been properly performed? Many courts refuse to make any reduction. The Supreme Court of New Hampshire reasoned:

[W]hether a plaintiff's legal malpractice recovery should be reduced by the amount of attorney's fees the plaintiff would have paid for the defendant's competent performance is "still [an] unsettled issue." ***.

Some jurisdictions that have addressed this issue have held that the verdict should be reduced by the amount of the contingency fee because only then would the verdict reflect what the plaintiff would have recovered had the defendant performed competently in the underlying action. ***.

We disagree that reducing the verdict by the amount of the contingency fee puts the plaintiff in the same position that he or she would have been in if the defendant had performed competently in the underlying action. If we were to hold that the verdict must be reduced by the amount of the contingency fee, at the conclusion of the malpractice action, the verdict would be reduced by the amount of the contingency fee, and the plaintiff would have to pay his or her new attorney for the services that the new attorney provided in the prosecution of the malpractice action. We think this is an inequitable result.¹³

¹¹ 43 P.3d at 348-49.
PROBLEM 7-2
THE FLAWED TRUST

Chase and Claire Cumberland, husband and wife, hired a lawyer, Larry Lambertson, to provide estate planning services. The couple requested an estate plan that would allow all property they owned upon the death of the first of them to be available to support the survivor for life. The couple also expressed a desire to minimize future estate taxes.

To accomplish these objectives, Lambertson prepared two trusts, A and B. Unfortunately, a critical paragraph governing distributions from Trust B during the lifetime of the surviving spouse was omitted. When Chase died, the omission of the critical paragraph prevented Claire from gaining practical access to the property that she thought would be available to her. As a result, Claire was unable to take advantage of various financial opportunities and was otherwise greatly inconvenienced.

Claire complained to Lambertson for more than six months, but he never mentioned that the omission in the trust document could be corrected through judicial reformation of the trust. As a nonlawyer, Claire had no idea that there were legal procedures for reforming a document. Claire eventually hired new counsel, James Newly, who commenced a malpractice action against Lambertson based on his negligence in drafting the trust. The suit seeks damages to compensate Claire for the fact:

- that she is precluded from practical enjoyment of the property built up during the marriage;
- that she has had to, and will continue to have to, employ professionals to guide her in coping with the limitations posed by the misdrafted trust;
- that the actions of the defendant have caused conflict within the family and great distress to Claire;
- that she now has to pay accountants to file income tax returns for an irrevocable trust that does not need to exist; and
- that she is exposed to possible litigation by aggrieved beneficiaries of the trust.

Lambertson's malpractice defense lawyer now argues that recovery of the alleged damages is barred by Claire's failure to seek reformation of the trust document.

(a) Please evaluate the merits of this argument, laying out the steps in your reasoning process.

(b) What are the malpractice prevention lessons?
B. Unlawful Conduct

1. In General

In recent years, many state laws and judicial decisions have limited the right of a person engaged in serious criminal conduct to maintain a tort action for harm sustained in the course of that endeavor. For example, a California statute states broadly:

In any action for damages based on negligence, a person may not recover any damages if the plaintiff’s injuries were in any way proximately caused by the plaintiff’s commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony.14

In Barker v. Kallash, the New York Court of Appeals said:

[A] distinction must be drawn between lawful activities regulated by statute and activities which are entirely prohibited by law. In the first instance, *** a violation of a statute governing the manner in which activities should be conducted, would merely constitute negligence or contributory negligence *** [and] would today be resolved under the rule of comparative negligence ***. However, when the plaintiff has engaged in activities prohibited, as opposed to merely regulated, by law, the courts will not entertain the suit if the plaintiff’s conduct constituted a serious violation of the law and the injuries for which he seeks recovery were the direct result of that violation.15

The principles underlying such statutes and decisions have sometimes found application in legal malpractice cases. For example, a Texas case held that public policy barred a legal malpractice action for damages suffered by clients who were convicted of knowingly committing bank fraud after they had allegedly received negligent advice relating to a loan transaction.16 The court wrote that the “basic policy is that individuals who have committed illegal acts shall not be permitted to profit financially or be otherwise indemnified from their crimes.”17

As discussed below, the most common variation of the unlawful-conduct rule in the field attorney liability is one which bars a claim for malpractice committed by a criminal-defense lawyer.

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14. CAL. CIV. CODE § 3333.3 (Westlaw 2006).
17. Id. at 470.
2. The Exoneration or Innocence Requirement in Criminal-Defense Malpractice

**CAANAN V. BARTE**

Supreme Court of Kansas

The opinion of the court was delivered by LUCKERT, J.:

***. Marvin Canaan, after being convicted of first-degree murder*** [and] sentenced to life in prison, sued his court-appointed defense attorneys and their legal investigator for legal malpractice. ***.

While this case was proceeding, Canaan sought postconviction relief by filing a pro se *** motion. *** Judge Cleaver ruled that there was no basis for Canaan's claim of ineffective assistance of counsel and denied his *** motion.

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"Today, the courts generally have accepted the principle that guilt or innocence is relevant to pleading and proving a legal malpractice cause of action." 3 Mallen & Smith, Legal Malpractice § 26.3, 810 (5th ed. 2000).

*** [A] majority of states addressing the issue have held that successful postconviction relief is a prerequisite to the maintenance of a legal malpractice action arising out of criminal proceedings.

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Canaan argues that *** attorneys practicing criminal and civil law are subject to the same duty of care, and are implicitly subject to suits for money damages where the attorney's failure to exercise due care results in harm, whether that harm be a wrongful conviction, lost plea bargain opportunity, or an excessive sentence. ***.

*** [A] majority of courts considering the issue have held that a plaintiff must show exoneration by postconviction relief before he or she can sue defense lawyers: [citations to cases applying Alaska, Florida, Illinois, Maryland, Nevada, Oregon, Pennsylvania, Tennessee, Texas, and Virginia law omitted].

Some courts, including many which appear in the first category, hold that a plaintiff must show actual innocence. ***. [Citations to cases applying Alaska, California, Georgia, Kentucky, Massachusetts, Nebraska, Nevada, New York, New Hampshire, Pennsylvania, Texas, and Virginia law omitted.]

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Various policies or justifications have been stated for the exoneration rule, including: equitable principles against shifting responsibility for the consequences of the criminal's action; the paradoxical difficulties of awarding damages to a guilty person; theoretical and practical difficulties of
proving causation; the potential undermining of the postconviction process if a legal malpractice action overrules the judgments entered in the postconviction proceedings; preserving judicial economy by avoiding relitigation of settled matters; creation of a bright line rule determining when the statute of limitations runs on the malpractice action; availability of alternative postconviction remedies; and the chilling effect on thorough defense lawyering. We find many of these stated reasons persuasive.

Many courts express concern that a criminal defendant should not be allowed to profit from his or her own illegal conduct and find that it is improper to shift the burden of responsibility for the crime away from the criminal and to the defense attorney. Similarly, it is stated that a criminal's conviction and sentence are the direct consequence of the criminal behavior, regardless of any negligence by the attorney. ***.

Allowing recovery of damages without exoneration is contrary to the fundamental principle of tort law that damages are provided only for legally protected legal interests (Restatement [Second] of Torts § 1, comment d, § 7[1] [1965]), "and the liberty of a guilty criminal is not one of them. The guilty criminal may be able to obtain an acquittal if he is skillfully represented, but he has no right to that result." Also, "monetary remedies are inadequate to redress the harm to incarcerated criminal defendants."

Because of the antecedent criminal conduct, it cannot be said that "but for" the attorney's conduct the outcome of the criminal proceeding would differ. Thus, "without obtaining relief from the conviction or sentence, the criminal defendant's own actions must be presumed to be the proximate cause of the injury."***.

Defense attorneys should not have to spend time and energy in "defensive" lawyering to avoid potential malpractice claims. Further, it is important to ensure an adequate supply of lawyers willing to undertake the representation of indigent defendants.***.

Not all courts have adopted the exoneration rule. Courts in [Alabama, Indiana, Michigan, New Mexico, and Ohio] have criticized or rejected the exoneration rule, often in cases where a plaintiff had obtained postconviction relief.

Canaan argues that legal malpractice should be viewed in the same manner as a lost chance for a better recovery in medical malpractice. [Krahn v. Kinney, 43 Ohio St.3d 103, 105, 538 N.E.2d 1058 (1989)], in considering whether an attorney could be negligent for failing to advise his or her client of a plea offer, stated: "[T]he injury in such a situation 'is not a bungled opportunity for vindication, but a lost opportunity to minimize her criminal record.'"***. The public policy reason for the loss of chance theory is that, if such claims were barred, doctors would be free of liability for even the grossest malpractice in treating seriously ill or injured patients. Canaan argues the same rationale applies here. A criminal defendant's "preexisting injury" is the charge against him, and the attorney's
job is to minimize the consequences of that charge. If an attorney negligently fails to communicate a plea offer or immunity offer, the defendant has been harmed by losing the chance for a better outcome.***.

This argument does not survive when weighed against the public policy reasons against allowing a criminal defendant to sue his defense attorney as set out by the cases adopting the exoneration rule. As stated in [Peeler v. Hughes & Luce, 909 S.W.2d 494, 497-98 (Tex. 1995)]: “The lost opportunity of an admittedly guilty person to escape prosecution because of her lawyer’s negligence does not override the public policy against shifting the consequences of a crime to a third party.”***. Canaan’s argument is directly at odds with the idea that a criminal defendant should not be able to shift responsibility onto his or her defense attorney when it is the accused’s own criminal behavior that is the direct and proximate cause of the conviction. If accepted, Canaan’s position would allow convicted criminals to sue their defense attorneys for damages any time they believed their attorney should have asked for a lesser included instruction, for example. Canaan’s argument that defense attorneys would escape liability for malpractice also ignores the fact that all attorneys are subject to disciplinary rules requiring them to represent their clients in a diligent and competent manner.***. As stated in [Wiley v. County of San Diego, 19 Cal. 4th 532, 538, 79 Cal. Rptr. 2d 672, 966 P.2d 983 (1998)]:

“In *** instances of attorney negligence, postconviction relief will provide what competent representation should have afforded in the first instance: dismissal of the charges, a reduced sentence, an advantageous plea bargain. In the case of trial error, the remedy will be a new trial. If the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation ***. Those courts analogizing to civil actions have not considered the implications of postconviction relief for ineffective assistance of counsel.*** Given that availability, it is inimical to sound public policy to afford a civil remedy, which in some cases would provide further boon to defendants already evading just punishment on ‘legal technicalities.’”***.

*** [W]e find the majority view persuasive. We hold that before Canaan may sue his attorneys for legal malpractice he must obtain postconviction relief.

Because of the procedural posture of this case, we need not address whether a plaintiff must prove actual innocence. Canaan *** attempted to establish ineffective assistance of counsel. His petition was denied. Thus, Canaan has not been successful in obtaining any form of postconviction relief.

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Affirmed in part and reversed in part.
Notes on Unlawful Conduct

1. The Running of the Statute of Limitations on Criminal-Defense Legal Malpractice. As the principal case suggests, an exoneration or innocence requirement poses a substantial obstacle to a legal malpractice action brought by a former criminal-defense client. That obstacle is compounded if a state follows a two-track approach in calculating the running of the statute of limitations. As described in Ereth v. Cascade County:

The crux of the issue is whether the statute of limitations for legal malpractice should be tolled for the criminal defendant while he or she pursues a claim for postconviction relief or whether he or she should pursue a claim for legal malpractice simultaneously with the claim for postconviction relief.

*** [O]ther jurisdictions are divided ***. The first group of states have adopted what is referred to as a “one-track” approach. These courts require a criminal defendant to first litigate a successful claim for postconviction relief before permitting him or her to file a claim for legal malpractice against counsel. ***. The second group of states have adopted a “two-track” approach. This allows a defendant to simultaneously pursue a claim for postconviction relief in the criminal court and a claim for legal malpractice in the civil courts. ***.

Under the one-track approach, the statute of limitations does not begin to run until the criminal defendant is exonerated through some sort of postconviction relief. Under the two-track approach, the statute of limitations commences to run upon discovery of the error, irrespective of whether postconviction relief is sought or granted. The advantage to each is illustrated by a review of two decisions ***.

We first review the one-track approach. In Shaw v. State, Dep’t of Admin. (Alaska 1991), 816 P.2d 1358, the Alaska Supreme Court held that a convicted criminal defendant must obtain postconviction relief as a precondition to maintaining a legal malpractice claim against his or her attorney. ***.

The Shaw court ruled that Shaw’s legal malpractice claim was not barred by the statute of limitations and that the statute was tolled until Shaw had received postconviction relief. The Shaw court held that public policy supported some form of postconviction relief as a prerequisite to filing a claim for legal malpractice. According to the court, judicial resources are conserved since, if the defendant is denied postconviction relief, the legal principle of collateral estoppel serves to eliminate any frivolous malpractice claims. Furthermore,
the court found that the requirement of postconviction relief promoted judicial economy because a number of the issues litigated in the quest for postconviction relief, such as proximate cause and damages, would be duplicated and relevant in the legal malpractice claim. Additionally, the Shaw court highlighted the importance of developing a bright line test for purposes of assisting courts in applying the statute of limitations.

In Seevers v. Potter (1995), 248 Neb. 621, 537 N.W.2d 505, 510, the Nebraska Supreme Court, while noting, "[t]he simplicity of the [single track] rule appears attractive at first blush," found that the Michigan Supreme Court's "two-track" analysis in Gebhardt v. O'Rourke (1994), 444 Mich. 535, 510 N.W.2d 900, to be more persuasive.

***. The Gebhardt court concluded the statute of limitations starts to run on the date the criminal defendant discovers counsel's negligent acts or omissions. As the Gebhardt court observed, it is not unusual for a party to have both a criminal matter pending before a court, and a related civil suit arising out of that criminal matter also pending. In those instances, the court presented with the civil suit will commonly yield to the criminal matter, allowing it to proceed so the rights of the criminal defendant will not be infringed.

The Ereth court found the two-track approach "more persuasive because it incorporates a strict reading of the statute of limitations that at the same time addresses the problems posed by multiple litigations." The court noted that a "trial court handling the civil suit would have discretion regarding the duration of the stay, keeping in mind the nature of the claim asserted for postconviction relief." 20

2. Fees Barred by Unauthorized Practice of Law. A malpractice claim is often met with a counterclaim for unpaid fees that the plaintiff owes the defendant law firm. In one such case, the California Supreme Court held that a New York law firm's unauthorized practice of law in California barred enforcement of its fee agreement with respect to legal services performed in California. 21

3. Fees Barred by Improper Solicitation. In some states, a contract procured by improper client solicitation is unenforceable. 22

19. 81 P.3d at 469.
20. Id.
22. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 787 (1986). See also TEX. DISCIPLINARY R. PROF'L CONDUCT R. 7.03(d) (2007) (providing that a "lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation" of the Texas anti-solicitation rules).
Lacole Linden, a lawyer, represented Cassandra Cider in the sale of investment interests in a new business. Soon after the sale, the business went bankrupt. The investors then sued Cider for fraud based in part on misstatements contained in written materials provided to the investors in connection with the sale. Lawyer Linden had assisted Cider in preparing the written materials based on information provided by Cider. At trial, Cider was held liable to the investors for common-law fraud in the amount of $200,000. Although Cider believed there were appealable issues that might have resulted in reversal of the judgment, Cider settled the case with the investors by paying $120,000. Thereafter, Cider sued lawyer Linden for malpractice. Please address the following questions:

(a) What arguments could Linden make in asserting that client Cider’s unlawful conduct bars a malpractice claim?

(b) What impact does the settlement of the case have on whether an unlawful conduct defense can be asserted?

(c) Is it important whether or not Cider’s malpractice complaint alleges that Lawyer Linden recommended or participated in the conduct that the jury in the investors’ suit found to be fraudulent?

C. Malpractice Statutes of Limitations

1. In General

A cause of action for legal malpractice must be commenced within a certain period of time, and failure to do so subjects the claim to dismissal. The filing period depends upon the applicable statute of limitations, which typically gives the plaintiff a period of years within which to assert a claim. The policy behind such laws is clear:

[S]tatutes of limitations *** preclude claims in which a party’s ability to mount an effective defense has been lessened or defeated due to the passage of time. The policy underlying *** statutes of limitations is, at its roots, one of basic fairness. *** [O]ur system of jurisprudence is designed to achieve substantial justice through application of the law after the parties have had an opportunity to fully present both sides of a controversy. The failure to bring an action within a reasonable time is clearly not conducive to a full presentation of the evidence nor a search for the truth. *** 23

In thinking about statutes of limitations, consider the following:

One Statute or Many? First, are different theories of liability (e.g., breach of contract, negligence, fraud, and deceptive trade practices)

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governed by the same statute of limitations or by different statutes? Some states apply one statute of limitations to all theories of liability asserted against a lawyer. In other states, the statute of limitations varies depending on the nature of the claim. For example, a fraud claim might be subject to a longer or shorter statute of limitations than a negligence claim.

"Occurrence" versus "Damage." Second, when does the statute of limitations begin to run? Under some laws, the cause of action accrues and the clock starts to tick when the harmful acts or omissions occur, even though harm has not yet taken place. Under other provisions, the statute of limitations begins to run only once the alleged malpractice causes damage.

Tolling. Third, is there any reason why the running of the statute of limitations will be suspended or "tolled"? Many statutes of limitations incorporate into their text a discovery rule which suspends the running of the statute during a certain period of time because of the non-obvious nature of the claim. Other jurisdictions have judicially crafted discovery rules. Many states also recognize tolling based on the minority of the plaintiff, continuation of the attorney-client relationship, pursuit of post-conviction relief, or fraudulent concealment by the defendant. (See Part C-3.)

Statutes of Repose. Fourth, can a claim be time-barred even if the statute of limitations has not expired? In various areas of the law (e.g., products liability or construction defects), states have adopted "statutes of repose." These statutes are sometimes part of the same legislative enactment which defines the statute of limitations, and other times are separate laws. Statutes of repose hold that after a certain period of time has expired (e.g., ten years after a product was first sold or after a building was erected), a claim related thereto is barred regardless of what the statute of limitations otherwise provides. This can be true even if the harm has not yet occurred (e.g., if the defect in the product or building does not cause harm until year fourteen). Statutes of repose often reflect the powerful influence of enterprises whose interests they protect. Such laws occasionally have been held to be unconstitutional, but frequently they have survived judicial challenges.

Do lawyers have sufficient influence to secure state passage of a legal malpractice statute of repose? Would legislators, subject to popular election, be willing to pass such a consumer-unfriendly rule? The medical profession has procured passage of medical-malpractice laws in virtually every jurisdiction, some of which include statutes of repose. In some states, the legal profession has succeeded in gaining enactment of similar laws. In Illinois, for example, a statute applicable to lawyers defines both the statute of limitations and the statute of repose. The two relevant sections provide:
(b) An action for damages based on tort, contract, or otherwise against an attorney must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

(c) An action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred. 24

**Tort Reform.** Efforts to “reform” the law of torts sometimes seek to shorten the period within which legal malpractice actions may be filed. Such changes raise important questions of constitutional law and issues of basic fairness. Thus, it is not surprising that courts sometimes use their powers of judicial review to invalidate statutory changes to established tort principles. For example, the Illinois statute, quoted immediately above, has been held to be unconstitutional when applied without exceptions, such as tolling during minority. 25 Moreover, the Supreme Court of Illinois has held that a change in the law shortening a legal malpractice statute of limitations or statute of repose cannot be applied retroactively to bar suit by a claimant who has not had a reasonable period of time after the change in which to file an action. 26

2. Commencement of the Running of the Statute

The Alabama Legal Services Liability Act applies to all actions against “legal service providers” alleging a breach of their duties in providing legal services. Under § 6-5-572(2), the term “legal service provider” includes lawyers, the entities in which they practice, and non-lawyer staff members. Section 6-5-572(1) provides that:

> A legal services liability action embraces any form of action in which a litigant may seek legal redress for a wrong or an injury and every legal theory of recovery, whether common law or statutory, available to a litigant in a court in the State of Alabama now or in the future.

Section 6-5-574 then states:

(a) All legal service liability actions must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards; provided that in no event may the action be commenced more than four years after such act or omission or failure.

(b) Subsection (a) of this section shall be subject to all existing provisions of law relating to the computation of statutory periods of

27. ALA. CODE § 6-5-570 et seq. (Westlaw 2007).
limitations for the commencement of actions, *** provided, that notwithstanding any provisions of such sections, no action shall be commenced more than four years after the act, omission, or failure complained of; except, that in the case of a minor under four years of age, such minor shall have until his or her eighth birthday to commence such action.

**PROBLEM 7-4**

**THE FAILURE TO NOTIFY THE INSURER**

DiCetro Steel Co. hired Liam Lunar, a lawyer, in March 1998 to defend it in a toxic waste disposal suit. The potential liability was covered by DiCetro's insurance, but only if notice of the claim was promptly provided to the carrier. Lunar allegedly agreed to notify the insurers, but in December 2003 advised DiCetro that the companies had not yet been contacted. Between 1998 and October 31, 2005, Lunar billed DiCetro more than $104,000 in fees and expenses. At no time did DiCetro question why no defense or other financial assistance was being provided by the insurance company. However, DiCetro allegedly sought assurances through the years that the insurance claim was being handled by Lunar.

On the advice of lawyer Lunar, DiCetro settled the toxic-waste dispute in August 2005. In September 2006, the insurer was finally notified of the claims, the litigation, and the completed settlement. The carrier denied coverage based on untimely notice, which should have been provided when the claim first arose.

DiCetro has sued Lunar for malpractice. Pursuant to a tolling agreement between the parties,28 the malpractice action, which was filed on March 26, 2008, was deemed to have been filed on October 1, 2007. Lunar has filed a motion for summary judgment based on the statute of limitations defense.

(a) Assume that cases in the state are in conflict as to whether the statute of limitations for legal malpractice begins to run when the negligent act or omission occurs (the “occurrence approach”) or when the negligent act or omission causes damages (the “damage approach”). If the state has a statute identical to the Alabama Legal Services Liability Act (ALSLA), quoted above, is DiCetro's claim timely under either approach?

(b) Articulate the arguments supporting and opposing the motion.

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28. A tolling agreement estops the defendant from asserting the affirmative defense of statute of limitations with respect to the period covered by the agreement. Cf. Payton v. Monsanto Co., 801 So. 2d 529, 834 (Ala. 2001) (citing Sokol v. Bruno's, Inc., 527 So. 2d 1245 (Ala. 1988)). A tolling agreement may be useful when parties are attempting to resolve a malpractice claim without the bad publicity that attends a public filing. A tolling agreement can provide more time for negotiations.
3. Tolling

a. The Discovery Rule

HUMPHREYS V. ARGABRITE
United States Court of Appeals for the Sixth Circuit
162 Fed. Appx. 544 (6th Cir. 2006)

PER CURIAM.

The plaintiff, Alyssa Humphreys, filed this legal malpractice action in September 2003 against defendant William Argabrite, who had represented her in 2000 in the divorce action she filed against her former husband. *** [T]he district court *** held that the action was barred by Tennessee's one-year statute of limitations ***. The plaintiff appeals, contending that her cause of action did not accrue until she was informed by subsequent counsel *** [on] September 20, 2002, that her original attorney, Argabrite, had acted negligently in advising her to agree to the settlement that she and her husband had approved in the uncontested divorce action two years earlier. Hence, she contends, the statute of limitations did not run prior to the filing of this suit on September 8, 2003.

***

In March 2000, in contemplation of a divorce from Danny Humphreys, her husband of 16 years, Alyssa Humphreys contacted attorney William Argabrite, a Kingsport attorney who had earlier prepared the couple's wills and assisted them in some business matters, and asked him to refer her to a competent divorce attorney. Although Argabrite had little experience in handling divorce cases, he eventually became plaintiff's sole attorney in the divorce proceedings. His job was made easier by the fact that, prior to meeting with Argabrite, Alyssa and Danny Humphreys had mutually agreed that they would split the marital assets equally, providing Alyssa with certain real and personal property, and that she would have primary custody of their two children. They had also agreed that the plaintiff would receive $10 million in cash, representing her one-half share of the couple's financial interests in the various Humphreys family's coal companies, with the understanding that she would not insist upon a professional appraisal of the value of those companies. It was also understood that the $10 million would be paid out in annual installments and would not carry interest. ***.

*** [B]ased upon this initial agreement, Argabrite negotiated a marital dissolution agreement for plaintiff, and on December 12, 2000, the Chancery Court for Washington County, Tennessee, approved the agreement and granted Alyssa Humphreys a judgment of divorce. The decree essentially incorporated the couple's original agreement ***. *** Alyssa Humphreys received approximately $7 million worth of unencumbered assets, including the family home and cars, plus the settlement of $10 million, to be paid out without interest over a period of
15 years. For Argabrite’s work negotiating the agreement, the plaintiff paid him approximately $70,600 in attorney’s fees. She also gave him an $8,000 “tip” to express her appreciation, intending the money for the purchase of a set of golf clubs.

The payment on the $10 million settlement amounted to $666,667 per year, which Danny Humphreys arranged to make from the proceeds of a $6.5 million annuity that he purchased. When plaintiff was informed, during negotiations, that her husband would pay only $6.5 million for the annuity, she asked Argabrite, “Where is my other $3.5 million?” To this question her attorney replied, “Why do you care how he pays for it, Alyssa, as long as you get what you want?” Plaintiff testified that she “told Mr. Argabrite that this was very shrewd of Danny [Humphreys] to come up with an idea like [paying via a $6.5 million annuity] and [she] couldn’t help but feel that [she] was losing $3.5 million.” She nevertheless agreed to the annual payments at the time that the marital agreement was signed. She also agreed to forego interest on the annual payments, having previously informed Argabrite and her then-husband that she didn’t need to receive interest on the $10 million because she “could invest it and make [her] own interest.”

The marital dissolution agreement did not provide for alimony. Humphreys admits that she knew, before the divorce was finalized, that there was no alimony provision but claims that, when she asked Argabrite about it, he told her, “You don’t want alimony, you’ll have to pay taxes on it.”

*** In September 2002, the plaintiff met with Steven Raynor, an attorney *** who told Humphreys that he thought Argabrite had been negligent in his representation of her. Humphreys later claimed that prior to meeting with Raynor, she believed that Argabrite had done a good job of representing her. However, based on her conversations with Raynor, she contacted a malpractice attorney and, on September 8, 2003, filed a malpractice claim against Argabrite and his law firm[.] *** Plaintiff alleged that Argabrite acted negligently with regard to alimony, child support, and the $10 million interest-free settlement provision. The district court granted summary judgment to defendants on the ground that the complaint was time-barred ***.

*** Humphreys claims that the one-year period did not begin to run until September 20, 2002, when Humphreys first learned from Raynor that Argabrite might have committed malpractice. Tennessee courts apply a “discovery rule” in determining when a legal malpractice action accrues for limitation purposes. ***.

***. Taken in the light most favorable to the plaintiff, the evidence shows *** that the plaintiff’s malpractice claim accrued at the time the divorce decree was entered because she knew or should have known of her injury at that point. Concerning the statute of limitations for legal malpractice claims, the Tennessee Supreme Court has held that:
[The knowledge prong of the “discovery rule” is met] whenever the plaintiff becomes aware or reasonably should have become aware of facts sufficient to put a reasonable person on notice that an injury has been sustained***. We have stressed, however, that there is no requirement that the plaintiff actually know the specific type of legal claim he or she has, or that the injury constituted a breach of the appropriate legal standard. Rather, the plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct. *** A plaintiff may not, of course, delay filing suit until all the injurious effects or consequences of the alleged wrong are actually known to the plaintiff.

*** The plaintiff’s testimony indicated that, well before her conversation with Raynor—indeed, even before the divorce became final—she had full knowledge of the facts that she now contends reflect negligence on the part of the defendant. ***. She testified that she at one point asked Argabrite about alimony, but she conceded knowledge that she was not awarded any alimony under the marital dissolution agreement. Her testimony further demonstrates that she was aware that her ex-husband would be paying much less in child support than the percentage recommended by the Tennessee child support guidelines. Finally, the plaintiff argues that she never realized that, because the $10 million settlement was to be paid out over the course of 15 years without interest, she would not receive the equivalent in value of a $10 million lump sum. But her testimony clearly established her understanding that Danny Humphreys had arranged to purchase a $6.5 million annuity that would be used to fund annual payments to her and, thus, that the immediate value of her award was only $6.5 million.

***

On appeal, the plaintiff makes much of the fact that she had only an associate degree in arts, had very limited work experience, and had never been through a divorce before; she argues that she could not be expected to understand complex concepts such as the future versus present value of money and thus had to rely completely on what Argabrite told her. Her testimony reveals, however, that she understood the general financial and legal concepts at issue and was fully cognizant of the facts giving rise to those concepts. ***. Hence, the district court correctly found that *** regardless of the plaintiff’s reliance on erroneous legal advice, the plaintiff had knowledge of the facts from which a reasonable person would be put on notice that she has suffered an injury as a result of the defendant’s wrongful conduct.

*** We conclude that *** the malpractice action *** is time-barred. We therefore affirm the judgment of the district court ***.
Note on Discovery of Malpractice

1. Discovery of Malpractice in Complex Transactions. The complexity of some types of legal representation may prevent the client from discovering malpractice. However, courts are often reluctant to find that the client did not understand what was happening. Guest v. McLaverty is illustrative:

McLaverty represented Guest by appointment as a public defender. The last work McLaverty did for Guest was [when] Guest entered a guilty plea and was then released from jail on his own recognizance. The allegations of the complaint make it clear that prior to August 22, 2001, Guest was aware that: McLaverty only visited him on a few occasions and each occasion for a short period of time; McLaverty would not accept telephone calls from Guest while he was incarcerated and instructed him to write letters instead; and finally, he repeatedly pled with McLaverty to perform his own investigation into the allegations. We determine that this was "sufficient to put a reasonable person on inquiry regarding an [act or] omission." It is clear from Guest's complaint that he was dissatisfied with McLaverty by the time he was released from jail on August 22, 2001. This was further evidenced by the fact that he fired McLaverty and hired a new attorney shortly after being released from jail.

Guest cites Watkins Trust v. Lacosta, 2004 MT 144, 321 Mont. 432, 92 P.3d 620, for the proposition that: "[i]f a legal transaction is beyond the understanding of a layperson and the date of discovery is disputed, summary judgment is not appropriate." He claims he did not understand that he had a malpractice claim. Watkins, however, is clearly distinguishable. The facts of that case involved highly complex issues in estate and tax planning. We concluded that a trustee, even though she had been provided with a copy of the trust, could not have known, as a matter of law, that her attorney had erred in telling her that the trust was revocable. The record in Watkins established that the trust involved "would be very difficult for the average layperson to understand[.]" and further "[the expert] testified that even as an estate and tax planning expert, he had to spend many hours reading the [t]rust agreement before he could understand it." In this case, unlike the trustee in Watkins, Guest knew substantially all of the salient facts by the time McLaverty preformed his final services, on August 22, 2001. 29


30. 138 P.3d at 813.
b. The Continuous Representation Rule

Many states hold that the running of the statute of limitations is tolled while the attorney-client relationship is still in progress. However, difficult questions sometimes arise as to when such relationships terminate. Moreover, in some cases, facts may arise during the course of continuing representation that are so significant that it is fair to end the tolling and commence the running of the limitations period.31

[DeLeo v. Nusbaum]

Supreme Court of Connecticut
263 Conn. 588, 821 A.2d 744 (2003)

SULLIVAN, C.J.

***. The plaintiff, David DeLeo, brought this action against the defendants, Edward Nusbaum, an attorney, and the law firm of Nusbaum and Parrino, P.C.***. The plaintiff claimed that the defendants had failed to represent him adequately in a dissolution action brought by his wife. The plaintiff commenced his action against the defendants by service of process on June 27, 1996.***. Specifically, the plaintiff claimed that the defendants negligently had entered into a stipulated agreement, on behalf of the plaintiff, in which the plaintiff was permitted only supervised visitation with his children.*** [T]he defendants denied these allegations and asserted as a special defense that the plaintiff's claims were time barred by § 52-577, which provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

*** [The trial] court granted the defendants' motion for a directed verdict ***. Thereafter, the plaintiff appealed *** and we transferred the appeal to this court ***.

*** [A]t the time the trial court directed judgment in this case, there was no appellate case law in this state addressing whether this state recognizes the continuous representation doctrine. The doctrine, however, enjoys widespread support in other states. Indeed, a majority of states that have considered this doctrine have adopted it in some form. 3 R. Mallen & J. Smith, Legal Malpractice (5th ed. 2000) § 22.13, p. 437.

The continuous representation doctrine was developed primarily in response to the harsh consequences of the occurrence rule, under which the period during which an action may be brought begins to run at the time of the allegedly tortious conduct, even though the attorney continues to represent the client, the client may be unaware of the tortiousness of

31. Cf. Coyle v. Battle, 47 N.H. 98, 782 A.2d 902, 906 (N.H. 2001) (declining to adopt the continuous representation doctrine because the facts did not demonstrate the plaintiff's "innocent reliance" on the defendant attorney, for "[t]he plaintiffs not only question[ed] and assess[ed] the defendants' billing practices, but found them lacking").
the conduct, and there has not yet and may never be an injury as a result of that conduct. *** [C]ourts adopting the continuous representation doctrine have frequently held it to be analogous to the course of treatment rule [in medical-malpractice litigation]. ***.

After the filing of this appeal, the Appellate Court recognized the continuous representation doctrine, concluding that, in legal malpractice cases, the statute of limitations is tolled during that period for which the plaintiff “must show that (1) the attorney continued to represent him and (2) the representation related to the same transaction or subject matter as the allegedly negligent acts.” Rosenfield v. Rogin, Nassau, Caplan, Lassman & Hirtle, LLC, 69 Conn. App. 151, 166, 795 A.2d 572 (2002).

In Rosenfield, the Appellate Court stated: “We conclude that we should adopt the continuous representation doctrine for several reasons. First, we already permit tolling of the statute of limitations under the continuing course of conduct and continuous treatment doctrines, which are very similar in policy and application to the continuous representation doctrine. Second, to require a client to bring an action before the attorney-client relationship terminates would encourage the client constantly to second-guess the attorney and force the client to obtain other legal opinions on the attorney’s handling of the case. Nothing could be more destructive of the attorney-client relationship, which we strive to preserve. Third, requiring a client to bring a malpractice action against the attorney during the pendency of an appeal from the judgment in an underlying action in which the attorney allegedly committed malpractice could force the client into adopting inherently different litigation postures and thereby compromise the likelihood of success in both proceedings because the client would be defending the attorney’s actions in the appeal and contesting the attorney’s actions in the malpractice action ***. Fourth, the policy underlying the statute of limitations is upheld because the conduct that is the subject of legal malpractice actions is generally memorialized in court pleadings or in hearing transcripts and, thus, the dangers associated with delay are lessened ***. Fifth, adoption of the continuous representation doctrine would prevent an attorney from postponing the inevitable event of defeat beyond the statute of limitations period to protect himself from liability for his actions.” ***.

In addition ***, two principal rationales have been identified as underlying the continuous representation doctrine. The first is that “a person seeking professional assistance has a right to repose confidence in the professional’s ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered.” ***. The second is that the continuous representation doctrine furthers the goal of “enabling the attorney to correct, avoid or mitigate the consequences of an apparent error ***.” ***.

We find these reasons persuasive ***.
We conclude that the continuous representation doctrine, suitably modified to reflect these competing interests, should be adopted. Thus, today we join the majority of states that have adopted the continuous representation doctrine. Under the rule we adopt today, a plaintiff may invoke the doctrine, and thus toll the statute of limitations, when the plaintiff can show: (1) that the defendant continued to represent him with regard to the same underlying matter; and (2) either that the plaintiff did not know of the alleged malpractice or that the attorney could still mitigate the harm allegedly caused by that malpractice during the continued representation period.

With regard to the first prong, we conclude that the representation continues for the purposes of the continuous representation doctrine until either the formal or the de facto termination of the attorney-client relationship. The formal termination of the relationship occurs when the attorney is discharged by the client, the matter for which the attorney was hired comes to a conclusion, or a court grants the attorney’s motion to withdraw from the representation. A de facto termination occurs if the client takes a step that unequivocally indicates that he has ceased relying on his attorney’s professional judgment in protecting his legal interests, such as hiring a second attorney to consider a possible malpractice claim or filing a grievance against the attorney. A client who has taken such a concrete step may not invoke this doctrine, because such actions clearly indicate that the client no longer is relying on his attorney’s professional judgment but instead intentionally has adopted a clearly adversarial relationship toward the attorney.

We reject the [suggested] requirement that the client continue to trust his attorney in order for the attorney-client relationship to continue for purposes of this doctrine. This requirement would necessitate determinations of how much disenchantment with a client’s attorney is too much, both by courts applying the rule and by clients seeking to ascertain the date upon which their malpractice claims will be barred. Equally important, a client is free to change his or her mind and reestablish a relationship of trust even after actions or statements, such as the letter written in the present case by the plaintiff to his wife, that may indicate a lack of such trust in his attorney at the time made.

The continuous representation doctrine only tolls the statute of limitations for as long as either the plaintiff does not know of the alleged malpractice or the attorney may still be able to mitigate the harm allegedly caused. Tolling the statute while the plaintiff lacks actual knowledge of the alleged malpractice serves the purpose of not requiring the client to second-guess his attorney. Tolling the statute while the attorney may be able to mitigate the damage permits the client, without endangering his malpractice claim, to allow the attorney who is already working on his case to attempt to mitigate or even prevent harm. Furthermore, it will ordinarily be the case that tolling while mitigation remains possible will prevent the client from having to sue his attorney.
while the initial litigation is pending. When none of these purposes is furthered by tolling the statute, however, the tolling must end.

In applying this test to the facts of the present case, we conclude the following. First, with regard to whether there was a de facto or formal termination of the relationship, the trial court, in finding that the plaintiff's relationship with the defendants had deteriorated to such an extent that the plaintiff was not entitled to the protection of this doctrine, relied on evidence that the plaintiff had sent a letter to his wife stating that "you[r] lawyers have not only committed malpractice in handling this case but are guilty of billing fraud," and "[m]y lawyer has not done much better." The act of sending this letter to the plaintiff's wife does not rise to the level of unequivocally indicating that the plaintiff had ceased relying on his attorney's professional judgment in protecting his legal interests and, therefore, as a matter of law, does not constitute a de facto termination of the attorney-client relationship.

Accordingly, we next consider whether the plaintiff can establish either the mitigation or lack of knowledge components of the second prong. The trial court found that the plaintiff had admitted that the defendants could not have mitigated the damage allegedly caused by their negligence in 1992. Thus, because of the inability to establish mitigation, the plaintiff is required to show that he had no knowledge of the defendants' negligence. The plaintiff has not presented any evidence on this issue, nor was it considered by the trial court, because the plaintiff and the trial court reasonably did not understand the rule to require such evidence.***

The judgment is reversed and the case is remanded to the trial court for further proceedings according to law.

Notes on the Continuous Representation Rule

1. General Relationship versus Specific Matters. Courts sometimes conclude that continuing representation of a client is not a continuation of the same representation that involved the alleged malpractice. For example, in Bastys v. Rothschild, a client brought a legal malpractice action based on a lawyer's loss of the client's prenuptial agreement and purportedly negligent advice with respect to a divorce settlement.** In refusing to apply the continuous-representation rule, the court wrote:

New York's continuous representation doctrine does not apply to a client's "continuing general relationship with a lawyer."*** Rather, it tolls the statute of limitations "only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice."*** While the record shows that Rothschild continued to provide Jonas Bastys with estate planning advice into the limitations period, plaintiff has

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failed to demonstrate that any advice rendered after July 15, 1994, “pertain[ed] specifically” to the matters that are the subject of the malpractice claim. ***

However, other decisions have been more willing to find the type of continuation of representation that triggers the tolling rule. For example, in Williams v. Maulis, the court held that an attorney’s continued representation of the estate of a widow’s deceased husband was a continuation of related services that the attorney had performed for the widow in negotiating a contract for deed, which was the focus of the alleged malpractice. 34

2. Practice Pointer: The Hidden Danger of Mitigating the Effects of Malpractice. An attorney who confesses malpractice to a client and then assists the client in mitigating the effects of that error may inadvertently toll the running of the statute of limitations. In Gold v. Weissman, an attorney (Weissman) told his client (appellant) that he had failed to file the client’s medical malpractice action within the statute of limitations. 35 Weissman blamed the error on his “attorney service” and “asked for more time to pursue the attorney service and in the meantime suggested that appellant file a complaint against her doctor with the Division of Medical Quality of the Medical Board of California (the Board).” Weissman “emailed appellant’s daughter, confirming he had prepared the draft complaint and reitering his willingness to file it for her,” although the client “apparently chose not to file the complaint.” The client later argued that the attorney’s conduct tolled the running of the statute of limitations. The court wrote:

Weissman continued to explore possible compensation from the attorney service in the year before appellant filed her lawsuit. He also agreed to prepare a Board complaint in response to the question by appellant’s daughter of what recourse remained against appellant’s doctor other than the time-barred malpractice lawsuit. Both appellant’s unfiled lawsuit and Board complaint thus arose from the same event: her doctor’s malpractice. Moreover, the lawsuit and Board complaint shared a common purpose: to permit appellant some measure of redress for her injuries and thus some relief—psychic from the Board complaint, financial from the lawsuit—and possible closure. The distinctions Weissman tries to draw between the lawsuit and the Board complaint—different forums and types of relief—do not change the fact that the same medical malpractice gave birth to both proceedings ***. Accordingly, the [trial] court erred in finding Weissman’s representation of appellant was not continuous and did not toll the statute of limitations. 36

33. Id. at 262.
36. Id. at 1201.
3. Local Court Rules and Termination of the Lawyer-Client Relationship. In Smith v. Conley, the court found that an attorney-client relationship involving the client's conviction for passing bad checks terminated not on the date that the attorney filed a motion in the trial court to withdraw from the representation, but on the date that the attorney clearly informed the client that he no longer could represent him and that he would not file further actions on his behalf. The court said that local court rules on withdrawal varied, and that "efficient administration of justice would not be served" by holding that those variable standards controlled the running of the statute of limitations. "The date of termination of an attorney-client relationship for **[statute of limitations]** is a fact-specific determination to be made according to the rules set forth by statute and by case law." 35

PROBLEM 7-5

THE MISSED MARITIME DEFENSE

In January 2004, Chad's Cargo, Inc. hired Larmar Lorey, a lawyer, to defend it against a maritime personal-injury suit. The plaintiff seaman was injured while boarding a vessel when the wash of a tugboat owned by Chad's Cargo caused him to fall from the gangplank. Lorey failed to file a timely maritime-limitation pleading, which would have had the effect of limiting the liability of Chad's Cargo to the value of the vessel and its freight. On August 31, 2005, the trial court in the personal-injury suit rendered judgment on a jury verdict for an amount greater than the limit that would have been imposed by a timely maritime-limitation pleading.

On September 15, 2005, Chad's Cargo hired additional counsel to file post-judgment motions and an appeal. The case was ultimately settled, and based on the agreement of the parties the court of appeals dismissed the appeal on May 19, 2006.

On February 19, 2008, Chad's Cargo filed a malpractice lawsuit against Lorey, alleging that Lorey breached the standard of care by failing to file a timely maritime-limitation pleading. Lorey has moved for summary judgment on the grounds that the two-year statute of limitations on Chad's Cargo's malpractice claim began to run no later than January 27, 2006, the date when the parties purportedly agreed to settle the underlying personal-injury case. Assume that the version of the continuing representation rule discussed above in DeLeo v. Nusbaum is in effect.

(a) When did the statute of limitations begin to run?
(b) Should the court grant summary judgment for Lorey?

38. Id. at 513-14.
c. Fraudulent Concealment

Fraudulent conduct by an attorney will give rise to professional discipline and civil liability. In addition, if an attorney's fraud relates to the facts giving rise to a legal malpractice claim, that conduct may also toll the running of the statute of limitations. This rule has been narrowly interpreted by some courts. For example, in Delanno, Inc. v. Peace, the Arkansas court explained:

In order to toll the statute of limitations, the fraud perpetrated must be concealed. Fraudulent concealment consists of "some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that conceals itself." Here, the appellant asserts that the telephone conversation in the spring of 2001 between Gail Delanno and the appellees regarding the tax situation constitutes fraudulent concealment. In that conversation, the appellees told Mrs. Delanno that they had on file a tax clearance letter for Delanno from the State, which absolved Delanno of any tax liability relative to the purchase of Encompass' assets, and furthermore that the appellees would take care of the tax matter.

The appellees' statements regarding the tax clearance letter were inaccurate. However, assuming arguendo that the statements amounted to a positive act of fraud, in order to show that the statute of limitations was suspended, the appellant must prove that the statements constituted fraudulent concealment. In order to show fraudulent concealment, the appellant must prove that the statements were positive acts of fraud that were furtively planned and secretly executed, and that the statements were concealed, or perpetrated in a manner that concealed itself.

Delanno has not produced any evidence showing that the inaccurate statements made by the appellees were furtively planned and executed, or concealed. The appellant essentially argues that because the lawyers made statements that proved to be untrue, and, because a jury could possibly conclude that the lawyers were aware of and attempted to conceal that fact, the statements may therefore constitute fraudulent concealment. This argument does not

39. See MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007) (stating that "[i]t is professional misconduct for a lawyer to: *** (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation").
40. See Chapter Five Part B. Most courts agree that the tort of fraud consists of five elements: "(1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the representation." Delanno, Inc. v. Peace, 365 Ark. 542, 2006 WL 1644634, at *2.
41. 2006 WL 1644634.
not take cognizance of the elements of fraudulent concealment. Regardless of possible conclusions by a jury, some evidence of secretive, furtive, or deceptive action designed to conceal the existence of a fraudulent act is necessary to satisfy the appellant's burden. Because the appellant has produced no evidence consistent with fraudulent concealment other than the inaccurate statements made by the appellees, we conclude that Delanno has not proven that the statutory period was tolled by fraudulent concealment. 42

D. Non-Assignability of Legal Malpractice Claims

In some cases it can be argued that recovery is barred by a state rule prohibiting assignment of legal malpractice claims. In Kommavongsa v. Haskell, 43 the Supreme Court of Washington explained:

Even where assignability [of causes of action] is the general rule, some 18 jurisdictions have held that public policy considerations dictate a different rule for legal malpractice claims. 44

In Picadilly, Inc. v. Raikos, 582 N.E.2d 338 (Ind. 1991) the Indiana Supreme Court held that a party may not assign a legal malpractice claim to someone who was his adversary in the underlying litigation. ***.

The Picadilly court observed that the common law in most states, including Indiana, teaches that any chose in action that survives the death of the assignor may be assigned. This rubric dates from an English statute enacted in 1330, which permitted the executor of a decedent's estate to sue on actions for trespass to chattels owned by the decedent. Over the centuries, courts interpreting this statute came to view assignment and survival as "convertible propositions." ***. [However, the Picadilly] *** court concluded that rather than relying entirely on ancient common law rules that may have outlived their usefulness, "[a]ssignment should be permitted or prohibited based on the effect it will likely have on modern society, and the legal system in particular." ***.

The Picadilly court concluded that to allow the assignment of malpractice claims, particularly to allow such assignments to one's adversary in the same litigation that gave rise to the alleged

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42. Id. at *2-3.
43. 149 Wash. 2d 288, 67 P.3d 1068, 1068 (Wash. 2003) (en banc).
44. [Fn. 2 stated:] The parties' research reflects that 18 out of 25 states that have examined this issue have prohibited such assignments entirely. A number of these states have done so at least in part because torts arising out of injuries done to the person, reputation or feelings of the injured parties, or arising out of contracts of a purely personal nature (such as marriage) are not assignable in their states, and legal malpractice is seen as a species of injury to the person; moreover, the attorney-client relationship arises from a contract of a purely personal nature. ***.
malpractice, would weaken at least two standards that define the lawyer's duty to the client: the duty to act loyally and the duty to maintain client confidentiality.***. As for the duty to act loyally:

If assignments were permitted, we suspect that they would become an important bargaining chip in the negotiation of settlements—particularly for clients without a deep pocket. An adversary might well make a favorable settlement offer to a judgment-proof or financially strapped client in exchange for the assignment of that client's right to bring a malpractice claim against his attorney. Lawyers involved in such negotiations would quickly realize that the interests of their clients were incompatible with their own self-interest.***.

As for the duty of lawyers to maintain client confidences and secrets, the Picadilly court observed that once a client sues his attorney, the attorney is permitted to disclose confidential client information that is reasonably necessary to establish a defense. So long as the client maintains control over the suit, the scope of the disclosure can be limited by the client's power to drop the claim. Once the client assigns the claim, the client's control over the litigation is lost, but the attorney's right to defend by revealing client information survives.***.

Finally, the Picadilly court was concerned about the erosion of public confidence in the legal system that is likely to follow from assignment of legal malpractice claims to an adversary in the same litigation that gave rise to the alleged malpractice.***.

In Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. Ct. App. 1994), *** the Texas Court of Appeals made an astute observation:

Most legal malpractice assignments seem to be driven by forces other than the ordinary commercial market. In most,***, the motive for assignment was the plaintiff's inability to collect a judgment from an insolvent, uninsured (or underinsured) defendant. In several instances, the malpractice plaintiff was the original plaintiff who, unable to collect against the original defendant, obtained the malpractice action in hopes of satisfying the underlying judgment.

***. To allow such assignments would serve two principal goals: enabling the defendant-client to extricate himself from liability, and funding the original plaintiff's judgment. But to allow assignments would exact high costs: the plaintiff would be able to drive a wedge between the defense attorney and his client by creating a conflict of interest; in time, it would become increasingly risky to represent the underinsured, judgment-proof defendant; and the malpractice case would cause a reversal of the positions taken by each set of lawyers
Finding some of these expressed concerns to be “overstated” and other to be “persuasive,” the Kommavongsa court held that legal malpractice claims are not assignable. The majority reasoned:

[W]e think that prohibiting such assignments in general will provide less incentive for collusion, based on the self-interests of the defendant in the underlying litigation. A defendant who can assign his or her legal malpractice claim in exchange for a covenant not to enforce a judgment in the underlying litigation would have little incentive to seriously litigate the amount of damages allegedly arising from his or her negligence. *** [A] stipulated judgment cannot properly serve as an indication of the actual damages, if any there were, as a result of the alleged legal malpractice. ***

Prohibiting the assignment of legal malpractice claims to an adversary in the same litigation that gave rise to the legal malpractice claim will not prevent clients from pursuing their own legal malpractice claims to judgment, and then assigning their judgments in order to satisfy their own liabilities or submitting to execution upon such judgments. Thus, prohibiting such assignments will not protect lawyers from the consequences of their own legal malpractice. ***

The Kommavongsa dissenters strongly objected to the new rule:

Today the majority adopts a rule of law to protect lawyers among all the professions—that is only lawyers—from malpractice claims where the claim has been assigned. The majority adopts this rule *** based on public policy grounds which are in fact not exclusive to the legal profession. The confidentiality and fiduciary aspects cited by the majority apply as well to many professionals ***.

To support its public policy concern, the majority invokes the legal profession’s sacred cow—access to justice. The argument is that lawyers may be unwilling to accept cases if they might face malpractice liability in an assigned claim. The same argument could be made for any other professional, yet there is no concern that patients might face an access to medical care problem ***

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45. Id. at 1072-77.
46. Id. at 1078-79.
47. Id. at 1083-84 (Ireland, J., dissenting).
Problem 7-6
A Deal With One of the Defendants

Calder Calhoun, a ceramic artist, hired Ladislav Lamb, a lawyer, to represent him in a legal malpractice action against two other lawyers (Lebel Able and Laban Baker). Calhoun believes that Able and Baker poorly represented Calhoun in conjunction with an unsuccessful art transaction, causing Calhoun serious financial losses.

In discovery, Lamb has had difficulty unearthing information that will be helpful to the malpractice case. Bob Tops, your law school classmate and co-clerk at the Lamb firm, has suggested to Lamb that it might be useful to try to turn the two defendant lawyers (A and B) against each other, hoping that cross accusations will result in the revelation of information useful in Calhoun's malpractice claim.

Tops, who saw something like this on a television program, recommends that Lamb, acting on behalf of Calhoun, offer Able this deal: (1) Able will remain a named defendant in the case, testify truthfully against Baker, and after the conclusion of the litigation will pay Calhoun $10,000. (2) Calhoun will agree not to collect from Able any part of a judgment entered against Able, and will refund to Able fifty cents of every dollar that Calhoun collects from a judgment against Baker in excess of $25,000. Tops thinks that this agreement will inspire Able to make sure Baker is implicated by the testimony at trial.

Lamb has never heard of anything like this and has asked for your advice on whether to pursue the proposed arrangement.

E. Joint Liability and Reimbursement

If there are two or more tortfeasors, a lawyer can defend against a claim for legal malpractice by arguing the liability is "several" only, rather than "joint and several." If that argument is successful, the lawyer will be liable only for the lawyer's individual contribution to the plaintiff's harm. In contrast, if liability is joint and several, the lawyer will be liable for harm that other joint tortfeasors caused, as well as for harm that the lawyer caused individually. However, even in that case, a lawyer can defend against disproportionate responsibility by asserting claims for contribution or indemnity against other joint tortfeasors. This section considers the rules governing joint and several liability, contribution, and indemnity.

Joint and Several Liability Traditionally. Joint and several liability means that two or more persons (joint tortfeasors) can be sued and held liable for the same harm. Any joint tortfeasor can be made to pay as much as the full amount of the joint liability, although the plaintiff can collect the full amount only once. For example, if two lawyers, A and B, are sued and held jointly and severally liable to the plaintiff for damages in the amount of $10,000, the plaintiff can collect all the money from A, or
all the money from B, or part of the money from each. However, the sums recovered by the plaintiff may total no more than $10,000 from A and B together, since that is the amount to which the plaintiff is entitled under the judgment.

Under the traditional tort rules, joint and several liability arose in three situations. Those cases involved:

1. indivisible harm caused by multiple tortfeasors;
2. concerted action; and
3. vicarious liability.

For example, if lawyer A was negligent in failing to investigate the facts of a case, and lawyer B, A's supervisor, was negligent in failing to discover and correct the error, A and B could be sued and held jointly and severally liable if their separate acts of negligence caused the loss of the case, since that would qualify as indivisible harm.

Similarly, if two lawyers conspire to deplete a client's trust account, and A takes money from the account to buy a car and B takes money to pay for a vacation, A and B can each be held liable for all of the losses to the client because they acted in concert. This is true even though the harm could rationally be divided (A could theoretically be held liable only for the funds used to buy the car, and B could be held liable only for the cost of the vacation). Such segregation of damages is not allowed in concerted-action cases.

Further, if a plaintiff alleges that a law firm is liable based solely on the rule of respondeat superior for the negligence of an associate within the scope of employment, the law firm and the associate can be sued together and held jointly and severally liable for the harm. On the assumed facts, the law firm would be liable for the blameworthy conduct of the associate based on vicarious liability.

Joint and Several Liability Today. The three traditional categories of joint and several liability are a useful starting point for thinking about whether persons can each be held liable for the same harm. However, the rise of comparative principles, which in many states caused the doctrine of contributory negligence to be replaced by comparative negligence or comparative fault (see Part A of this chapter), has led virtually all jurisdictions to re-examine when liability for harm should be apportioned, rather than imposed jointly and severally. Many changes have been made and today the rules are far more complex than a generation ago.

With respect to multiple tortious acts causing indivisible harm:
- some states retain the old rule of joint and several liability;
- some impose only apportioned several liability;
- some say that the joint and several liability is imposed on tortfeasors responsible for more than a certain percentage of the total fault in the case (e.g., more than 50% responsible); and
some say that joint and several liability depends on other factors, such as whether the acts in question constitute a specified type of crime.\footnote{See Restatement (Third) of Torts: Apportionment of Liability § 17 cmt. a (2000) (describing different five “tracks” of liability).}

There are other variations.

Joint and several liability based on concerted action survives today in most jurisdictions. The same is true of joint and several liability based on vicarious liability (such as where a law partnership and partner are both liable for torts of the partner committed within the scope of the partnership business). However, practicing lawyers should not rely on generalizations about the law nationally and must consult local provisions.

**Indemnity and Contribution.** A joint tortfeasor who pays more than his or her fair share of the damages may have a right to recover reimbursement from another joint tortfeasor. Indemnity is total reimbursement, generally limited to cases where one party is wholly at fault and the other is entirely innocent. For example, if a law firm pays a judgment based solely on vicariously liability for the tort of a paralegal acting within the scope of employment, the law firm will normally be entitled to 100% reimbursement—indemnity—from the paralegal (although, of course, it may be difficult to collect that amount). Depending on the circumstances, partnership agreements, contracts or state law may provide for indemnification. For example, a law firm dissolution agreement may state that some partners will indemnify others for any future losses relating to the prior activities of the former partnership.

Contribution is partial reimbursement. In many states, the rules are statutory, but in others contribution rights are created by common law.\footnote{See McLaughlin v. Lougee, 137 P.3d 267, 277 (Alaska 2006) (allowing common-law proportional contribution).} In most states, contribution is calculated on a percentage or “comparative” basis. For example, suppose that A and B are joint tortfeasors and that the jury finds that A was 70% responsible for the harm, while B was only 30% responsible. In a state allowing proportional contribution, if A pays the plaintiff’s judgment in the amount of $100,000, A may be able to obtain reimbursement from B in the amount of $30,000. Note, however, that there are many variables. For example, contribution is normally not available to intentional tortfeasors; a joint tortfeasor’s right to contribution may depend upon his or her satisfying (fully paying) the judgment of the plaintiff; and a contribution claim must be asserted in a timely fashion that complies with applicable rules of civil procedure.\footnote{See id. at 272 (declining to adopt the rule followed by some courts which provides that all claims, including contribution claims, must be tried in one action).}

Some states still calculate contribution on a pro rata basis which is a relatively crude system of counting heads and dividing rather than calculating respective degrees of fault. For example, if there are three joint tortfeasors, A, B, and C, and A pays the plaintiff’s judgment, A can obtain
reimbursement for one-third of the amount from B and one-third of the amount from C, regardless of their respective fault.

Comparative contribution, like indemnification awarded in cases of vicarious liability, helps to ensure that liability is distributed in proportion to fault. Proportionality is an important principle in modern tort law. However, proportional responsibility may only be achieved if all of the joint tortfeasors possess assets to pay their share. If an employee is judgment-proof, an employer's right to indemnification from the employee may be worthless. So too, one of several tortfeasors whose multiple tortious acts caused indivisible harm may be required to bear more than a fair share of the loss if another tortfeaso has no money to pay a contribution judgment or is not subject to the jurisdiction of the court.

The classic tort regime of joint and several liability supplemented by indemnity and contribution essentially took the position that full compensation of the plaintiff was more important than limiting a defendant tortfeasor's liability in proportion to fault. Not all states agree with these priorities. In many instances, recent tort reform efforts have struck a different balance. In some states, where joint and several liability has been limited, legislatures or courts have sometimes said that the most important thing is that no one pay for more harm than he or she caused, even if that means that the plaintiff obtains less than full recovery.

Indemnity or Contribution from Predecessor Counsel and Co-Counsel. Legal malpractice cases occasionally raise the issue of whether indemnity or contribution can be obtained by a defendant attorney from predecessor counsel or co-counsel. Some states resolve these questions largely by reference to general state rules on contribution and indemnity. For example, a New York court broadly stated that:

Consistent with *** general principles, New York courts have routinely recognized that an attorney defending a legal malpractice action may state a valid claim for contribution against another attorney alleged to have contributed to the injury for which the plaintiff client complains ***.

Thus, it is well-settled that an attorney sued for malpractice may bring a third-party complaint seeking indemnity or contribution against an attorney, whether retained subsequently, concurrently,

51. Seattle First Nat'l Bank v. Shoreline Concrete Co., 588 P.2d 1308, 1312 (Wash. 1978) ("[t]he cornerstone of tort law is the assurance of full compensation to the injured party").

52. Cf. Church v. Rawson Drug & Sundry Co., 173 Ariz. 342, 842 P.2d 1355, 1364 (Ariz. Ct. App. 1992) (in holding that a statute abolishing joint and several liability was constitutional, the court wrote, "[i]f*** the plaintiff cannot receive payment for his injuries from *** [other tortfeasors], there is no compelling social policy which requires the defendant to pay more than his fair share of the loss").
or independently, whose negligence has contributed to or aggravated the plaintiff's damages.

However, other courts have been troubled by the real or apparent policy implications of allowing one of a client's attorneys to seek contribution from another. For example, California decisions prohibit a negligent first attorney from seeking reimbursement from a negligent successor attorney, but allow reimbursement claims by one co-counsel against another in some circumstances. In Musser v. Provencher, the California Supreme Court addressed these issues. (Note that California allows equitable or partial indemnity on a comparative basis, which is what other states refer to as comparative or proportional contribution.)

The court wrote:

The Courts of Appeal have given various reasons for barring indemnification in predecessor/successor cases, but an examination of their opinions reveals two fundamental policy considerations. The first policy consideration is avoiding conflicts of interest between attorney and client: The threat of an indemnification action would arguably create a conflict of interest between the successor attorney and the client because the greater the award the successor attorney managed to obtain for the client in the malpractice action, the greater the exposure [of the successor attorney] to the [claim of the] predecessor attorney in the indemnification action. The second policy consideration is protecting confidentiality of attorney-client communications: In order to defend against an indemnification action, the successor attorney might be tempted to compromise the confidentiality of communications with the client.

The question we must consider, therefore, is whether allowing equitable indemnity would be contrary to public policy when one concurrent counsel or cocounsel sues another.

Whether a claim for indemnity is allowable in concurrent counsel or cocounsel cases should be decided on a case-by-case basis.

In the case before the court, a bankruptcy attorney had erroneously told a family law attorney that a request for support incidental to divorce proceedings would not violate the automatic stay imposed by the bankruptcy court. As a result of the error the state court of appeals reversed the support awards and "[facing punitive damages for violation of the automatic stay," the divorce client settled with her husband for less than the original support order and then sued her family law attorney for malpractice. The

54. 28 Cal. 4th 274, 48 P.3d 408, 408, 121 Cal. Rptr. 2d 373 (2002).
55. See id. at 411.—Eds.
family law attorney then sought indemnification from the bankruptcy attorney who had provided the erroneous advice. Discussing the conflict of interest issue, the court wrote:] The conflict of interest we are concerned about is not a conflict between an attorney's duty to the client and the attorney's purported duty to concurrent counsel or cocounsel ***. Rather, the conflict *** [is] between an attorney's duty to the client and the attorney's self-interest. [These facts give us no reason] *** to believe that an attorney's self-interest will interfere with loyalty to the client just because the attorney, as a joint tortfeasor, may face an indemnification claim if the client sues the attorney's concurrent counsel or cocounsel for malpractice.

The other relevant policy is protecting the confidentiality of attorney-client communications. ***. [The client] ***, in her settlement with [the family law attorney], expressly waived her attorney-client privilege with respect to *** [the bankruptcy attorney's] representation of her in the bankruptcy portion of the dissolution action. [Therefore, confidentiality is not an issue.]

In conclusion, because the policy considerations that underlie the rule barring indemnification claims in predecessor/successor cases do not obtain in this concurrent counsel case, it would be unjust to deny *** [the family law attorney] an opportunity to seek indemnity or contribution from [the bankruptcy attorney].

F. Releases and Covenants Not to Sue

Most tort claims are settled rather than fully litigated. When a case is settled, the plaintiff recovers an amount of money in exchange for assuring the defendant that there will be no further efforts to hold the defendant legally responsible for the claim in question. The assurance is embodied in a document, which is normally called a release or a covenant not to sue. Under traditional rules, a plaintiff, by signing a release, gave up the right to sue any person (including the settling party and other joint tortfeasors) for the claim. In contrast, a covenant not to sue was simply a contractual agreement not to sue the defendant who paid the settlement; the right to sue others was retained by the plaintiff.

The legal distinction between releases and covenants not to sue was lost on most laypersons, who sometimes, acting without legal counsel, inadvertently signed a document that gave up rights they intended to reserve. In other instances, a document labeled a release said in its text that the right to sue other persons for the harm was retained, thus creating a legal inconsistency between the title and the text that called into question the effect of the document.

56. Id. at 411-14.
Today, most states hold that by signing a settlement document, a plaintiff does not give up rights against persons not named in the document or intended by the plaintiff to benefit from the release.57 According to the Restatement, a “valid release of one tortfeasor *** does not discharge others liable for the same harm, unless it is agreed that it will discharge them.”58 The Restatement commentary adds that the intent to reserve rights need not be expressed in writing and can be proved by parol evidence. Some courts have gone further than the Restatement in attempting to prevent unfairness and uncertainty in the use of settlement documents. Thus, the Texas Supreme Court has ruled that a settlement document releases from liability only those tortfeasors named or otherwise specifically identified in the document and no others.59

Credits and Satisfaction of Judgment. One joint tortfeasor is normally entitled to a credit for an amount paid to the plaintiff by another joint tortfeasor. According to the Uniform Contribution Among Tortfeasors Act, which has been adopted in several states:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.60

PROBLEM 7-7
THE WRONGFUL INCARCERATION RELEASE

Camden Cox was convicted of abduction, murder, and burglary, and sentenced to a term of incarceration for fifty years. Six years into his imprisonment, Cox petitioned for a writ of habeas corpus, and five years later the writ was granted. The next day, the State and Cox jointly moved to vacate the abduction, murder, and burglary convictions. The circuit

57. See also Winters v. Patel, 154 Fed. Appx. 299, 303 (3d Cir. 2005) (holding that a release, which relinquished claims against parties in a privacy action and others “who are jointly and severally liable,” did not release a malpractice claim against a lawyer who was neither a party or joint tortfeasor in the privacy action, nor an intended beneficiary of the release).
60. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4 (Westlaw 2007).
court entered an order vacating the convictions, dismissing the indictments, and releasing Cox from custody.

With the assistance of a member of the State Senate, Cox requested compensation from the State for his wrongful incarceration. The State General Assembly then approved "An Act for the relief of Camden Cox." The Act stated:

That there shall be paid for the relief of Camden Cox from the general fund of the State treasury, upon execution of a release of all claims he may have against the State or any agency, instrumentality, officer, employee, or political subdivision (i) the sum of $350,000 to be paid to Camden Cox and (ii) an annuity for the primary benefit of Camden Cox in the cumulative amount of $400,000.

Cox subsequently executed a document releasing all claims Cox may have against the State or any agency; instrumentality; officer; employee or political subdivision of the Commonwealth in connection with his arrest, conviction and incarceration [during the eleven years in question], subsequently vacated.

Shortly thereafter, Cox filed a legal malpractice action against the court appointed lawyer, Lambert Lang, who had represented him in the abduction, murder, and burglary trial. Cox alleged that Lang failed to exercise reasonable care in the conduct of Cox's defense. Lang thereafter filed an answer asserting that the malpractice action was barred by the release that Cox signed with the State.

How should the court rule?

Notes on Settlement and Contribution

1. How Settlement Affects Contribution Rights. Most states hold that a settling joint tortfeasor is entitled to seek contribution from non-settling joint tortfeasors, provided the settlement was reasonable in amount.

As to whether contribution may be obtained from a settling joint tortfeasor, states are deeply divided. Some authorities hold that in order to promote settlements, a settling joint tortfeasor must be insulated from further liability that might arise from a subsequent contribution claim. Others say that early settlement—perhaps as a result of a "sweetheart" deal with a favored potential defendant, such as a family member—should not be allowed to frustrate the public policy of distributing liability in proportion to fault. They hold that contribution from a settling joint tortfeasor must be permitted. As a result of this disagreement about priorities, some states allow a contribution claim to be asserted against a settling joint tortfeasor; others do not; and still others have crafted
different rules, such as saying that by settling with D1, plaintiff gives up against D2 a portion of the damages equivalent to D1’s percentage share of the total fault.

2. Advance Payments by the Defendant. Sometimes a defendant's liability for certain elements of damages is not disputed. For that and other reasons, defendants may make payments to or for the plaintiff in advance of trial. Some jurisdictions have passed laws that expressly address the issue of advance payments by a defendant in a legal malpractice action. The Alabama Legal Services Liability Act contains such a provision, which includes an interesting twist in subsection (b):

(a) In all legal service liability actions, any advance payment made by the defendant or his insurer to or for the plaintiff, or any other person, may not be construed as an admission of liability ***. Evidence of such advance payment is not admissible until there is a final judgment in favor of the plaintiff, in which event the court shall reduce the judgment to the plaintiff to the extent of advance payment. The advance payment shall inure to the exclusive credit of the defendant or his insurer making the payment. In the event the advance payment exceeds the liability of the defendant or the insurer making it, the court shall order any adjustment necessary to equalize the amount which each defendant is obligated to pay, exclusive of costs.

(b) In no case shall an advance payment in excess of an award be repayable by the person receiving it. 61

G. Immunities and Privileges

Public Defenders. Malpractice actions against public defenders are often barred by some variety of statutory immunity. For example, a Tennessee court 62 found that an assistant public defender was immune from suit for malpractice under either of two state laws. The first provided that:

No court in this state has *** authority to entertain any suit against the state or against any public defender or any employees thereof acting in their official capacity with a view to reach the state, its treasury, funds or property, or the funds or property of any public defender or its employees for any act of negligence arising from the execution of the employee’s official duties as an employee of the district public defenders conference ***. 63

The second statute said that:

State officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer’s or employee’s

61. ALA. CODE § 6-5-576 (Westlaw 2007).
63. TENN. CODE ANN. § 8-14-209 (Westlaw 2007).
office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain. 64

However, in some states public defenders are not immune from suit. For example, the California Supreme Court reasoned:

[The acts or omissions of a deputy public defender in representing a defendant in a criminal action do not involve the type of basic policy decisions that are insulated from liability by statutory immunity. Instead, legal representation provided by a deputy public defender entails operational (as opposed to policy) decisions that are incident to the normal functions of the office of the public defender. Once the decision is made to provide legal services, a deputy public defender's actions implementing that decision do not qualify for the immunity.

***. Holding deputy public defenders accountable at law for legal malpractice does not result in unwarranted judicial interference in the affairs of the other branches of government, but rather simply subjects these public employees to the same principles of tort law applicable to private attorneys performing identical professional services in the same type of proceedings. 65

Court-Appointed Lawyers. Some decisions hold that certain court-appointed lawyers—such as lawyers appointed to represent the interests of children in child-abuse or marital-dissolution cases—perform a quasi-judicial function and are immune from suit for malpractice. 66 Such immunity extends to "actions taken during or, activities necessary to, the performance of functions that are integral to the judicial process." 67 However, other states are directly to the contrary. The Maryland Court of Appeals held that a court-appointed lawyer for a child had no immunity from being sued for malpractice. The court found that the functions of the appointed counsel were "no more 'judicial' than the functions of many other trial attorneys who are subject to malpractice suits." 68

"Numerous states have statutes providing for the appointment of 'guardians ad litem,' although there is little uniformity in the case law and statutes with regard to the functions, duties, and immunities of 'guardians ad litem.' 69 It is debatable whether a tort claim against a lawyer acting as a court-appointed guardian ad litem should be regarded as a form of legal malpractice. However, courts "have almost unanimously

64. Id. at § 9-8-307(h). See also CONN. GEN. STAT. § 4-165 (Westlaw 2006) (similar; applying also to private lawyers appointed by the court as special assistant public defenders).
69. Id. at 732.
accorded guardians *ad litem* absolute immunity for their actions that are integral to the judicial process."\(^{70}\)

**The Qualified Privilege to Represent One's Client.** Various qualified privileges are recognized throughout the law where there is good reason to permit or encourage certain types of conduct. For example, lawyers have a privilege to fulfill their legal and ethical obligations to their clients, even if doing so may incidentally harm third parties. In a Texas case, three defendants in an alleged ticket-fixing scheme were represented by different lawyers, who worked together to craft a joint defense. After all three defendants were convicted, one of them sued the lawyer of another for tortious interference with contract, arguing that if that lawyer had not persuaded the other lawyers to limit the cross-examination of a certain prosecution witness, the plaintiff would not have been convicted. The court rejected the claim stating:

> We find that [attorney] Caballero's conduct was privileged. As long as our statutes permit the joinder of parties in criminal and civil litigation, there is an ethical and vital need for attorneys, on behalf of their respective clients, to meet, discuss, compromise and plan joint defenses or strategies. This should be done without the fear that if one or more or all of the parties are unsuccessful that the attorneys not in privity with the other litigants should be subject to a tortious interference with contract suit. In such instances, privilege should, as a matter of law, bar recovery as long as the interference is done to protect one's contract right to represent one's own client.\(^{71}\)

**H. Arbitration Agreements**

**Related Ethics Rules.** Lawyer ethics codes commonly contain a provision similar to the ABA Model Rule which provides that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."\(^{72}\)

"[M]ost state bar ethics committees have concluded that mandatory arbitration provisions do not prospectively limit a lawyer's liability, but instead only prescribe a procedure for resolving such claims."\(^{73}\) Thus, advisory ethics opinions suggest that mandatory arbitration clauses in lawyer-client contracts may be legally valid. However, that does not

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70. Carubba, 877 A.2d at 783.
necessarily mean that such provisions are beneficial to clients, since the
decision to arbitrate necessarily involves the forfeiture of valuable rights.74

Adhesion Contracts. Some courts have recognized that arbitration
provisions may be unfair to consumers. A recent Louisiana case considered
the enforceability of an arbitration clause in the lawyer-client contract
which provided:

Any and all disputes, controversies, claims or demands arising out
of or relating to this Agreement or any provisions hereof, the
providing of services by [the Stern Defendants] to [Mr. Lafleur], or
in any way relating to the relationship between [the Stern
defendants] and [Mr. Lafleur], whether in contract, tort or
otherwise, at law or in equity, for damages or any other relief, made
by or on behalf of [Mr. Lafleur] shall be resolved by binding
arbitration pursuant to the Federal Arbitration Act in accordance
with the Commercial Arbitration Rules then in effect with the
American Arbitration Association. Any such arbitration proceeding
shall be conducted in Harris County, Texas pursuant to the
substantive federal laws established by the Federal Arbitration Act.
The expense of any arbitration shall be a Case Advance pursuing
the Claims. Any party to any award rendered in such arbitration
proceeding may seek a judgment upon the award and that judgment
may be entered by any federal or state court in Harris County,
Texas having jurisdiction. [Mr. Lafleur] understands and
acknowledges that [Mr. Lafleur] is waiving all rights to a trial by a
jury or a judge.75

The court refused to enforce the arbitration provision because it was
an adhesionary contract. The court wrote:

A contract of adhesion is a standard contract, usually in printed
form, prepared by a party of superior bargaining power for
adherence or rejection by the weaker party. Often in small print,
these contracts sometimes raise a question as to whether the
weaker party actually consented to the terms. ***. However, the
real issue in a contract of adhesion analysis is not the standard form
of the contract, but rather whether a party truly consented to all the
printed terms. ***.

The trial court found that the arbitration provision in the
Agreement at issue was a standard form contract, with small print,
and prepared by the Stern defendants. While we agree the print
size is small, we do not find that it is unreasonably small.

74. See, e.g., Robert J. Kraemer, Attorney-Client Conundrum: The Use of Arbitration
Agreements for Legal Malpractice in Texas, 33 St. Mary's L.J. 909, 917 (2002) (noting that
"the unsophisticated client is at a bargaining disadvantage to the attorney in regard to the
client's rights and duties under a contract *** [and may think that trial is always an option,
regardless of any agreement he may sign]").
75. LaFleur v. Law Offices of Anthony G. Buzbee, P.C., 960 So. 2d 105, 110 (La. Ct.
App. 2007).
Furthermore, the arbitration provision is in the same size print as the rest of the contract and it is sufficiently set apart with a heading so that the arbitration provision is easily recognizable to anyone reading the contract. However, we emphasize and agree with the trial court's assessment that an attorney-client relationship is more than a contractual one; it is fiduciary, which requires a full and fair disclosure of all the rights and interest which are materially affected by the contract.

The trial court determined that this particular arbitration provision was "unduly burdensome," because it attempts to solely bind the client, Mr. Lafleur, to the arbitration requirement for any dispute brought by or on his behalf, while allowing the attorneys, the Stern defendants, to avail themselves of any and all procedural and substantive law remedies. The arbitration provision also imposes the expense of any arbitration exclusively on the client, Mr. Lafleur, as a "[c]ase [a]dvance" (repayable and reimbursable to the attorneys under the Agreement, Paragraph 7) regardless of the outcome of the arbitration proceedings. The arbitration provision further states that only the client, Mr. Lafleur, "understands and acknowledges that [he] is waiving all rights to a trial by a jury or a judge" for any and all disputes arising out of or relating to the Agreement. The trial court found that under the circumstances, the arbitration provision was arbitrary and adhesionary, and therefore, lacking in the requisite consent necessary for enforcement of the provision. We agree.

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We find this case distinguishable from Aguillard, 908 So.2d at 21, wherein the supreme court found that an arbitration clause in an auction document limited both parties rights to litigate. The Aguillard scenario did not involve the unequal bargaining power that is inherent in the attorney-client relationship. ***

*** Due to the lack of mutuality, the arbitration provision was unconscionable, and we therefore decline to order arbitration. ***

**State Arbitration Statutes.** There are questions regarding how lawyer-client arbitration agreements mesh with state statutes governing arbitration generally or arbitration of certain lawyer-client disputes in particular. For example, a Texas court held that a legal malpractice action was not "a claim for personal injury excluded from the scope of the Texas Arbitration Act." Addressing very different issues, the California Supreme Court ruled that a client waived his rights under the state's Mandatory Fee Arbitration Act by filing a malpractice suit, and could not challenge the arbitral award that had been entered in the suit pursuant

76. *Id.* at *5-6.
to a mandatory arbitration provision in the lawyer-client contract. As these rulings suggest, it is important for lawyers to recognize that the inclusion of an arbitration provision in a lawyer-client agreement may remove a wide range of legal and factual issues from judicial review and trigger the applicability of a vast body of arbitration law.

**Legal Malpractice Arbitration Laws.** Some states have passed legal malpractice statutes which expressly address the issue of arbitration. For example, the Alabama Legal Services Liability Act provides:

(a) After a legal service provider has rendered services, or failed to render services, to a client out of which a claim has arisen, the parties thereto may agree to settle such dispute by arbitration. Such agreement must be in writing and signed by both parties. Any such agreement shall be valid, binding, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.

(b) The claimant shall select one competent and disinterested arbitrator, and the party or parties against whom the claim is made shall select one competent and disinterested arbitrator. The two arbitrators so named shall select a third arbitrator, or, if unable to agree thereon within 30 days, then upon request of any party, such third arbitrator shall be selected by a judge of a court of record. The arbitrators shall then hear and determine the dispute in accordance with the procedural rules established by the American Arbitration Association. The decision in writing of any two arbitrators shall be binding upon all parties. Each party shall pay fees of his own arbitrator, and split the expenses of the third. A judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

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**Problem 7-8**

**Pleading Malpractice Defenses**

Lawyer represented a corporate client (Seller) in a business transaction involving the sale to another corporation (Buyer) of ownership interests in Seller’s corporation that might be found to constitute non-registered “securities” in violation of state or federal law. After learning facts that caused it to believe that it had been swindled in the sale, Buyer sued Seller, based in part on misstatements of accounts receivable and other assets. Seller then settled with Buyer by obtaining a release in exchange for payment of a sum of money and assigning its malpractice claim against Lawyer to Buyer. Buyer (now Plaintiff) then sued Lawyer (now Defendant) for negligence, negligent misrepresentation, fraud, breach of fiduciary duty, deceptive trade practices, and liability arising

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79. ALA. CODE § 6-5-575 (Westlaw 2007).
under state and federal securities laws. Defendant must file an answer to Plaintiff’s complaint. After admitting or denying the allegations in the Complaint, Defendant might plead, for example:

Specific and Affirmative Defenses

Para. 101. Defendant alleges the following defenses, reserving the right to amend, change, or add additional defenses as allowed by law. Each defense is stated in the alternative to, and without waiving, Defendant’s other defenses.

Beginning with paragraph 102, make a comprehensive list of defenses and affirmative defenses that should be asserted. Remember that defenses are contentions that either negate the elements of the plaintiff’s prima facie case or are “affirmative defenses,” matters which are normally not part of the case unless the defendant brings them up.80 Remember also that defenses mentioned in this chapter are only some of those that might be raised in a legal malpractice action. Other defenses may be rooted in other areas of the law, such as the law of contract.

Each paragraph in your list of defenses only needs to be one or two sentences in length: “notice” pleading is sufficient. For example, if laches were a plausible affirmative defense on the facts of this problem, an item on the list might read “1.02 Recovery is barred in whole or in part by laches.”

In order to be comprehensive, it might be helpful to list defenses responding to the various causes of action first and affirmative defenses second. Think back to the material covered in this chapter, as well as in earlier chapters (e.g., Chapter 3 Negligence, Chapter 4 Breach of Fiduciary Duty, Chapter 5 Liability to Third Parties, and Chapter 6 Remedies). You should be able to list at least a dozen, and perhaps more than two dozen, defenses and affirmative defenses based on what you have learned in this course and earlier law school courses. No specific knowledge of securities law is required in order to answer this question. However, if you are aware of defenses under securities law, include them on your list.

80. An affirmative defense asserts independent grounds for denying recovery to the plaintiff. Even if the plaintiff proves the elements of a claim, a successful affirmative defense enables a defendant to avoid liability.