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Legal Malpractice in Florida

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I. INTRODUCTION

As Sir Thomas More says in *A Man for All Seasons*, “[t]he law is not a ‘light’ for you or any man to see by; the law is not an instrument of any kind. The law is a causeway upon which so long as he keeps to it a citizen may walk safely.”¹ An attorney is charged with helping “citizens” in the twists and turns along this causeway and even helping them back to the causeway when they have lost their direction. When an attorney fails in carrying out his responsibilities, one remedy available to the injured “citizen” or person is an action for legal malpractice.

II. ELEMENTS OF A LEGAL MALPRACTICE ACTION

A legal malpractice plaintiff must plead and prove: (1) the attorney’s employment; (2) the attorney’s neglect of a reasonable duty; and (3) the negligence resulted in, and was the proximate cause of, loss to the plaintiff.²

1. ROBERT BOLT, *A MAN FOR ALL SEASONS*, Act II (1960).

2. *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999); *Olmsted v. Emmanuel*, 783 So. 2d 1122 (Fla. 1st Dist. Ct. App. 2001); *Home Furniture Depot, Inc. v. Entevor AB*, 753 So. 2d 653 (Fla. 4th Dist. Ct. App. 2000); *Anderson v. Steven R. Andrews, P.A.*, 692 So. 2d 237 (Fla. 1st Dist. Ct. App. 1997); *Sure Snap Corp. v. Baena*, 705 So. 2d 46 (Fla. 3d Dist. Ct. App. 1997); *Bolves v. Hullinger*, 629 So. 2d 198 (Fla. 5th Dist. Ct. App. 1993); *Chipman v. Chonin*, 597 So. 2d 363 (Fla. 3d Dist. Ct. App. 1992); *Riccio v. Stein*, 559 So. 2d 1207 (Fla. 3d Dist. Ct. App. 1990); *Thompson v. Martin*, 530 So. 2d 495 (Fla. 2d Dist. Ct. App. 1988); *Maillard v. Dowdell*, 528 So. 2d 512 (Fla. 3d Dist. Ct. App. 1988); *Hatcher v. Roberts*, 478 So. 2d 1083 (Fla. 1st Dist. Ct. App. 1985); *Weiner v. Moreno*, 271 So. 2d 217 (Fla. 3d Dist. Ct. App. 1973). *See also* *Arky, Freed, Stearns, Watson, Greer, Weaver, & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988) (holding litigants must state their pleadings with sufficient particularity for the defense to be prepared).

A. *The Attorney's Employment*

The first element of the cause of action, that an attorney must be employed by the plaintiff/client,³ is addressed in *Ginsberg v. Chastain*.⁴ The issue before the court in *Ginsberg* was whether attorney Daniel Ginsberg's one-time representation of Fred Chastain in a real estate matter entitled Chastain to believe that Ginsberg was also representing him at a meeting between Chastain and Annmarie Ahlers, one of Ginsberg's long-time clients.⁵

Where the record is devoid of any evidence, which indicates that an attorney-client relationship existed for legal services related to the particular meeting at issue, the element is not proven.⁶ Chastain testified at trial that he never discussed the subject of the meeting with Ginsberg, that he never asked Ginsberg to perform any services in connection with drafting the agreement between the parties, that Ginsberg never billed Chastain for any services in connection with the agreement, that Chastain never requested a bill, and that the parties had no fee agreement.⁷ Chastain thus failed to establish employment of the attorney and had no cause of action for legal malpractice.⁸

Whether an attorney-client relationship existed in *Giedzinski v. Palmer*⁹ was deemed to be a factual issue resulting in a summary judgment being reversed.¹⁰ Palmer claimed that attorney Giedzinski breached his fiduciary duty and confidential relationship to her when she purchased an interest in a land trust from him.¹¹ Giedzinski claimed he was not acting as Palmer's attorney or as an attorney for the land trust when Palmer purchased her

3. *Riccio v. Heitner*, 559 So. 2d 609 (Fla. 3d Dist. Ct. App. 1990) (holding law firm estopped from denying the attorney client relationship existed due to failure to advise clients that law firm had been dissolved while continuing to represent the clients).

4. 501 So. 2d 27 (Fla. 3d Dist. Ct. App. 1986).

5. *Id.* at 28.

6. *Accord Gutter v. Wunker*, 631 So. 2d 1117 (Fla. 4th Dist. Ct. App. 1994) (affirming dismissal for failure to allege attorney client relationship).

7. *Ginsburg*, 501 So. 2d at 29.

8. *Id.*

9. 595 So. 2d 294 (Fla. 5th Dist. Ct. App. 1992).

10. *Contra Voutsinas v. Stutin*, 626 So. 2d 300 (Fla. 5th Dist. Ct. App. 1993) (showing no facts to indicate attorneys ever agreed to handle the matter).

11. *Giedzinski*, 595 So. 2d at 295.

interest.¹² Due to the disputed issues of fact, the case was “simply not a case that lends itself to disposition via summary judgment.”¹³

Even if an attorney-client relationship exists, the action complained of must be within the scope of the attorney’s initial employment.¹⁴ The aggrieved client in *Atkin v. Tittle & Tittle*¹⁵ sued a lawyer for failing to properly investigate zoning issues prior to the client purchasing an unimproved lot. The trial court entered a directed verdict for the attorney, overruling a jury verdict in favor of the former client.¹⁶ The Third District Court of Appeal reinstated the jury verdict.¹⁷

The *Atkin* trial court relied upon *Maillard v. Dowdell*¹⁸ in concluding that the lawyer had “performed the duties for which he was employed, investigated issues brought to his attention, and was not required to render additional land use and zoning opinions for which he was not retained.”¹⁹ This limited view of the attorney’s duty was rejected by the appellate court due to the expert testimony presented at trial and the language in the contract regarding zoning issues.²⁰ The court concluded:

Although *Maillard* provides the general rule as to an attorney’s duties when representing a client in a real estate transaction, that rule is not absolute. An attorney may *not* disregard matters that arise and reasonably signal potential legal problems although those matters may not fall precisely within the general rule.²¹

1. Privity

A cause of action against an attorney for malpractice requires privity of contract unless excepted.²² The Supreme Court of Florida in *Angel, Cohen*

12. *Id.*

13. *Id.*

14. *Davis v. Hathaway*, 408 So. 2d 688 (Fla. 2d Dist. Ct. App. 1982) (reversing summary judgment due to dispute in scope of attorneys services in the sale of a business).

15. 730 So. 2d 376 (Fla. 3d Dist. Ct. App. 1999).

16. *Id.*

17. *Id.* at 378.

18. 528 So. 2d 512 (Fla. 3d Dist. Ct. App. 1988).

19. *Atkin*, 730 So. 2d at 377.

20. *Id.* at 377–78.

21. *Id.* at 378 (citing *Maillard*, 528 So. 2d at 515).

22. *Nat’l Union Fire Ins. Co. v. Salter*, 717 So. 2d 141 (Fla. 5th Dist. Ct. App. 1998) (holding insurance company could not sue attorneys for insured since they were not in privity with attorneys or an intended third-party beneficiary).

and *Rogovin v. Oberon Inv., N.V.*²³ set forth the general controlling law as to who may bring an action for legal malpractice. In *Angel*, the court stated, “Florida courts have uniformly limited attorneys’ liability for negligence in the performance of their professional duties to clients with whom they share privity of contract.”²⁴

2. Third-Party Beneficiary Exception

The *Angel* court recognized that in Florida, the privity requirement had been relaxed when “it was the apparent intent of the client to benefit a third party.”²⁵ The area of will-drafting was cited as the most obvious example of this limited exception to the privity requirement.²⁶ The First District Court of Appeal in *Greenberg v. Mahoney, Adams & Criser, P.A.*²⁷ understood the *Angel* decision to encompass those situations where “it was the apparent intent of the client to benefit the third party.”²⁸ The facts of the underlying malpractice case in *Greenberg* are not set forth in the opinion. Therefore, no guidance is provided as to what areas outside of the will-drafting arena may overcome the privity requirement.²⁹

In the case of *Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner*,³⁰ the court explained the “so-called will-drafting exception.”³¹ The Third District Court of Appeal found that “[o]nly where the testator’s intent as expressed in the will itself, not as shown by extrinsic evidence, is frustrated due to the negligence of the testator’s attorney—does the frustrated beneficiary of the will have a legal malpractice action against the testator’s lawyer.”³²

23. 512 So. 2d 192 (Fla. 1987).

24. *Id.* at 194. See also *Voutsinas v. Stutin*, 626 So. 2d 300 (Fla. 5th Dist. Ct. App. 1993) (failing to establish employment); *Nickolauson v. Rhyne*, 529 So. 2d 365 (Fla. 2d Dist. Ct. App. 1988) (alleging privity sufficiently, details to be determined from the evidence).

25. *Angel*, 512 So. 2d at 194.

26. *Id.*; see also *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*, 467 So. 2d 315 (Fla. 3d Dist. Ct. App. 1985); *DeMaris v. Asti*, 426 So. 2d 1153 (Fla. 3d Dist. Ct. App. 1983); *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1976).

27. 614 So. 2d 604 (Fla. 1st Dist. Ct. App. 1993).

28. *Id.* at 605.

29. See *id.*

30. 586 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1991).

31. *Id.* at 1223.

32. *Id.*; accord *Miami Beach Cmty. Church, Inc. v. Stanton*, 611 So. 2d 538 (Fla. 3d Dist. Ct. App. 1992) (“[A] beneficiary of a will does not have a legal malpractice action against the testator’s lawyer unless the testator’s intent as expressed in the will, not as shown by extrinsic evidence, is frustrated due to the lawyer’s negligence.”) (citing *Espinosa*, 586 So.

Espinosa cited the following as an example of the privity exception:

[W]here (1) the testator makes a will leaving all her property to her daughter and remarries thereafter, (2) hires a lawyer to make certain that her daughter remains the *sole* beneficiary under the will after her remarriage, and is negligently assured by the lawyer that no change was necessary to effect this intention, and (3) upon her death, her husband takes a statutory share of her estate as a pretermitted husband—it has been held that the daughter has a legal malpractice action against the testator’s lawyer; this is so because the testamentary intent, as expressed in the will, to leave all her property to her daughter was frustrated due to the lawyer’s negligent failure to draft a new will specifically excluding the testator’s new husband and again leaving all her property to the daughter.³³

The court in *Espinosa* found that “[a]n attorney preparing a will has a duty not only to the testator-client, but also to the testator’s intended beneficiaries, who may maintain a legal malpractice action against the attorney on theories of either tort (negligence) or contract (as third-party beneficiaries).”³⁴ The Third District’s decision was approved by the Supreme Court of Florida.³⁵ Since there was no intention in any of the wills or codicils to provide for the person suing the testator’s attorney, the court held that the claimant was not a third-party beneficiary and had no cause of action against the attorney.³⁶

The Supreme Court of Florida, in its *Espinosa* decision, stated “we adhere to the rule that standing in legal malpractice actions is limited to those who can show that the testator’s intent *as expressed in the will* is frustrated by the negligence of the testator’s attorney.”³⁷ The Fourth District Court of Appeal denied the plaintiffs’ cause of action in *Babcock v.*

2d at 1223); *DeMaris v. Asti*, 426 So. 2d 1153, 1154 (Fla. 3d Dist. Ct. App. 1983) (lacking any indication that the testator’s intent had been frustrated, the complaint failed to state a cause of action for legal malpractice); *O’Neill v. Sacher*, 526 So. 2d 771 (Fla. 3d Dist. Ct. App. 1988); *Martin v. Nemeč*, 526 So. 2d 157 (Fla. 4th Dist. Ct. App. 1988); *Arnold v. Carmichael*, 524 So. 2d 464 (Fla. 1st Dist. Ct. App. 1988).

33. *Espinosa*, 586 So. 2d at 1223 (citing *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1976)).

34. *Id.*; see *Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993).

35. *Id.*; see also *Hare v. Miller, Canfield, Paddock and Stone*, 743 So. 2d 551 (Fla. 4th Dist. Ct. App. 1999).

36. *Id.* at 1380.

37. *Espinosa*, 612 So. 2d at 1380.

Malone.³⁸ The plaintiffs in *Babcock* sued a lawyer for failure “to timely prepare a new will for their uncle.”³⁹ Their uncle died before signing the new will, which resulted in the plaintiffs’ obtaining nothing.⁴⁰ The appellate court affirmed the trial court’s dismissal of the complaint for failure to state a cause of action.⁴¹ The appellate court relied upon *Espinosa* in holding that although the would-be beneficiaries had alleged that the attorney knew that the uncle was very ill, no cause of action existed because their uncle never signed the new will.⁴²

Although *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*⁴³ involves a lawsuit by a frustrated beneficiary against the attorney who drafted her son’s will, the court decided the matter on lack of proximate cause.⁴⁴ Because the court determined that the intended bequest in *Lorraine* was homestead property, the property passed to the decedent’s children pursuant to article X of the Florida Constitution⁴⁵ rather than to the decedent’s mother as designated in the will.⁴⁶ The mother sued the attorney who drafted the will.⁴⁷ The appellate court affirmed a summary judgment in favor of the attorney finding that the “testamentary intent was not frustrated by [the attorney’s] professional negligence, but rather by Florida’s constitution and statutes.”⁴⁸ The *Lorraine* appellate court distinguished *McAbee v. Edwards* by stating that “[t]he attorney in *McAbee* could have drafted the will to” obtain the result sought by the testator; however, in *Lorraine*, Florida’s homestead provisions made drafting the desired result impossible.⁴⁹

A cause of action did not exist against the attorney who drafted the will at issue in *Kinney v. Shinholser*.⁵⁰ The personal representative and

38. 760 So. 2d 1056 (Fla. 4th Dist. Ct. App. 2000).

39. *Id.*

40. *Id.*

41. *Id.* at 1057.

42. *Id.* (citing *Espinosa*, 612 So. 2d at 1380).

43. 467 So. 2d 315 (Fla. 3d Dist. Ct. App. 1985).

44. *Id.* at 316–17.

45. FLA. CONST. art. X, § 4(c).

46. *Lorraine*, 467 So. 2d at 319.

47. *Id.* at 317–18.

48. *Id.* at 319.

49. *Id.* at n.7; see also *Mann v. Cooke*, 624 So. 2d 785, 788 (Fla. 1st Dist. Ct. App. 1993) (holding that an attorney is not liable to third-party beneficiary of husband’s revocable trust because terms were clear and unambiguous); *Rosenstone v. Satchell*, 560 So. 2d 1229, 1229–30 (Fla. 4th Dist. Ct. App. 1990) (relaxing strict privity requirement in area of will drafting).

50. 663 So. 2d 643, 646 (Fla. 5th Dist. Ct. App. 1995).

beneficiary under a trust sued the lawyer who had drafted the will, claiming that the lawyer “knew or should have known that the inclusion of the general power of appointment in the trust would frustrate [the] intent [of the testator] and cause an increase in [estate] taxes.”⁵¹ The only evidence of such intent was the will’s “direction that the just taxes be paid.”⁵² This was insufficient to allow the personal representative and beneficiary under the trust to sue the attorney who drafted the will for damages resulting from having to pay taxes because of the inclusion of the general power of appointment.⁵³ However, in the same case, the appellate court held that a cause of action did exist against the attorney retained to probate the will because he allegedly failed to timely advise the client that disclaiming the power of appointment within nine months after the death of the decedent would overcome the inclusion of the general power of appointment in the trust.⁵⁴ The *Kinney* court found that *Espinosa*’s third-party beneficiary test had been satisfied since the client was the ultimate beneficiary under the wills and trusts at issue.⁵⁵ The Fourth District in *Stept v. Paoli*,⁵⁶ citing to *Kinney*, also found an attorney not liable to revocable living trust beneficiaries who claimed that taxes were paid unnecessarily since the trust did not contain the “expressed intent of the testator to avoid or minimize taxes.”⁵⁷

The third-party intended beneficiary exception to the privity requirement for bringing a legal malpractice action is not limited to will drafting; it extends to adoptees. The case of *Rushing v. Bosse*⁵⁸ established that “privity between the child and attorney” is not required in a legal malpractice action “against the attorney who institutes and proceeds with a private adoption.”⁵⁹ The *Rushing* court stated that it did not read *Angel, Cohen and Rogovin v. Oberon Inv.*⁶⁰ as “creating an exception to the privity requirement limited solely to the area of will drafting.”⁶¹

Furthermore, the Florida courts have considered the third-party beneficiary exception to the privity requirement in other areas, specifically in condominium and association law. In *Hunt Ridge at Tall Pines, Inc. v.*

51. *Id.* at 644–45.

52. *Id.* at 645.

53. *Id.* at 645–46.

54. *Id.* at 646.

55. *Kinney*, 663 So. 2d at 646.

56. 701 So. 2d 1228 (Fla. 4th Dist. Ct. App. 1997).

57. *Id.* at 1229 (citing *Espinosa*, 586 So. 2d at 1221).

58. 652 So. 2d 869 (Fla. 4th Dist. Ct. App. 1995).

59. *Id.* at 873.

60. 512 So. 2d 192, 193–94 (Fla. 1987).

61. *Rushing*, 652 So. 2d at 873.

Hall,⁶² a homeowners' association sued an attorney claiming that its "declaration of covenants, conditions, and restrictions" was invalid, precluding the association from "perform[ing] its duties, including collecting fees."⁶³ Relying upon *Espinosa*, the appellate court affirmed the dismissal of the complaint because the general partner of the limited partnership which developed the residential community, not the homeowners' association, had retained the attorney who drafted the declaration.⁶⁴ The homeowner's association's argument that it was a third-party beneficiary was unpersuasive since the declaration explicitly stated, "that its provisions were intended for the benefit of the owners. It did not indicate that it was for the benefit of the homeowners' association."⁶⁵

Individual condominium unit owners, in *Silver Dunes Condominium of Destin, Inc. v. Beggs and Lane*⁶⁶ attempted to establish that they were intended third-party beneficiaries of the representation by the condominium association's attorney.⁶⁷ The unit owners claimed "they were the apparent intended third-party beneficiaries of the legal services contract between the association and [its attorneys] because the association was at all times acting on behalf of and for the benefit of the unit owners as their fiduciary."⁶⁸ The court held that the members "were not the apparent intended third-party beneficiaries."⁶⁹ As a result of the association's lawyer having "threatened legal action against some unit owners," the court could not conclude that the lawyer was representing both the individual unit owners and the association while the individual unit owners and the association were adverse to each other.⁷⁰

As demonstrated in the results above and herein, the third-party beneficiary exception to the privity requirement is not unlimited.⁷¹ In

62. 766 So. 2d 399 (Fla. 2d Dist. Ct. App. 2000).

63. *Id.* at 400.

64. *Id.* at 400-01 (citing *Espinosa*, 612 So. 2d at 1378).

65. *Id.*

66. 763 So. 2d 1274 (Fla. 1st Dist. Ct. App. 2000).

67. *Id.* at 1275.

68. *Id.* at 1276.

69. *Id.* at 1277.

70. *Id.* See *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 389 (Fla. 4th Dist. Ct. App. 1999) (holding an attorney who represents a corporation owes no fiduciary duty to the shareholders) (citing *Brennan v. Ruffner*, 640 So. 2d 143, 145-46 (Fla. 4th Dist. Ct. App. 1994)).

71. *Vargas v. Reinert*, 547 So. 2d 264 (Fla. 3d Dist. Ct. App. 1989) (concluding lack of privity precluded suit against City of Hialeah attorney who agreed to court order to preserve

Brennan v. Ruffner,⁷² a lawsuit was brought by a “disgruntled minority shareholder of a closely held corporation” against the attorney representing the corporation.⁷³ The Fourth District Court of Appeal affirmed a final summary judgment⁷⁴ and found “that an attorney-client relationship did not exist between [such] shareholder and the [corporate] attorney,”⁷⁵ notwithstanding the fact that such attorney had drafted a shareholder’s agreement that directly affected the shareholder’s rights.⁷⁶ The appellate court was no doubt influenced by a previous lawsuit instituted by the disgruntled minority shareholder against the other shareholders in which the disgruntled minority shareholder claimed that he “was *not* represented by counsel in the negotiation of the shareholder’s agreement.”⁷⁷

Similarly, in *Chaiken v. Lewis*,⁷⁸ no error was found where the trial court instructed the jury that “counsel for a partnership represents the partnership entity, but does not thereby become counsel for each partner individually.”⁷⁹ In contrast to the *Brennan* ruling, *Greenberg v. Mahoney, Adams & Criser, P.A.*⁸⁰ held that the mere assertion by the client that it was an intended third-party beneficiary was sufficient to obtain a reversal of the lower court’s decision dismissing a professional malpractice suit.⁸¹

Assertion of privity failed in *Athans v. Soble*.⁸² The client in *Athans* claimed that the attorney caused the loss of a potential buyer’s deposit in a real estate transaction.⁸³ Due to record evidence supporting the client’s assertion that although the attorney dealt only with the daughter of the plaintiff, the attorney knew that their legal services were rendered on behalf of the plaintiff, the appellate court overturned a summary judgment in favor of the attorney.⁸⁴

City vehicle involved in an accident but failed to inform City of order resulting in destruction of vehicle).

72. 640 So. 2d 143 (Fla. 4th Dist. Ct. App. 1994).

73. *Id.* at 144.

74. *Id.*

75. *Id.*

76. *Id.* at 146–47.

77. *Brennan*, 640 So. 2d at 145.

78. 754 So. 2d 118 (Fla. 3d Dist. Ct. App. 2000).

79. *Id.*

80. 614 So. 2d 604 (Fla. 1st Dist. Ct. App. 1993).

81. *Id.* at 605.

82. 553 So. 2d 1361 (Fla. 2d Dist. Ct. App. 1989).

83. *Id.* at 1362.

84. *Id.* at 1361–63.

3. Effect of Negligent Misrepresentation and Fraud

Privity is not required when an attorney makes a negligent misrepresentation to a nonclient,⁸⁵ and lack of privity will not protect an attorney from direct fraudulent acts or statements.⁸⁶ Although the underlying facts of the case are not discussed, *Bongard v. Winter*⁸⁷ holds that “an attorney may properly be held liable for his or her own fraudulent misrepresentations even if acting on behalf of a disclosed client.”⁸⁸ However, where different counsel represents each party, one party’s counsel is not liable to the other party for malpractice.⁸⁹

The malpractice claim was dismissed for failing to allege an attorney-client relationship in *Gutter v. Wunker*;⁹⁰ however, the fraud claim survived.⁹¹ The fraud in *Gutter* allegedly involved failure to disclose material facts in limited partnership documents related to a restaurant venture.⁹² The court described those situations in which a claim for fraud would lie as follows:

To state a cause of action for fraud, a party must allege: (1) a false statement concerning a material fact; (2) the representor’s knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation. *Lance v. Wade*, 457 So.2d 1008 (Fla. 1984); *A.S.J. Drugs, Inc. v. Berkowitz*, 459 So.2d 348 (Fla. 4th DCA 1984). A defendant’s knowing concealment or nondisclosure of a material fact may also support an action for fraud where there is a duty to disclose. See *Don Slack Ins., Inc. v. Fidelity & Cas. Co. of N.Y.*, 385 So.2d 1061 (Fla. 5th DCA 1980) and RESTATEMENT (SECOND) OF TORTS §§ 550, 551 (1977). Furthermore, where a party in an arm’s length transaction

85. *Riggs Nat’l Bank of Wash., D.C. v. Freeman*, 682 F. Supp. 519, 520 (S.D. Fla. 1988); see also *TransPetrol, Ltd. v. Radulovic*, 764 So. 2d 878, 880 (Fla. 4th Dist. Ct. App. 2000) (dismissing counts for fraud and RICO due to lack of duty to disclose and lack of proximate cause); *Zafiris, Inc. v. Moss*, 506 So. 2d 27 (Fla. 3d Dist. Ct. App. 1987).

86. *Moss v. Zafiris, Inc.*, 524 So. 2d 1010, 1011 (Fla. 1988); *A.S.J. Drugs, Inc. v. Berkowitz*, 459 So. 2d 348, 350 (Fla. 4th Dist. Ct. App. 1984) (suggesting oral statement by attorney could constitute fraud against non-client).

87. 516 So. 2d 27 (Fla. 3d Dist. Ct. App. 1987).

88. *Id.*

89. *Drawdy v. Sapp*, 365 So. 2d 461, 462 (Fla. 1st Dist. Ct. App. 1978).

90. 631 So. 2d 1117 (Fla. 4th Dist. Ct. App. 1994).

91. *Id.* at 1119.

92. *Id.* at 1118.

undertakes to disclose information, all material facts must be disclosed. *Vokes v. Arthur Murray, Inc.*, 212 So.2d 906 (Fla. 2d DCA 1986).⁹³

4. Insurer's Liability for Acts of Defense Counsel and Subrogation Rights

The issue of whether an insurance company is vicariously liable for the malpractice of the attorney it selects to defend an insured was examined in *Aetna Casualty and Surety Co. v. Protective National Insurance Co. of Omaha*.⁹⁴ After acknowledging that cases in other jurisdictions were split on this issue, the court was "persuaded by the reasoning of those cases which have held that an insurance company is not vicariously liable for the malpractice of the attorney it selects to defend the insured."⁹⁵ This reasoning prevented Protective, an excess general liability insurance carrier, from suing Aetna, the primary general insurance carrier and its counsel under an equitable subrogation theory for allegedly not raising a statute of limitations defense.⁹⁶

*Marlin v. State Farm*⁹⁷ held that an insured could not sue his carrier for negligence in failing to exercise control over the insurance company's appointed attorney after an excess verdict was rendered against the insured.⁹⁸ The court succinctly stated "[a]s the insurer has no obligation or right to supervise or control the professional conduct of the attorney, it is not liable for the litigation decisions of counsel."⁹⁹

In *Don Reid Ford, Inc. v. Feldman*,¹⁰⁰ after taking over a bankrupt insurance carrier, the Florida Insurance Guaranty Association, Inc. (FIGA), sued the attorney appointed to represent an insured for failing to defend.¹⁰¹ The result was a final judgment against the insured that was paid by FIGA.¹⁰² A summary judgment in favor of the attorney was affirmed upon a finding that the statute of limitations began when the judgment against the insured was entered, not when the judgment was paid.¹⁰³

93. *Id.* at 1118-19.

94. 631 So. 2d 305, 306 (Fla. 3d Dist. Ct. App. 1993).

95. *Id.*

96. *Id.* at 305-06.

97. 761 So. 2d 380 (Fla. 4th Dist. Ct. App. 2000).

98. *Id.* at 380-81.

99. *Id.* at 381 (citations omitted).

100. 421 So. 2d 184, 185 (Fla. 5th Dist. Ct. App. 1982).

101. *Id.*

102. *Id.*

103. *Id.*

B. Reasonable Duty

Secondly, a malpractice plaintiff must plead and prove neglect of a reasonable duty.¹⁰⁴ As is more fully set out below, fulfillment of this duty does not require the attorney to be a predictor of the future in unsettled areas of the law, nor does it require him to inform his client of conflicting law unless the conflicting question will soon be answered by controlling authority.¹⁰⁵ The attorney's duty does require him to exercise good faith and to make diligent inquiry in order to be protected by judgmental immunity.¹⁰⁶

A cause of action exists against an attorney who neglects to perform the services that he explicitly or impliedly agrees to when he accepts employment.¹⁰⁷ However, an attorney's failure to accurately predict changes on unsettled points of law is not actionable.¹⁰⁸ A cause of action against the attorneys in *Kaufman v. Stephen Cahen, P.A.*¹⁰⁹ for their failure to timely file a wrongful death claim did not exist since the law regarding the statute of limitations for such cause of a action was changed by a Supreme Court of Florida decision during the course of the representation.¹¹⁰

However, *Stake v. Harlan*¹¹¹ holds that an attorney has a duty to inform his or her clients of a possible change in the law known to the attorney that could have a materially adverse effect upon the clients.¹¹² In *Stake*, the attorney had actual knowledge of the certification of a question to the Supreme Court of Florida, evidenced by his citation of the pending case in a letter he wrote to the client.¹¹³ The Second District Court of Appeal held that the attorney breached his duty to make his clients aware of the implications of the certified question, and thereby, denied his clients the

104. See *Dykema v. Godfrey*, 467 So. 2d 824 (Fla. 1st Dist. Ct. App. 1985).

105. See generally *Home Furniture Depot, Inc. v. Entevor AB*, 753 So. 2d 653, 655 (Fla. 4th Dist. Ct. App. 2000) (holding "a lawyer owes the client a duty to exercise the degree of reasonable knowledge and skill which lawyers of ordinary ability and skill possess and exercise."); *Azuz v. Singer*, 708 So. 2d 292, 293 (Fla. 4th Dist. Ct. App. 1998) (finding that negligence action available upon claim that stipulated final order differed from terms authorized by client); *McCurry v. Eppolito*, 506 So. 2d 1110 (Fla. 1st Dist. Ct. App. 1987) (stating attorney's failure to see that mechanic's lien law requirements were met was malpractice); *Dykema*, 467 So. 2d at 824.

106. See cases cited in *supra* note 105.

107. See cases cited in *supra* note 105.

108. See cases cited in *supra* note 105.

109. 507 So. 2d 1152 (Fla. 3d Dist. Ct. App. 1987).

110. *Id.* at 1152-53.

111. 529 So. 2d 1183 (Fla. 2d Dist. Ct. App. 1988).

112. *Id.* at 1186.

113. *Id.* at 1184-85.

opportunity to make an informed decision on whether or not to transact the subject real estate closing in the manner suggested by the attorney.¹¹⁴

In *Crosby v. Jones*,¹¹⁵ the Supreme Court of Florida held that the evaluation of an attorney's judgment could be determined as a matter of law.¹¹⁶ The Supreme Court of Florida exercised jurisdiction because of a conflict between districts in *Jones v. Crosby*¹¹⁷ and *Kaufman v. Stephen Cahen, P.A.*¹¹⁸ The client in *Crosby* released the driver of the vehicle that collided with him, but the client did not release the driver's employer.¹¹⁹ The employer obtained a summary judgment at the trial level, which was affirmed on appeal.¹²⁰ The attorney obtained summary judgment upon the trial court's holding that *JFK Medical Center, Inc. v. Price*¹²¹ set forth the longstanding law in Florida on the doctrine of judgmental immunity.¹²² *JFK Medical Center* specifically disapproved the *Jones v. Gulf Coast Newspapers, Inc.* holding, thereby establishing that the attorney acted properly.¹²³

"The rule of judgmental immunity is premised on the understanding that an attorney, who acts in good faith and makes a diligent inquiry into an area of law, should not be held liable for providing advice or taking action in an unsettled area of law."¹²⁴ At the time the attorney entered into the dismissal with prejudice both *Sun First National Bank v. Batchelor*,¹²⁵ which was a decade old Supreme Court of Florida decision, and case law in the attorney's district supported his decision.¹²⁶ The only contrary decision was outside his district.¹²⁷ The Supreme Court of Florida went on to hold that there is not always an absolute duty to inform the client of conflicting case law.¹²⁸ "Attorneys cannot be placed in the position of having to accept

114. *Id.* at 1186.

115. 705 So. 2d 1356 (Fla. 1998).

116. *Id.* at 1357.

117. 677 So. 2d 379 (Fla. 2d Dist. Ct. App. 1996).

118. 507 So. 2d 1152 (Fla. 3d Dist. Ct. App. 1987).

119. *Crosby*, 705 So. 2d at 1357.

120. *Jones v. Gulf Coast Newspapers, Inc.*, 595 So. 2d 90 (Fla. 2d Dist. Ct. App. 1992).

121. 647 So. 2d 833 (Fla. 1994).

122. *See Crosby*, 705 So. 2d at 1357.

123. *Id.* (citing *JFK Medical Center, Inc.*, 647 So. 2d at 833).

124. *Crosby*, 705 So. 2d at 1358 (Fla. 1998); *accord Meir v. Kirk, Pinkerton McClelland, Savary & Carr, P.A.*, 561 So. 2d 399 (Fla. 2d Dist. Ct. App. 1990).

125. 321 So. 2d 73 (Fla. 1975).

126. *See, e.g., Crosby*, 705 So. 2d at 1358, 1359.

127. *Id.* at 1359 (citing *Walsingham v. Browning*, 525 So. 2d 996 (Fla. 1st Dist. Ct. App. 1988)).

128. *Id.*

direction from clients on intricate interpretations of the correct or current state of the law. The attorney, not the client, is the individual trained to interpret the law.”¹²⁹ The *Kaufman* holding was approved in *Crosby*.¹³⁰ *Stake* was distinguished “because the issue was pending on a certified question before this Court at the time the attorney rendered the advice; thus the attorney had the duty to inform the client that issue would soon be decided by a higher court.”¹³¹

The attorney’s good faith and diligent inquiry are questions of fact. The appellate court in *DeBiasi v. Snaith*¹³² indicated that the attorney’s actions in failing to timely seek a motion for certification were not “fairly debatable” and did not deal with an “unsettled area of the law” to which judgmental immunity would apply; thus, it reversed a summary judgment in the attorney’s favor.¹³³ The *DeBiasi* court held that “*Crosby v. Jones* teaches that the lawyer who seeks the protection of judgmental immunity must have acted in good faith and made a diligent inquiry into that area of the law.”¹³⁴ Since the issues of good faith and diligent inquiry remained unresolved, the “case was not ripe for summary disposition.”¹³⁵

Judgmental immunity does not insulate the attorney from exercising ordinary care. Both *Crosby* and *DeBiasi* were relied upon in *Sauer v. Flanagan and Maniotis, P.A.*¹³⁶ Sauer sued her attorneys alleging their failure to properly advise her regarding her rejection of a million dollar offer of judgment.¹³⁷ The underlying trial resulted in a defense verdict and the imposition of attorney’s fees and costs against the client.¹³⁸ In the malpractice action, the attorneys argued that the defense of judgmental immunity should apply to settlement recommendations.¹³⁹ The court could “discern no basis for concluding that an attorney is insulated from liability

129. *Id.*

130. *Id.* (citing *Kaufman*, 507 So. 2d at 1152).

131. *Crosby*, 705 So. 2d at 1359 n.3.

132. 732 So. 2d 14 (Fla. 4th Dist. Ct. App. 1999).

133. *Id.* at 16.

134. *Id.*

135. *Id.*

136. 748 So. 2d 1079 (Fla. 4th Dist. Ct. App. 2000). *See also* *Dollman v. Shutts and Bowen*, 575 So. 2d 320 (Fla. 3d Dist. Ct. App. 1991) (reversing summary judgment due to factual issues surrounding communication of proposed sale of real estate).

137. *Sauer*, 748 So. 2d at 1080.

138. *Id.*

139. *Id.* at 1081.

for failing to exercise ordinary skill and care in resolving settlement issues.”¹⁴⁰

It was undisputed that the attorney accused of malpractice in *Herig v. Akerman, Senterfitt & Edison*¹⁴¹ “acted in good faith and made a diligent inquiry into the law [that] was not disputed.”¹⁴² Accordingly, the summary judgment in favor of the attorney was affirmed since, at the time the attorney was engaged to prepare a personal management contract for a minor, “there was no statute or case law governing artistic management contracts of minors per se.”¹⁴³ The enactment of the Child Performer and Athlete Protection Act,¹⁴⁴ adopted several years after the agreement was signed, allowed the agreement to be set aside.¹⁴⁵ Therefore, the attorney was protected by the doctrine of judgmental immunity.¹⁴⁶

An attorney does not owe a duty in a real estate closing to any party other than the attorney’s client,¹⁴⁷ or in a will drafting to a previous beneficiary when an attorney omits the beneficiary at the request of the testator or testatrix.¹⁴⁸ “[V]iolation of the Rules of Professional Conduct ... [is not] negligence per se[; however, a violation] may be used as some evidence of negligence.”¹⁴⁹ The *Rules of Professional Conduct* do not create a legal duty on a lawyer.¹⁵⁰ However, evidence that an attorney did not conduct himself or herself as reasonably as an attorney, with respect to the

140. *Id.* at 1082.

141. 741 So. 2d 591 (Fla. 1st Dist. Ct. App. 1999). It should be noted that the correct name of the law firm is Akerman, Senterfitt & Eidson, but the official reporter misspelled the firm name.

142. *Id.* at 593.

143. *Id.*

144. FLA. STAT. § 743.08 (3)(b) (1997).

145. *Herig*, 741 So. 2d at 594.

146. *Id.*

147. *Assad v. Mendell*, 511 So. 2d 682 (Fla. 3d Dist. Ct. App. 1987) (stating that a bank’s attorney owed no duty to borrower); *Southworth v. Crevier*, 438 So. 2d 1011 (Fla. 4th Dist. Ct. App. 1983) (stating that a seller’s attorney in real estate transaction had no duty to buyer); *Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A.*, 367 So. 2d 633, 634 (Fla. 2d Dist. Ct. App. 1979) (stating that a bank’s law firm owed no duty to buyer for the negligent performance of a title search); *Adams v. Chenowith*, 349 So. 2d 230 (Fla. 4th Dist. Ct. App. 1977) (stating that a seller’s attorney owed no duty to purchaser since seller’s and purchaser’s interests were adverse and there was no allegation of intentional misrepresentation against the attorneys).

148. *Chase v. Bowen*, 771 So. 2d 1181, 1182 (Fla. 5th Dist. Ct. App. 2000).

149. *Pressley v. Farley*, 579 So. 2d 160, 161 (Fla. 1st Dist. Ct. App. 1991), *dismissed*, 583 So. 2d 1036 (Fla. 1991).

150. *Id.*

Code of Professional Responsibility, is evidence of a failure to use due care as an attorney.¹⁵¹

Moreover, an attorney has no duty to pursue faultless or judgment proof parties. During the investigation of a potential lawsuit arising from an automobile accident, the law firm, which was sued in *Williams v. Beckham & McAiley, P.A.*,¹⁵² had determined that no liable party had insurance or assets.¹⁵³ The law firm had filed a lawsuit prior to the expiration of the statute of limitations for the purpose of preserving the cause of action.¹⁵⁴ When no action was taken in the lawsuit, the court dismissed the suit for lack of prosecution.¹⁵⁵ Affirming the summary judgment in favor of the law firm, the appellate court held that the law firm had no duty to pursue any party it felt, after investigation, was not culpable or collectible.¹⁵⁶

Finally, an attorney's duty does not require him to take futile action on behalf of his client. In *Hunzinger Construction Corp. v. Quarles & Brady General Partnership*,¹⁵⁷ the client claimed that its lawyers should have submitted a claim to its insurance company in a construction litigation case.¹⁵⁸ If the claim had been submitted, the client argued, the insurance company would have provided a defense and paid for the attorney's fees which the client had to pay.¹⁵⁹ The client suffered an adverse summary judgment.¹⁶⁰ The appellate court found no error in the trial court's determination "that there was no duty *owed to the client* on the part of the lawyer to submit the defense to the insurance company, where the complaint did not allege any cause of action which arguably came within the coverage of the policy."¹⁶¹

C. *Proximate Cause of Loss*

The third element that a legal malpractice plaintiff must plead and prove is that the attorney's negligence resulted in and was the proximate

151. *Gomez v. Hawkins Concrete Const. Co.*, 623 F. Supp. 194, 199 (N.D. Fla. 1985).

152. 582 So. 2d 1206 (Fla. 2d Dist. Ct. App. 1991).

153. *Id.* at 1207.

154. *Id.* at 1208.

155. *Id.* at 1207.

156. *Id.* at 1208.

157. 735 So. 2d 589 (Fla. 4th Dist. Ct. App. 1999).

158. *Id.* at 592.

159. *Id.*

160. *Id.*

161. *Id.* at 593.

cause of loss to the plaintiff.¹⁶² The general tort law that “[n]o damages may be recovered where losses do not usually result from or could not have been foreseen as a proximate result of a particular negligence” is set forth in the legal malpractice case of *Chadwick v. Corbin*.¹⁶³ However, “once a negligent act occurs, the actor will be liable for injury flowing therefrom, unless ‘an act unforeseeable to him and independent of his negligence intervenes to cause the loss.’”¹⁶⁴

[A]n attorney who drafts documents is not ipso facto a guarantor that the documents will be litigation free or will accomplish everything that the client might want The rationale is that if there were malpractice liability under those circumstances, an attorney would in effect insure his work; but since insurance coverage ordinarily calls for premium payment, attorneys fees would inevitably increase substantially to provide for that type of insurance.¹⁶⁵

In *Hatcher v. Roberts*,¹⁶⁶ a client-mortgagor brought a legal malpractice action against its attorney and law firm contending that in the underlying foreclosure proceeding the lawyer negligently withdrew an affirmative defense of prepayment.¹⁶⁷ The First District Court of Appeal found, as did the trial court, “that, under all the facts, circumstances, and law existing at the time of the foreclosure suit, the prepayment defense asserted and then withdrawn in the foreclosure proceeding could not possibly have succeeded, even with diligent preparation and litigation by” the attorney.¹⁶⁸ Therefore, since the attorney’s acts were not the proximate cause of the client’s alleged damages, no legal malpractice had occurred.¹⁶⁹

162. *Home Furniture Depot, Inc. v. Entevor AB*, 753 So. 2d 653, 655 (Fla. 4th Dist. Ct. App. 2000).

163. 476 So. 2d 1366, 1368 (Fla. 1st Dist. Ct. App. 1985) (citing 17 FLA. JUR. 2d DAMAGES § 38); *accord Ferrari v. Vining*, 744 So. 2d 480 (Fla. 3d Dist. Ct. App. 1999).

164. *Mitrani v. Druckman*, 576 So. 2d 406, 408 (Fla. 3d Dist. Ct. App. 1991) (citing *State Farm Ins. Co. v. Nu Prime Roll-A-Way of Miami, Inc.*, 557 So. 2d 107, 109 (Fla. 3d Dist. Ct. App. 1990)).

165. *Daytona Dev. Corp. v. McFarland*, 505 So. 2d 464, 467 (Fla. 2d Dist. Ct. App. 1987).

166. 478 So. 2d 1083 (Fla. 1st Dist. Ct. App. 1985).

167. *Id.* at 1085.

168. *Id.* at 1086.

169. *Id.* at 1087; *accord Pennington v. Caggiano*, 723 So. 2d 931 (Fla. 5th Dist. Ct. App. 1999) (holding attorneys who withdrew were not responsible for former client’s failure or inability to obtain substitute counsel prior to loss on a summary judgment in a medical malpractice proceeding).

An attorney will not be liable if “some separate force or action is the active and efficient intervening cause, the sole proximate cause or an independent cause.”¹⁷⁰ However, if the negligent attorney sets off a chain of events resulting in harm, or if the intervening cause is foreseeable, his negligence may be considered the proximate cause notwithstanding the intervening cause.¹⁷¹

If the client causes his own damages, the attorney will not be held liable.¹⁷² In *Goodwin v. Alexatos*,¹⁷³ an attorney represented both the seller and purchaser of an orange grove.¹⁷⁴ Problems developed after the closing of the transaction, and the purchaser demanded a return of his money for, among other reasons, the attorney’s failure to clear certain title impediments which were known at the time of closing.¹⁷⁵ When the money was not forthcoming, the purchaser sued the seller and the attorney.¹⁷⁶ One of the claims against the attorney was for malpractice in failing to clear the title to the property.¹⁷⁷ The directed verdict on the malpractice claim was upheld on appeal upon a finding that the “proximate cause was [the purchaser’s] decision to abandon the transaction, not any delay allegedly caused by [the attorney].”¹⁷⁸

The issue in *Boyd v. Brett-Major*¹⁷⁹ was “whether the attorney followed the explicit directions of his client.”¹⁸⁰ The jury found that the client had instructed his attorney to delay, rather than win, a mortgage foreclosure.¹⁸¹ Accordingly, the lawyer did not plead the absolute defense provided by section 903.14 of the *Florida Statutes*¹⁸² against the bonding company,

170. *DWL, Inc. v. Foster*, 396 So. 2d 726, 728 (Fla. 5th Dist. Ct. App. 1981) (citing *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So. 2d 520 (Fla. 1980)).

171. *DWL, Inc.*, 396 So. 2d at 728 (citing *Gibson*, 386 So. 2d at 522). See also *Daytona Dev. Corp. v. McFarland*, 505 So. 2d 464 (Fla. 2d Dist. Ct. App. 1987) (reversing summary judgment for determination of whether lawyer was proximate cause of client’s damages in a real estate matter).

172. *Davenport v. Stone*, 528 So. 2d 45, 46 (Fla. 3d Dist. Ct. App. 1988) (noting client who was fully advised and voluntarily signed property settlement agreement suffered no loss due to attorneys incompetence).

173. 584 So. 2d 1007 (Fla. 5th Dist. Ct. App. 1991).

174. *Id.* at 1009.

175. *Id.*

176. *Id.* at 1009–10.

177. *Id.* at 1010.

178. *Goodwin*, 584 So. 2d at 1010.

179. 449 So. 2d 952 (Fla. 3d Dist. Ct. App. 1984).

180. *Id.* at 954.

181. *Id.*

182. FLA. STAT. § 903.14 (2001).

which was foreclosing upon its mortgage, resulting in a summary judgment adverse to the client.¹⁸³ Finding no cases in Florida on point, the court cited to *Orr v. Knowles*,¹⁸⁴ for the following proposition:

It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of [the] client within the limits of the law.¹⁸⁵

The *Boyd* court was not impressed by the argument that its ultimate holding in favor of the attorney would allow lawyers to avoid liability by saying they followed their client's instructions.¹⁸⁶

The lawyer in *Lawyers Professional Liability Ins. Co. v. McKenzie*¹⁸⁷ was sued for the profit allegedly lost by the client who had to go through two foreclosure sales before the litigation was complete.¹⁸⁸ In the first foreclosure sale, the mortgagor did not redeem the property, and the client-mortgagee was the highest bidder at the sale.¹⁸⁹ The mortgagee had been negotiating with a third party to purchase the property after the completion of the foreclosure.¹⁹⁰ After the sale, the lawyer realized that the legal description was wrong, which ultimately resulted in the scheduling of another foreclosure sale.¹⁹¹ Before the second sale, the mortgagor located a buyer for the property who paid off the mortgagee.¹⁹² The court found that the

[A]ttorney, though negligent, did in fact do what he was employed to do. He foreclosed on the mortgage and [the client] received all that she was entitled to under the terms of the instrument. She did

183. *Boyd*, 449 So. 2d at 953.

184. 337 N.W.2d 699, 702 (Neb. 1983).

185. *Boyd*, 449 So. 2d at 954 (quoting *Orr v. Knowles*, 337 N.W.2d 699, 702 (Neb. 1983)).

186. *Id.*

187. 470 So. 2d 752 (Fla. 3d Dist. Ct. App. 1985).

188. *Id.* at 753.

189. *Id.*

190. *Id.* at 752.

191. *Id.* at 753.

192. *Lawyers Professional Liability Ins. Co.*, 470 So. 2d at 753.

not prove that [the attorney's] negligence was a proximate cause of her failure to get the property back.¹⁹³

Similarly, the lawyer in *Snaith v. Haraldson*,¹⁹⁴ who drafted balloon mortgage language and represented both the mortgagor and mortgagee, had no liability to the mortgagor for failing to properly provide for the legend required by section 697.05(2)(a) of the *Florida Statutes*, because the deficiency did not cause any damages to the mortgagor.¹⁹⁵ Although the Fourth District Court of Appeal in *Lefebvre v. James*¹⁹⁶ did not mention the lack of proximate cause as its reasoning for overturning the jury verdict, its reversal was based upon the fact that the lawyer's failure to amend the complaint to add a cause of action did not result in any damages to the client.¹⁹⁷ The case involved damages to a farmer's livestock allegedly because of a problem with the feed delivered to the farmer.¹⁹⁸ The company that delivered the feed became bankrupt, and its insurer denied coverage based upon the pleadings that set forth a defective product theory.¹⁹⁹ Negligent delivery would have been covered under the policy. The attorney considered adding a claim for negligent delivery, but he did not amend because he thought that the amendment would not have related back to the original cause of action and would therefore be barred by the statute of limitations.²⁰⁰ The trial court disagreed and ruled as a matter of law that the amendment would have related back.²⁰¹ The appellate court agreed with the lawyer's assessment and found that "an amendment to the complaint alleging negligent delivery of the feed would have constituted a new cause of action, would not have related back to the filing of the claim, and would have been barred by the statute of limitations."²⁰² Therefore, the appellate court

193. *Id.* at 754.

194. 466 So. 2d 1148 (Fla. 4th Dist. Ct. App. 1985).

195. *Id.*; accord *Singer v. William H. Stolberg, P.A.*, 770 So. 2d 1281, 1282 (Fla. 4th Dist. Ct. App. 2000) (holding an attorney "is not negligent for failing to enforce an order the trial court was not required to enforce").

196. 697 So. 2d 918 (Fla. 4th Dist. Ct. App. 1997).

197. *Id.* at 920.

198. *Id.* at 918.

199. *Id.* at 919.

200. *Id.*

201. *Lefebvre*, 697 So. 2d at 919.

202. *Id.* at 920. See *School Bd. of Broward County v. Surette*, 394 So. 2d 147 (Fla. 4th Dist. Ct. App. 1981).

instructed the lower court to enter a directed verdict in favor of the attorney.²⁰³

In another example of lack of proximate cause, the attorney who filed an Age Discrimination in Employment Act claim on behalf of his client in *Bolves v. Hullinger*²⁰⁴ escaped liability for his failure to timely file suit based upon the appellate court's finding that "[t]here was a complete absence of evidence of intentional or reckless disregard for whether [the employer's] actions were in violation of the ADEA."²⁰⁵ Since no damages were available in the underlying action, even if the lawsuit had been timely filed, the attorney's "negligence in allowing the statute of limitations to expire on the federal claim did not result in damage to [the client]."²⁰⁶

Lack of proximate cause is determinative of a cause of action even where the attorneys' negligence, as in *Olmsted v. Emmanuel*,²⁰⁷ is clear. In the pretrial stipulation, the plaintiff's attorneys failed to invoke Title 42, section 1981 of the *United States Code*²⁰⁸ as a basis for recovery.²⁰⁹ The only basis for recovery invoked was Title VII of the Civil Rights Act of 1964.²¹⁰ Accordingly, the \$3,460,000 jury award was reduced to \$300,000 because of the \$300,000 cap under Title VII, which would not have applied to a section 1981 action.²¹¹ The court summarized the law on proximate cause after setting out the elements of a legal malpractice cause of action:²¹²

"To be liable for malpractice arising out of litigation, the attorney must be the proximate cause of the adverse outcome of the underlying action which results in damage to the client." The plaintiff must "demonstrate [] that there is *an amount of damages* which [he] would have recovered but for the attorney's negligence." Thus, in a case such as this, the plaintiff has to prove that he "would have prevailed on the underlying action but for the attorney's negligence." In this case, there is no dispute about the facts that Olmsted retained appellees and that appellees neglected a reasonable duty owed to Olmsted when they failed to invoke 42

203. *Id.*

204. 629 So. 2d 198 (Fla. 5th Dist. Ct. App. 1993).

205. *Id.* at 201.

206. *Id.*

207. 783 So. 2d 1122 (Fla. 1st Dist. Ct. App. 2001).

208. 42 U.S.C. § 1981 (2000).

209. *Olmsted*, 783 So. 2d at 1124.

210. 42 U.S.C. § 2000e-3.

211. *Olmsted*, 783 So. 2d at 1124.

212. *See generally, supra* note 2 (citing cases that describe the elements of a legal malpractice cause of action).

U.S.C. § 1981 as a basis for relief in the pretrial stipulation, resulting in the holding that any claim pursuant to section 1981 had been abandoned. Here, the dispute relates to the third element, i.e., whether Olmsted can establish that appellees' negligence was the proximate cause of a loss to him.²¹³

After examining Eleventh Circuit cases involving section 1981 claims, the court concluded that the client could not establish that he would have met the legal requirements of a section 1981 claim.²¹⁴ Accordingly, since the client could not satisfy the proximate cause element, the court affirmed the dismissal of the legal malpractice claim under section 1981.²¹⁵

The malpractice plaintiff may use expert testimony to establish that the client would have recovered damages but for the actions of the attorney or that the client would have recovered more in damages but for the attorney's actions. The use of expert testimony to establish causation was examined in *Tarleton v. Arnstein & Lehr*.²¹⁶ The client sued her lawyer as a result of losing the right to sue upon certain promissory notes due to the release clause in her divorce proceeding settlement agreement.²¹⁷ After indicating that one element of a legal malpractice case is proving that "the attorney's negligence resulted in and was the proximate cause of loss to the client,"²¹⁸ which requires the client to demonstrate that "there is an amount of damages which the client would have recovered but for the attorney's negligence,"²¹⁹ the court stated that the appeal "focuses on whether the Former Wife presented sufficient evidence to satisfy the third element."²²⁰

The client produced a legal expert who testified as to standard of care and an accountant who testified regarding damages.²²¹ The trial court judge overturned a jury verdict in favor of the client, reasoning that she had not established proximate cause because she failed to present testimony indicating that a more favorable result would have occurred in the divorce

213. *Olmsted*, 783 So. 2d at 1125–26 (alterations in original) (citations omitted).

214. *Id.* at 1128.

215. *Id.* See also *Somerset Village, Ltd. P'ship v. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.*, 782 So. 2d 414 (Fla. 3d Dist. Ct. App. 2001) (failing to obtain transcript not proximate cause of summary judgment affirmance).

216. 719 So. 2d 325 (Fla. 4th Dist. Ct. App. 1998).

217. *Id.* at 327.

218. *Id.* at 328.

219. *Id.*

220. *Id.*

221. *Tarleton*, 719 So. 2d at 328.

proceeding had the attorney acted differently.²²² The Fourth District Court of Appeal reinstated the jury verdict finding “that the lay jury was competent to determine that Former Wife would have been awarded more but for the Firm’s negligence.”²²³ The Court went on to state as follows:

Under the “trial within a trial” standard of proving proximate cause, the jury necessarily has to determine whether the client would have prevailed in the underlying action, in this case the dissolution action, before determining whether the client would prevail in the malpractice action. Because the jury is substituting its judgment for the fact finder of the dissolution proceeding, no expert testimony specifically stating that a reasonable judge would have given her more than she received in the settlement agreement would be required to establish proximate causation. To establish proximate causation, Former Wife must demonstrate that there is an amount of damages which she would have recovered but for the Firm’s negligence. From the evidence noted above, the jury, sitting as the trier of fact in the dissolution action, determined the amount Former Wife would have been awarded if she went to trial and concluded that the amount was greater than she received under the settlement agreement. Thus, Former Wife has established the proximate cause element.²²⁴

Whether an attorney’s negligence is the proximate cause of his client’s injury is a question of fact. Although the Fourth District Court of Appeal found that the attorney’s conduct fell below a reasonable standard of care in *Spaziano v. Price*,²²⁵ a jury verdict in favor of the attorney was upheld because “the question submitted to the jury was whether there was negligence on the part of [the attorney] which was a legal cause of loss, injury or damage to Spaziano. The jury chose to answer that question in the negative.”²²⁶ Since there was conflicting evidence on whether the client suffered any injuries from the airplane crash, which formed the basis for the underlying case that was dismissed because of the Warsaw Convention’s two-year statute of limitations, the jury’s resolution of the disputed issues of fact was not disturbed.²²⁷

222. *Id.* at 330.

223. *Id.*

224. *Id.* (citations omitted).

225. 763 So. 2d 1047 (Fla. 4th Dist. Ct. App. 1999).

226. *Id.* at 1049.

227. *Id.* at 1049–50.

III. EFFECT OF MULTIPLE REPRESENTATIONS

Multiple attorney representation of a client affects an attorney's liability for malpractice. Subsequent representation by another attorney may relieve an attorney of malpractice liability, and referral by an attorney spreads the liability. An attorney is not liable for his omission if subsequent counsel had the opportunity to perform the act and avoid the problem. This issue is examined in *Frazier v. Effman*.²²⁸ Lisa Frazier retained attorney Steven Effman in a medical malpractice action.²²⁹ Effman did not join Florida Patient's Compensation Fund as a defendant.²³⁰ Gary Rotella replaced Effman as Frazier's attorney.²³¹ Although he could have done so during his stewardship of the case, Rotella did not join the Compensation Fund either.²³² Frazier retained a third lawyer who discovered the non-joinder by Frazier and Effman and the expiration of the limitations period to join the Compensation Fund.²³³ Frazier sued both Rotella and Effman for legal malpractice.²³⁴ The appellate court affirmed the trial court's dismissal of the action against Effman with prejudice.²³⁵ "Under the circumstances of this case, where the complaint shows that the defendant lawyer was discharged and new counsel retained long before the claim became barred, a claim of negligence cannot be maintained."²³⁶ The court made no mention of the proceeding against Rotella.

The extent of a referring lawyer's responsibility for the negligence of the trial attorney was resolved in *Norris v. Silver*.²³⁷ The trial attorney and the referring attorney had shared fees on other cases without any written agreement.²³⁸ Under rule 4-1.5 of the *Rules Regulating the Florida Bar*, when fees are divided "each lawyer assumes joint legal responsibility for the representation."²³⁹ Therefore, a division of fees automatically spreads the

228. 501 So. 2d 114 (Fla. 4th Dist. Ct. App. 1987).

229. *Id.* at 115.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Frazier*, 501 So. 2d at 115.

234. *Id.*

235. *Id.*

236. *Id.*

237. 701 So. 2d 1238 (Fla. 3d Dist. Ct. App. 1997).

238. *Id.* at 1239.

239. *Id.* at 1240 (citing R. Regulating Fla. Bar 4-1.5(g)(2)).

liability between the two attorneys.²⁴⁰ The plaintiffs were required to “prove an express or implied agreement to divide the fee.”²⁴¹

IV. PLEADING REQUIREMENTS

Proper pleading of an action against an attorney for malpractice requires pleading more than bare legal assertions; however, even such a complaint should not be dismissed where capable of being cured. The naked legal conclusion that an attorney was negligent will not satisfy the pleading requirements for legal malpractice.²⁴² Nevertheless, as with other causes of action, a court will only examine the “four corners of the complaint” to determine if the allegations are sufficient to overcome a motion to dismiss for failure to state a cause of action.²⁴³

A dismissal with prejudice was affirmed in *Bankers Trust Realty, Inc. v. Kluger*.²⁴⁴ This harsh sanction resulted from the failure to “state any of the specifics of the alleged malpractice.”²⁴⁵ The complaint merely stated the “insufficient legal conclusion that the attorneys ‘negligently, carelessly, unskillfully and tardily conducted the . . . action and delayed obtaining a judgment therein.’”²⁴⁶ However, *Breakers of Ft. Lauderdale, Ltd. v. Cassel*²⁴⁷ overturned a trial court ruling dismissing a complaint for legal malpractice with prejudice because the complaint, “while deficient in that it

240. R. Regulating Fla. Bar 4-1.5(g)(2)(A) (2002).

241. *Norris*, 701 So. 2d at 1241.

242. *Rios v. McDermott, Will & Emery*, 613 So. 2d 544, 545 (Fla. 3d Dist. Ct. App. 1993); *Pressley v. Farley*, 579 So. 2d 160 (Fla. 1st Dist. Ct. App. 1991), *cause dismissed*, 583 So. 2d 1036 (Fla. 1991); *Dillard Smith Constr. Co. v. Greene*, 337 So. 2d 841, 843 (Fla. 1st Dist. Ct. App. 1976) (holding that a client’s allegation that attorney had neglected to keep client informed, without more, lacks specificity as well as a causative relationship to client’s alleged loss and is insufficient to state cause of action for legal malpractice).

243. *Bricker v. Kay*, 446 So. 2d 1151, 1152 (Fla. 3d Dist. Ct. App. 1984). *See also* *Baycon Indus. v. Shea*, 714 So. 2d 1094 (Fla. 2d Dist. Ct. App. 1998); *Thompson v. Martin*, 530 So. 2d 495 (Fla. 2d Dist. Ct. App. 1988) (a complaint need only indicate that a cause of action exists and need not anticipate affirmative defenses).

244. 672 So. 2d 897 (Fla. 3d Dist. Ct. App. 1996). *See also* *Conley v. Shutts & Bowen, P.A.*, 616 So. 2d 523 (Fla. 3d Dist. Ct. App. 1993) (amended complaint did not allege sufficient facts to state a cause of action, dismissal with prejudice affirmed).

245. *Bankers Trust Realty, Inc.*, 672 So. 2d at 898.

246. *Id.*

247. 528 So. 2d 985 (Fla. 3d Dist. Ct. App. 1988).

failed to establish conclusively when appellant actually knew that its attorney's conduct constituted malpractice, was not beyond cure."²⁴⁸

V. VENUE

In general, the venue for a negligence suit is where the plaintiff suffers his or her injuries.²⁴⁹ In legal malpractice suits, this rule is not always easily applied.²⁵⁰ In *Tucker v. Fianson*,²⁵¹ the attorney being sued practiced and resided in Broward County, Florida.²⁵² The malpractice complaint alleged that the attorney had rendered negligent advice regarding a condominium conversion in Dade County, Florida, and the client chose to sue in Dade County, Florida.²⁵³ The trial court denied the attorney's motion to transfer the case to Broward County.²⁵⁴ In affirming the trial court's ruling, the Third District Court of Appeal relied upon section 47.011 of the *Florida Statutes*,²⁵⁵ and the court adopted the rule that "for venue purposes, a tort claim is deemed to have accrued where the last event necessary to make the defendant liable for the tort took place."²⁵⁶ The court graphically described its ruling by invoking a bow and arrow theme.²⁵⁷ "In sum, it is claimed that, while lawyer Tucker negligently shot his arrow into the air of Broward County, it did no harm and had no effect until it fell to earth in Dade. It is therefore here that he must answer for his asserted error."²⁵⁸

The bow and arrow analogy was also attempted in *Roberts v. Cason*,²⁵⁹ where one concurring justice could not tell from the record whether "the arrow shot into the air in Orange County fell to earth in Orange or Lake County."²⁶⁰ In the same case, the dissenting judge suggested that the arrow

248. *Id.* at 986. See also *Parker v. Gordon*, 442 So. 2d 273 (Fla. 4th Dist. Ct. App. 1983) (amended complaint explicit on facts but obscure as to causes of action dismissed); *Kartikes v. Demos*, 214 So. 2d 86 (Fla. 3d Dist. Ct. App. 1968) (dismissing case without leave to amend reversed).

249. *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743, 745 (Fla. 1967).

250. The lack of a transcript of the motion to transfer venue hearing prevented review in *McFadden v. Wolfman & Greenfield, P.A.*, 616 So. 2d 500 (Fla. 5th Dist. Ct. App. 1993).

251. 484 So. 2d 1370 (Fla. 3d Dist. Ct. App. 1986).

252. *Id.* at 1371.

253. *Id.*

254. *Id.*

255. FLA. STAT. § 47.011 (2001).

256. *Tucker*, 484 So. 2d at 1371.

257. *Id.* at 1372.

258. *Id.*

259. 652 So. 2d 439 (Fla. 5th Dist. Ct. App. 1995).

260. *Id.* at 440-41 (Harris, C.J., concurring specially).

“did not land (*i.e.*, accrue) any place at all based upon the plaintiffs’ amended complaint, which is woefully inadequate.”²⁶¹ The underlying facts in *Roberts* indicate that a real estate closing involving property located in Lake County was held in Orange County.²⁶² The plaintiff filed suit in Orange County against attorneys having a place of business only in Lake County.²⁶³ The *Roberts* court, relying upon *Tucker*, held that venue was properly placed in Orange County because that is where the allegedly negligent closing took place.²⁶⁴

The allegedly injured client in *Weiner v. Prudential Mortgage Investors, Inc.*²⁶⁵ brought suit in Dade County, Florida against its attorneys who lived and practiced in Marion County, notwithstanding a claim that a foreclosure suit had not been brought in Alachua County as instructed.²⁶⁶ The aggrieved client attempted to construct a claim based upon false communications in Dade County.²⁶⁷ The court deemed the attempt “chimerical,” and it was disregarded for venue purposes.²⁶⁸

The dates of service of process, of filing for legal malpractice, and of filing an action for fees were critical in *Hollywood Lakes Country Club, Inc. v. Silver & Waldman, P.A.*²⁶⁹ The law firm of Silver and Waldman, P.A., was served with a suit for malpractice in Broward County, Florida, on October 27, 1998.²⁷⁰ At the time of service, Hollywood Lakes Country Club was not a plaintiff in the Broward County proceeding.²⁷¹ In Miami-Dade County, Florida, on October 29, 1998, Silver and Waldman filed suit to recover attorneys’ fees against Hollywood Lakes.²⁷² Hollywood Lakes was added as a party plaintiff in the Broward proceeding on November 25, 1998.²⁷³ On November 19, 1998, six days prior to becoming a party plaintiff in the Broward action, Hollywood Lakes sought to have the Miami-Dade

261. *Id.* at 442 (Cobb, J., dissenting).

262. *Id.* at 440.

263. *Id.*

264. *Roberts*, 652 So. 2d at 442. *See also* *Williams v. Goldsmith*, 619 So. 2d 330 (Fla. 3d Dist. Ct. App. 1993) (holding legal malpractice claim and other claims properly venued where last event necessary to make the defendant liable for the tort took place).

265. 557 So. 2d 912 (Fla. 3d Dist. Ct. App. 1990).

266. *Id.* at 913.

267. *Id.* at 913 n.1.

268. *Id.*

269. 737 So. 2d 1194 (Fla. 3d Dist. Ct. App. 1999).

270. *Id.* at 1194–95.

271. *Id.*

272. *Id.* at 1195.

273. *Id.*

case transferred to Broward County.²⁷⁴ The trial court denied the motion.²⁷⁵ The appellate court relied upon rule 1.170(a) of the *Florida Rules of Civil Procedure*, and it held that the Miami-Dade case was a compulsory counterclaim.²⁷⁶ Since the plaintiffs perfected service of process over Silver and Waldman in the Broward County case before the Miami-Dade action was filed, the appellate court remanded the case with instructions to transfer the Miami-Dade action to Broward County.

Venue was proper in two different counties in *Ivey v. Padgett*.²⁷⁷ The legal malpractice claim was filed both as a contract action, for which venue would be where the alleged breach occurred, and in tort, for which venue would be where the act (or omission) occurred.²⁷⁸ The alleged malpractice was for failure to timely file a medical malpractice case against a Volusia County doctor.²⁷⁹ The attorney resided in Putnam County.²⁸⁰ The court found that venue was proper in Volusia County because that is where the lawsuit was to be filed.²⁸¹ The county in which the defendants resided was also proper from a venue perspective.²⁸² Since the plaintiff's choice of venue is generally favored, the case proceeded where the plaintiff filed suit, in Volusia County.²⁸³

VI. JURISDICTION

Legal services are often provided to Florida citizens by non-resident law firms. In Florida, in order to sue a non-resident lawyer, two requirements must be met. First, Florida's long arm statute must be applicable.²⁸⁴ Second, minimum contacts must exist in order to satisfy due process requirements.²⁸⁵

274. *Hollywood Lakes Country Club, Inc.*, 737 So. 2d at 1195.

275. *Id.*

276. The court cited to *Johnson v. Allen, Knudsen, DeBoest, Edwards & Rhodes, P.A.*, 621 So. 2d 507 (Fla. 2d Dist. Ct. App. 1993) (holding that a "malpractice action and a fee dispute based upon the same representation invokes the compulsory counterclaim provision of FLA. R. CIV. P. 1.170(a)").

277. 502 So. 2d 22 (Fla. 5th Dist. Ct. App. 1986).

278. *Id.* at 23.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Ivey*, 502 So. 2d at 23.

283. *Id.*

284. FLA. STAT. § 48.193 (2002).

285. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989).

The first consideration is Florida's long arm statute. A retainer agreement spanning several years can satisfy the requirements of Florida's long arm statute. The denial of a law firm's motion to abate for lack of personal jurisdiction was affirmed in *Windels, Marx, Davies & Ives v. Solitron Devices, Inc.*²⁸⁶ The law firm was retained by its client, monthly, over a period of several years.²⁸⁷ The court found that there was "record of substantial activity in Florida,"²⁸⁸ which satisfied section 48.193 of the *Florida Statutes*.

If Florida's long arm statute is satisfied, further analysis is necessary. After satisfying itself that the plaintiff had not established jurisdiction under Florida's long arm statute, the court in *Horowitz v. Laske*²⁸⁹ did not reach the minimum contacts analysis. In that case, the lawyer's "brief and insubstantial"²⁹⁰ contacts with Florida did not amount to engaging in a business venture, and the alleged tortious acts were not committed in Florida.²⁹¹ Since neither section 48.193(1)(a) nor 48.193(1)(b) of the *Florida Statutes* was satisfied, the court found no personal jurisdiction.²⁹²

Establishing jurisdiction under Florida's long arm statute must be accomplished by establishing minimum contacts. In Florida, minimum contacts are not established where an out-of-state law firm delivers a legal opinion for use in Florida. A nonfinal order finding personal jurisdiction over a New York law firm that rendered an opinion regarding a Florida real estate transaction was overturned on appeal in *Fleming & Weiss, P.C. v. First American Title Ins. Co.*²⁹³ "To render a nonresident defendant subject to jurisdiction in a Florida court, the statutory requirements of the long-arm statute and the minimum contacts requirement must be met."²⁹⁴ The New York law firm had delivered its legal opinion in Florida for use by a Florida

286. 510 So. 2d 1177, 1179 (Fla. 4th Dist. Ct. App. 1987).

287. *Id.* at 1177.

288. *Id.* at 1178.

289. 751 So. 2d 82 (Fla. 5th Dist. Ct. App. 1999), *overruled by* *Wendt v. Horowitz*, 822 So. 2d 1252 (Fla. 2002).

290. *Id.* at 85.

291. *Id.* at 86.

292. *Id.* See *Hill v. Sidly & Austin*, 762 F. Supp. 931, 935 (S.D. Fla. 1991) (noting long arm jurisdiction requirements were satisfied, but minimum contacts were insufficient in an attorney law firm dispute).

293. 580 So. 2d 646 (Fla. 3d Dist. Ct. App. 1991).

294. *Id.* at 647 (citing *Venetian Salami Co. v. Parthenais*, 554 So. 2d at 499 (Fla. 1989)).

bank in transacting a Florida loan.²⁹⁵ The appellate court found these acts insufficient to establish the required minimum contacts.²⁹⁶

Florida lacked jurisdiction over a Washington law firm in *Foster, Pepper & Riviera v. Hansard*,²⁹⁷ which involved investors in a limited partnership suing a law firm that had prepared a private placement memorandum.²⁹⁸ The court found that the law firm's

[S]ole act of preparing a part of the private placement memorandum, in the absence of any other contacts with Florida or the purchasers of the securities, was insufficient to constitute engaging in business in Florida for purposes of long-arm jurisdiction. Moreover, subjecting Foster[,] Pepper[, and Rivera] to Florida jurisdiction under these circumstances does not satisfy the minimum contacts requirements of due process.²⁹⁹

VII. MALPRACTICE IN CRIMINAL DEFENSE

Legal malpractice proceedings stemming from representation in criminal matters differ from those stemming from other types of legal representation. The case of *Orr v. Black & Furci, P.A.*³⁰⁰ is a good example. *Orr* holds that “[w]hile proximate causation ordinarily is a factual issue, in certain cases proximate cause may be determined as a matter of law, based on fairness and considerations of public policy.”³⁰¹ The issue in *Orr* was whether Florida courts would adopt the majority rule that a criminal defendant's guilty plea foreseeably and substantially caused the injury from a conviction.³⁰² The court adopted the majority rule and held that “when criminal defendants plead guilty to a crime, as malpractice plaintiffs they must prove their innocence in order to maintain a cause of action against their attorney.”³⁰³ Since the plaintiff in *Orr* pled guilty, the court ruled that the motion for summary judgment against the client on the professional malpractice claim was correctly granted.³⁰⁴

295. *Id.*

296. *Id.* at 648.

297. 611 So. 2d 581 (Fla. 1st Dist. Ct. App. 1992).

298. *Id.*

299. *Id.* at 582.

300. 876 F. Supp. 1270 (M.D. Fla. 1995).

301. *Id.* at 1276 (citation omitted).

302. *Id.*

303. *Id.*

304. *Id.* at 1278.

In addition to proximate cause being determined as a matter of law in some criminal cases, and criminal defendants being required as malpractice plaintiffs to prove their innocence after pleading guilty, a criminal defendant-malpractice plaintiff has a condition precedent to a malpractice suit. In *Steele v. Kehoe*,³⁰⁵ the Supreme Court of Florida answered the following certified question in the affirmative: “when a convicted defendant alleges that his or her attorney agreed to file a postconviction motion on his or her behalf, but failed to do so in a timely manner. . . must a defendant prevail in having his or her conviction or sentence reduced before filing a legal malpractice action?”³⁰⁶

After reviewing policy arguments from various cases, the court determined “that a convicted criminal defendant must obtain appellate or postconviction relief as a precondition to maintaining a legal malpractice action.”³⁰⁷ However, the statute of limitations for the malpractice action does “not commence until the defendant has obtained final appellate or postconviction relief.”³⁰⁸

In *Rowe v. Schreiber*,³⁰⁹ the Fourth District Court of Appeal followed the *Steele* holding, prior to it being rendered,³¹⁰ in finding that “a defendant must successfully obtain post-conviction relief for the cause of action to accrue in a case involving the legal malpractice of a criminal defense attorney.”³¹¹ *Rowe* goes one step further and requires a plaintiff suing a criminal defense attorney for negligence “to prove by the greater weight of the evidence that he was innocent of the crimes charged in the underlying criminal proceeding.”³¹²

Collateral estoppel is an affirmative defense to malpractice in criminal defense. The Supreme Court of Florida in *Zeidwig v. Ward*³¹³ answered the following rephrased certified question in the negative: “whether identity or mutuality of the parties or their privies is a prerequisite in Florida to the defensive application of the doctrine of collateral estoppel in the criminal-to-

305. 747 So. 2d 931 (Fla. 1999).

306. *Id.* at 932.

307. *Id.* at 933.

308. *Id.* See also *Manley v. Crawford*, 753 So. 2d 792 (Fla. 5th Dist. Ct. App. 2000); *Rosen v. Thomas E. Cazel, P.A.*, 739 So. 2d 1267 (Fla. 4th Dist. Ct. App. 1999).

309. 725 So. 2d 1245 (Fla. 4th Dist. Ct. App. 1999).

310. In so doing, the court followed the district court decision in *Steele v. Kehoe*, 724 So. 2d 1192 (Fla. 5th Dist. Ct. App. 1998).

311. *Rowe*, 725 So. 2d at 1249.

312. *Id.* at 1251.

313. 548 So. 2d 209 (Fla. 1989).

civil context.³¹⁴ The criminal client in *Zeidwig* had unsuccessfully asserted an “ineffective assistance of counsel” argument in the criminal proceeding with regard to certain recorded conversations that he alleged would have exonerated him.³¹⁵ The malpractice case was based upon the use of the same tapes.³¹⁶ The attorney’s argument—that the client was collaterally estopped from proceeding on the same theory that was lost in the criminal proceeding—trumped the client’s argument that the identity of the parties in the two proceedings were not the same, rendering the doctrine inapplicable.³¹⁷

VIII. DEFENSES

Various affirmative defenses have been asserted in malpractice actions against attorneys. *Res judicata* and a variety of estoppel defenses are available. An attorney may also plead the comparative negligence of his client. *In pari delicto* and fraud by the client are additional affirmative defenses to be used where appropriate.

A. Estoppel

Regarding malpractice in a civil case, the affirmative defenses of *res judicata*, collateral estoppel, estoppel based upon taking a position inconsistent with one taken in a prior suit involving the same party, and *estoppel in pais* are all discussed in *Keramati v. Schackow*.³¹⁸ The Keramatis’ child suffered a profound loss of hearing due to the alleged medical malpractice of a doctor who failed to promptly diagnose streptococcus bacteria that caused spinal meningitis.³¹⁹ The Roberts’ child, born at approximately the same time, born at the same hospital, and attended by the partner of the doctor who attended to the Keramatis’ child, was severely retarded based upon the same alleged failure to diagnose.³²⁰ Both families retained Schackow and McGalliard to prosecute medical malpractice actions.³²¹ The attorneys filed separate civil suits, which were assigned to

314. *Id.*

315. *Id.* at 210.

316. *Id.* at 211.

317. *Id.* at 212.

318. 553 So. 2d 741 (Fla. 5th Dist. Ct. App. 1989). *See also* Terminello v. Alman, 710 So. 2d 728 (Fla. 3d Dist. Ct. App. 1998) (holding *res judicata* and collateral estoppel barred second lawsuit against attorney after first case was dismissed with prejudice).

319. *Id.* at 743.

320. *Id.*

321. *Id.*

different judges.³²² The judge overseeing the *Roberts* case granted the defendants a summary judgment on statute of limitation grounds, and the appellate court affirmed on appeal.³²³ The facts giving rise to the *Roberts* decision were equally applicable to *Keramati*. The attorneys reached a settlement on behalf of the Keramatis for \$200,000.³²⁴ The Keramatis, thereafter, filed a legal malpractice suit claiming the settlement was less than the claims were worth because of the statute of limitation problems created by the lawyers' untimely filing of the medical malpractice action.³²⁵ Although the trial court entered a summary judgment in favor of the attorneys on various estoppel theories, the appellate court reversed on appeal.³²⁶

The appellate court first rejected the notion that *res judicata* or collateral estoppel were viable defenses.³²⁷ "Both doctrines require the identity of the parties or their privies to be applicable."³²⁸ An additional reason cited for rejecting the collateral estoppel argument is that the actions and issues in the underlying case and the legal malpractice case were "clearly not the same."³²⁹ "In the medical malpractice case, the adequacy of the amount settled for was not litigated, nor was the adequacy of Schackow's and McGalliards' representation in recommending such a settlement."³³⁰

Also absent was an "equitable basis to apply those cases which hold a party estopped in subsequent litigation to take a position inconsistent with one taken in a prior suit involving the same party."³³¹ The \$200,000 settlement may have been the best obtainable because of the lawyers' negligence. Moreover, because the attorneys would be entitled to a set off for the malpractice settlement, such settlement "appears to benefit them more than to harm them."³³²

Holding that the Keramatis' acceptance of the settlement did not amount to a false representation, the appellate court also rejected the doctrine of *estoppel in pais*. Moreover, such a defense would in any event create a jury issue. Furthermore, *Keramati* is the only reported decision in

322. *Id.*

323. *Roberts v. Casey*, 413 So. 2d 1226, 1227 (Fla. 5th Dist. Ct. App. 1982).

324. *Keramati*, 553 So. 2d at 742.

325. *Id.* at 743.

326. *Id.*

327. *Id.* at 744.

328. *Id.*

329. *Keramati*, 553 So. 2d at 745.

330. *Id.* at 744.

331. *Id.* at 745.

332. *Id.*

Florida to squarely address the issue of whether the acceptance of a settlement precludes suit against the attorney who negotiated such settlement.³³³

Collateral estoppel did not bar a claim for legal malpractice in *Smith v. Perry*,³³⁴ which involved an ex-wife's claim against an attorney who allegedly failed to properly present her loss of consortium claim in a personal injury lawsuit brought by her ex-husband. The lawyer unsuccessfully claimed that the malpractice issues were previously litigated in the divorce action.³³⁵ The court stated that collateral estoppel is applicable:

[W]here a subsequent cause of action between the same parties is upon a different claim or demand from the first cause of action. In such a case, the judgment of the prior action estops the parties from litigating in the second suit issues or questions common to both causes of action which were actually adjudicated in the prior litigation.³³⁶

The court determined that the issues presented in the dissolution action would not overlap the issues in the malpractice proceeding and overturned a contrary trial court summary judgment.³³⁷

Judicial estoppel as a malpractice defense is examined in *Ramsey v. Jonassen*,³³⁸ where the appellate court reversed a summary judgment in favor of the attorney. The attorney argued at the trial court level that the client "had waived her malpractice claim by failing to disclose that claim to the bankruptcy court in a Chapter 11 bankruptcy proceeding she had filed before she filed the malpractice action."³³⁹ After explaining the concept of judicial estoppel at length, the court summed up by stating "judicial estoppel is used to prevent a party from raising a claim that should have been raised in another action, and the failure to raise it was relied upon by a third party to

333. See also *Sauer v. Flanagan & Maniotis, P.A.*, 748 So. 2d 1079, 1082 (Fla. 4th Dist. Ct. App. 2000) (stating that failing to exercise ordinary skill and care in resolving settlement issues did not insulate attorney from liability); *Bolves v. Hullinger*, 629 So. 2d 198, 200 n.2 (Fla. 5th Dist. Ct. App. 1993) (citing *Keramati*, 553 So. 2d at 741).

334. 635 So. 2d 1019 (Fla. 1st Dist. Ct. App. 1994).

335. See also *Torres v. Nelson*, 448 So. 2d 1058, 1060 (Fla. 3d Dist. Ct. App. 1984) (finding that malpractice action for failing to settle within insurance policy limits not barred by prior verdict in favor of insurance company on bad faith claim).

336. *Smith*, 635 So. 2d at 1020 (citations omitted).

337. *Id.* at 1021.

338. 737 So. 2d 1114 (Fla. 2d Dist. Ct. App. 1999).

339. *Id.* at 1115.

his or her detriment.”³⁴⁰ Since the attorney was not involved in the bankruptcy proceeding, he could not avail himself of the judicial estoppel doctrine.³⁴¹

Judicial estoppel was also rejected as a defense to a malpractice claim in *Olmsted v. Emmanuel*.³⁴² The client (Olmsted) claimed that the attorneys (appellees) could not argue in the legal malpractice action that a cause of action under title 42, section 1981 of the *United States Code* would not have been successful since the same attorneys had made a contrary argument in the underlying case.³⁴³ The court describes the law in Florida regarding judicial estoppel as follows:

Olmsted contends, first, that appellees are estopped from “claim[ing] that [his] damages in excess of \$310,000 are now a matter of ‘speculation,’ . . . since they took a contrary position on the matter throughout the proceedings in the Federal Court.” In other words, Olmsted maintains that, because appellees argued throughout the federal litigation that he had a valid claim under section 1981, they should be precluded from taking a contrary position in their defense of this malpractice action. We are unable to agree.

Florida recognizes the equitable doctrine of judicial estoppel, which prevents litigants from taking totally inconsistent positions in separate judicial proceedings to the prejudice of the adverse party. *E.g.*, *Chase & Co. v. Little*, 116 Fla. 667, 156 So. 609, 610 (1934); *Ramsey v. Jonassen*, 737 So.2d 1114 (Fla. 2d DCA 1999); *Dunne v. Somoano*, 550 So.2d 5, 7 (Fla. 3d DCA 1989). However, in order to work an estoppel, the parties must be the same, the same issues must be involved, and the position assumed in the former trial must have been successfully maintained. *Chase*, 156 So. at 610; *Ramsey*, 737 So.2d at 1116. Here, appellees were not parties in the federal litigation, and the issue of whether Olmsted had a claim under section 1981 was never addressed on the merits in the federal litigation. Accordingly, we conclude that appellees are not estopped from arguing that the section 1981 claim would not have been successful. Although there are no Florida cases directly on

340. *Id.* at 1116.

341. *See also* *Berman v. Stern*, 731 So. 2d 148 (Fla. 4th Dist. Ct. App. 1999) (reversing summary judgment in favor of client based upon judicial estoppel due to issues of fact).

342. 783 So. 2d 1122 (Fla. 1st Dist. Ct. App. 2001).

343. *Id.* at 1125.

point, our conclusion is supported by *Shapiro v. Butler*, 273 A.D.2d 657, 709 N.Y.S.2d 687, 690 (App.Div.2000), which held that the doctrine of judicial estoppel did not bar an attorney and law firm from arguing in their former clients' legal malpractice action against them that the former clients would not have prevailed in a federal civil action against the clients for alleged illegal interception and disclosure of telephone conversations where the attorney and law firm had not been parties to the federal action and the attorney's position in that action had not been adopted by the court.³⁴⁴

Judicial estoppel prevented the client from suing his former attorney in *Monyek v. Klein*.³⁴⁵ A law firm and its client embarked upon two real estate acquisitions. After disagreements about the terms of the deal, a lawsuit resulted involving, among other matters, a claim that the law firm and its attorneys had breached their fiduciary duty. The trial judge ruled that the law firm had not breached its fiduciary duty.³⁴⁶ Over one year later, the client sued the law firm for negligence related to the same real estate transactions that were the subject of the previous lawsuit. After stating that "[u]nder the principle of estoppel by judgment, parties are estopped from litigating in a second suit points and questions which were common to both the first and second causes of action and which actually were adjudicated in the prior litigation,"³⁴⁷ the court affirmed the summary judgment in favor of the attorneys.³⁴⁸

B. Comparative Negligence

Although not explicitly stated in the cases which discuss the comparative negligence defense in a legal malpractice proceeding, the analysis appears to turn on whether the client's actions contributed to his damages, in which case the defense is viable, or whether the client is required to second guess his attorney's advice or get a second opinion, in which case the defense is not applicable.

A double comparative negligence situation is involved in *Michael Kovach, P.A. v. Pearce*.³⁴⁹ The underlying proceeding in which legal

344. *Id.* at 1126.

345. 329 So. 2d 25 (Fla. 3d Dist. Ct. App. 1976).

346. *Id.* at 26.

347. *Id.*

348. *Id.*

349. 427 So. 2d 1128 (Fla. 5th Dist. Ct. App. 1983).

malpractice allegedly occurred involved an automobile accident. When Pearce was found to have negligently operated his vehicle, Pearce sued his trial counsel claiming that Todter, the person who had sued Pearce, was at fault in the accident and that Pearce's lawyer (Kovach) failed to properly assert the comparative negligence of Todter.³⁵⁰

Accordingly it was necessary for the jury in the malpractice action to literally "re-try" the *Todter v. Pearce* case to correctly determine Todter's negligence, if any, and Pearce's negligence, if any, causing Todter's injuries and, if both were negligent, to compare their negligence, in order to determine how much of the \$600,000 verdict was properly chargeable to Pearce's negligence in injuring Todter, how much was chargeable to Todter's own negligence, and how much resulted from the alleged negligent failure to properly defend. In the malpractice action, Kovach asserted as a comparative negligence defense that Pearce was contributively negligent in the defense of the Todter action.³⁵¹

Pearce found himself having to prove a "case within a case" in the malpractice action.

The verdict against the attorney was reversed because of an error in the verdict form. Instead of providing the jury with the opportunity to apportion negligence between Pearce and Kovach as to the negligent defense in the injury case, and Todter and Pearce in the injury case, the verdict form only allowed for apportionment of fault between Pearce and Kovach in the malpractice action.³⁵²

Another Florida case in which the comparative negligence defense was used is *Solomon v. Meyer*.³⁵³ In attempting to purchase assets from a bankruptcy trustee, Solomon paid monies directly to the bankruptcy trustee who did not provide the assets to Solomon. Solomon's lawsuit against the trustee was unsuccessful. The federal court held that Solomon's own negligence caused his loss.³⁵⁴ In the malpractice action, the appellate court could not affirm summary judgment in favor of the attorneys because Solomon had alleged that his attorneys' advice had caused Solomon's negligence, and genuine issues of material fact existed as to whether the

350. *Id.* at 1129.

351. *Id.*

352. *Id.*

353. 116 So. 2d 37 (Fla. 3d Dist. Ct. App. 1959).

354. *Id.* at 38.

damages were caused by advice provided by the attorneys or the acts of the bankruptcy trustee.³⁵⁵

The Fourth District Court of Appeal ignored both *Kovach* and *Solomon* in *Tarleton v. Arnstein & Lehr*,³⁵⁶ when it boldly stated “[a] client cannot be found to be comparatively negligent for relying on an attorney’s erroneous legal advice or for failing to correct errors of the attorney which involve the exercise of professional expertise.”³⁵⁷ Thus, the appellate court found that the trial court erred in failing to issue a directed verdict in favor of the client on the issue of comparative negligence. The law firm had argued that the client was sophisticated in matters of business and should have seen the error of her attorney’s actions in advising her to sign a settlement agreement that served to waive a cause of action regarding certain promissory notes. “Simply because she was somewhat sophisticated in business matters does not impose upon her the burden to second guess her attorney’s advice or to hire a second attorney to see if such advice was proper.”³⁵⁸

C. In Pari Delicto and Fraud

In *Turner v. Anderson*,³⁵⁹ which was a case of first impression in Florida, the Fourth District labored to answer “[t]he question of whether a client who does an illegal act on advice of counsel can sue counsel for damages resulting therefrom.”³⁶⁰ After examining cases from other jurisdictions, the court held that “no public policy should allow appellant to recover damages as a result of engaging in criminal conduct such as occurred in this case.”³⁶¹ The court considered the appellant’s sophisticated background and his deposition testimony in which he admitted committing perjury with full knowledge of his conduct. What the court did not decide is more telling. “We need not decide whether the doctrine of *in pari delicto* is a bar where the client’s misconduct is far less in degree than counsel’s . . . nor need we decide whether the client can recover fees paid to counsel, because this is not part of appellant’s claim.”³⁶²

355. *Id.* at 38–39.

356. 719 So. 2d 325 (Fla. 4th Dist. Ct. App. 1998).

357. *Id.* at 331 (citations to Oregon and California cases omitted).

358. *Id.*

359. 704 So. 2d 748 (Fla. 4th Dist. Ct. App. 1998).

360. *Id.* at 750.

361. *Id.* at 751.

362. *Id.*

False and inconsistent information provided during discovery resulted in a legal malpractice case being dismissed with prejudice in *Cox v. Burke*.³⁶³ The former client sued her attorneys after being informed the day after the statute of limitations had expired that they were not going to handle her medical malpractice case.³⁶⁴ During the course of the malpractice litigation, and after a year of discovery, the defendant attorneys were able to prove that the former client had misled them about her identity, driver's license history, social security numbers, and prior injuries.³⁶⁵ The court found that a clear showing of "false or misleading answers in sworn discovery that either appear calculated to evade or stymie discovery on issues central to her case"³⁶⁶ justified dismissal. It is interesting to note that the appellate court deferred to the trial court's "discretion to fashion the apt remedy"³⁶⁷ but suggested that it "might have imposed a lesser sanction."³⁶⁸

D. *Statute of Limitations*

1. Background

A lawsuit against an attorney for professional malpractice, with whom the client has privity,³⁶⁹ must be commenced within two years from the time the cause of action is discovered or should have been discovered with the exercise of due diligence.³⁷⁰ The applicable statute reads as follows:

Actions other than for recovery of real property shall be commenced as follows:

* * *

(4) WITHIN TWO YEARS –

363. 706 So. 2d 43 (Fla. 5th Dist. Ct. App. 1998).

364. *Id.* at 44.

365. *Id.*

366. *Id.* at 47.

367. *Id.*

368. *Cox*, 706 So. 2d at 47.

369. *Hickey v. Dunn & Corey*, 761 So. 2d 1245 (Fla. 3d Dist. Ct. App. 2000) (holding that since a member of a pre-paid legal services plan was not in privity with attorney, four-year rather than two-year statute of limitations applied).

370. FLA. STAT. § 95.11(4) (2001); *Abbott v. Friedsam*, 682 So. 2d 597 (Fla. 2d Dist. Ct. App. 1996) (reversing summary judgment because affidavits did not conclusively show when plaintiffs knew or should have known that they had a cause of action to trigger the running of the statute of limitations).

- (a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.³⁷¹

The difficult question is when the two-year period begins.³⁷² In *Peat, Marwick, Mitchell & Co. v. Lane*,³⁷³ the Supreme Court of Florida analogized the accrual of a cause of action for legal malpractice to the accrual of a cause of action against accountants.³⁷⁴ “A clear majority of the district courts have expressly held that a cause of action for legal malpractice does not accrue until the underlying legal proceeding has been completed on appellate review because, until that time, one cannot determine if there was any actionable error by the attorney.”³⁷⁵ The court wanted to avoid the quandary that would require a party to file a malpractice proceeding against a professional claiming negligence while taking a totally inconsistent position during an appeal by alleging that the attorney was correct and a lower court’s ruling was incorrect. The *Peat* case holds that the cause of action does not begin to accrue until the injured party knew or should have known of the “redressable harm or injury.”³⁷⁶ When the client knew or should have known of the attorney’s negligence is a question of fact not ordinarily capable of determination on summary judgment.³⁷⁷ However, if a client incurs the expense of having to defend a lawsuit that should have been settled, except for the attorney’s malpractice, the accrual of the cause of action begins at that time, not, as urged by the client in *Breakers of Fort*

371. § 95.11–.11(4)(a).

372. *Rosa v. Roth*, 442 So. 2d 323 (Fla. 3d Dist. Ct. App. 1983) (reversing summary judgment in favor of attorney because issue of fact existed as to when client should have discovered malpractice).

373. 565 So. 2d 1323 (Fla. 1990).

374. *Id.* at 1325.

375. *Id.*; see also *Ramsey v. Jonassen*, 737 So. 2d 1114, 1115 (Fla. 2d Dist. Ct. App. 1999).

376. *Lane*, 565 So. 2d at 1325.

377. *Freel v. Fleming*, 489 So. 2d 1209 (Fla. 1st Dist. Ct. App. 1986) (holding that affidavit provided by client in trying to set aside a default judgment did not establish client knew a cause of action had accrued against lawyer who allowed default to be entered); *Green v. Bartel*, 365 So. 2d 785 (Fla. 3d Dist. Ct. App. 1978) (holding that when client discovered wrongful act is a question of fact).

Lauderdale, Ltd. v. Cassel,³⁷⁸ when damages were paid to the claimant on the lawsuit that should have been settled.

The earlier case of *Sawyer v. Earle*³⁷⁹ was disapproved to the extent it conflicted with *Peat*. In *Sawyer*, the Second District Court of Appeal held that the statute of limitations had been tolled notwithstanding that the claimant was unable to “determine his exact amount or full extent of damages”³⁸⁰ at the time the statute would have expired. The difference between the two cases turns on the fact that in *Peat* the client maintained that its legal position was correct until after the United States Tax Court had ruled against such position, while in *Sawyer*, the client believed his representation to be improper when he discharged his first lawyer, which was well within the two-year period.

The clients in *Spivey v. Trader*³⁸¹ retained an attorney who advised them that transferring certain assets owned as tenants by the entireties to a corporation would not place such assets at risk in a pending personal injury action.³⁸² A judgment was rendered in supplemental proceedings to the personal injury action finding such assets subject to attachment contrary to the attorney’s advice.³⁸³ The *Spivey* court, relying upon *Peat*, held that the two-year countdown began when the judgment on the supplemental proceedings was rendered, not when the client suspected that the attorney’s advice was wrong. This was because the client had “vigorously contested the fact that the real estate, or his interest therein, was subject to attachment in the personal injury action filed against him personally.”³⁸⁴

Since 1989, the Florida courts have been attempting to refine a rule of accrual applicable to transactional and litigational malpractice.

2. Transactional Malpractice

In the area of transactional malpractice, *Peat* was further analyzed in *Throneburg v. Boose, Casey, Ciklin, Lubitz, Martens, McBane & O’Connell*,

378. 528 So. 2d 985 (Fla. 3d Dist. Ct. App. 1988), *overruled in part by* *Freemont Indemnity Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A.*, 796 So. 2d 504 (Fla. 2001).

379. 541 So. 2d 1232 (Fla. 2d Dist. Ct. App. 1989).

380. *Id.* at 1234.

381. 620 So. 2d 212 (Fla. 4th Dist. Ct. App. 1993).

382. *Id.* at 213.

383. *Id.*

384. *Id.* at 215.

P.A.,³⁸⁵ in which a dismissal based upon the statute of limitations having expired was reversed. The *Throneburg* court stated:

We understand *Peat Marwick* to draw a distinction between knowledge of actual harm from legal malpractice and knowledge of potential harm. The former begins the limitations period; the latter does not. Legal services, like accounting services, are often subject to differing views among practitioners. Lawyers often disagree with one another on the same transaction. It seems clear to us that *Peat Marwick*, properly understood, means that the limitations period on claims of legal malpractice should not commence until it is reasonably clear that the client has actually suffered some damage from legal advice or services.³⁸⁶

Based upon the court's view of *Peat*, the filing of the lawsuit against the attorney in *Throneburg* more than two years after the real estate document in question was prepared, but less than two years after a decision holding the document to be invalid, was deemed to have been timely filed.

The preparation of a Florida postnuptial agreement was deemed transactional in *Robbat v. Gordon*.³⁸⁷ After reviewing *Peat* and *Throneberg*, the court stated:

Read together, *Peat, Marwick and Throneberg* stand for the proposition that knowledge of an adverse decision by a lower tribunal is not sufficient to start the running of the statute of limitations in a transactional malpractice claim where the client chooses to defend the actions of the defendant on appeal, since to require the client to pursue the malpractice claim while at the same time defending the professional's actions on appeal would place the client "in the wholly untenable position of having to take directly contrary positions in [the] two actions."³⁸⁸

It was not until after the litigation involving the postnuptial agreement was resolved that the statute of limitations began to run against the attorney who provided advice regarding the post-nuptial.

385. 659 So. 2d 1134 (Fla. 4th Dist. Ct. App. 1995).

386. *Id.* at 1136 (emphasis added).

387. 771 So. 2d 631 (Fla. 4th Dist. Ct. App. 2000).

388. *Robbat*, 771 So. 2d at 636-37.

3. Litigational Malpractice

The process of refining the accrual rule has been fraught with difficulty. A practical review of the difficulty in determining when the statute of limitations begins to run is set forth in the dissenting opinion in *Silvestrone v. Edell*.³⁸⁹ “Unfortunately, in practice it is unclear in Florida case law exactly when the statute of limitations begins to run in attorney malpractice cases.”³⁹⁰ The majority opinion in the Fifth District’s decision in *Silvestrone* found that the statute begins to run before a final judgment is rendered.³⁹¹ Due to various post trial motions, including the amount of attorney’s fees owed to the attorney for the prevailing party who later sued the attorney, approximately two years expired between the return of the jury verdict in the underlying federal antitrust action and the final judgment.³⁹² The case turned on the fact that the client had instructed his attorney not to appeal the jury verdict, to request a new trial, or to seek additur.³⁹³ Thus, the court found that the client “had all the information necessary to establish his cause of action”³⁹⁴ when the jury returned its verdict. An alternative argument that the cause of action should be tolled under the continuing representation doctrine was not considered because it was not presented below, although the court found that the argument had some “appeal.”³⁹⁵

In contrast to *Silvestrone*, the statute of limitations did not commence until the day after the court rendered final judgment in *Zakak v. Broida and Napier, P.A.*³⁹⁶ The court ordered the Zakaks to perform according to the settlement made by their attorney despite the Zakaks’ protest that the attorney was not authorized to enter into such settlement.³⁹⁷ When they refused to pay, the court ordered settlement and entered a final judgment against them.³⁹⁸ The Zakaks initiated a legal malpractice suit within two

389. 701 So. 2d 90 (Fla. 5th Dist. Ct. App. 1997), *vacated by* 721 So. 2d 1173 (Fla. 1998).

390. *Id.* at 94.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Silvestrone*, 701 So. 2d at 91. *See also* *Eldred v. Reber*, 639 So. 2d 1086 (Fla. 5th Dist. Ct. App. 1994) (holding statute of limitations began to run when opinion, not mandate, was issued by appellate court).

395. *Id.* at 91–92; *see infra* the section on Resurrecting, Delaying & Tolling the Statute of Limitations for a discussion of that doctrine.

396. 545 So. 2d 380 (Fla. 2d Dist. Ct. App. 1989).

397. *Id.* at 381.

398. *Id.*

years of the judgment, but more than two years after the order enforcing the settlement.³⁹⁹

In recognition of the conflict with *Zakak*, the Supreme Court of Florida accepted *Silvestrone v. Edell*⁴⁰⁰ for review “on the issue of whether the two-year statute of limitations for legal malpractice, in a litigation context, begins to run when the verdict is rendered or when final judgment is entered.”⁴⁰¹ In *Silvestrone*, the Supreme Court of Florida attempted to create a “bright line rule”⁴⁰² in order to “provide certainty and reduce litigation over when the statute starts to run.”⁴⁰³ Since the law was “not clear as to when the limitations period for legal malpractice, in a litigation-related context, begins to run.”⁴⁰⁴

The Supreme Court of Florida held in *Silvestrone* that there is a “bright line” rule that requires commencement of a cause of action for litigation legal malpractice within two years of the final conclusion of the underlying litigation.⁴⁰⁵ The court held that the statute of limitations begins to run when the final judgment becomes final.⁴⁰⁶ The Supreme Court of Florida did not address the knowledge of harm as required by the statute. A review of the facts from the Fifth District’s opinion indicates “[t]here is no question that Mr. Silvestrone knew about the alleged malpractice when the jury returned an unsatisfactory verdict.”⁴⁰⁷ Thus, the client knew about the malpractice at the time judgment became final. In footnote two of the *Silvestrone* decision, the court distinguished *Birnholtz v. Blake*⁴⁰⁸ because it involved transactional malpractice.

Unlike the client in *Silvestrone*, the client in *Pinkerton v. West*⁴⁰⁹ first learned of her attorney’s misadvice more than two years later from a

399. *Id.*

400. 721 So. 2d 1173 (Fla. 1998).

401. *Id.* at 1174.

402. *Id.* at 1176.

403. *Id.*

404. *Id.* at 1175.

405. *Silvestrone*, 721 So. 2d at 1175–76.

406. *See* Slapikas v. Llorente, 766 So. 2d 440, 441 (Fla. 4th Dist. Ct. App. 2000) (applying *Silvestrone* to determine if attorney’s fees were properly awarded); Gaines v. Russo, 723 So. 2d 398 (Fla. 3d Dist. Ct. App. 1999) (reversing a dismissal in reliance upon *Silvestrone*); Hold v. Manzini, 736 So. 2d 138 (Fla. 3d Dist. Ct. App. 1999) (holding redressable harm cannot be established until an adverse final judgment has been rendered against the client).

407. *Silvestrone*, 701 So. 2d at 91.

408. 399 So. 2d 375 (Fla. 3d Dist. Ct. App. 1981).

409. 353 So. 2d 102 (Fla. 4th Dist. Ct. App. 1977).

California attorney.⁴¹⁰ The attorney successfully argued before the trial court that the statute of limitations had expired because the former client had read an article contrary to the Florida lawyer's advice and wrote letters to the attorney questioning his conduct more than two years before suit was filed.⁴¹¹ In reversing the trial court's summary judgment in favor of the attorney, *Schetter v. Jordan*,⁴¹² was cited for the following proposition:

The applicability of the statute of limitations to the plaintiffs' cause of action for malpractice against the attorney-defendant is dependent upon when the attorney's alleged act of negligence became known to the client which matter is a question of fact to be determined by the trier of fact and not by the court in a summary proceeding.⁴¹³

Unlike a literal reading of the Supreme Court of Florida's decision in *Silvestrone*, which ignores the statutory requirement of knowledge by the client that the attorney committed malpractice, the *Schetter* approach is consistent with the requirements of the statute.⁴¹⁴

The Third District Court of Appeal, in *Watkins v. Gilbride Heller & Brown, P.A.*,⁴¹⁵ overturned the trial court's ruling that the statute of limitations commenced after the district court of appeal's ruling was final, rather than after any attempt to seek supreme court review was final. "[A] final judgment is not final until a timely filed appeal to, or petition for review by, the supreme court is resolved."⁴¹⁶ However, due to the "recent nature of *Silvestrone* and the rapid dispute over the bright line rule"⁴¹⁷ the following question was certified to the Supreme Court of Florida:

WHERE REVIEW OF A DISTRICT COURT DECISION IN AN ACTION UNDERLYING A LEGAL MALPRACTICE CLAIM IS SOUGHT IN THE FLORIDA SUPREME COURT, DOES THE TWO-YEAR STATUTE OF LIMITATIONS PERIOD OF SECTION 95.11(4)(A), FLORIDA STATUTES, BEGIN TO RUN FROM THE DATE THE DECISION BECOMES FINAL BY

410. *Id.*

411. *Id.* at 103.

412. 294 So. 2d 130 (Fla. 4th Dist. Ct. App. 1974).

413. *Id.* at 131.

414. *Id.*

415. 754 So. 2d 759 (Fla. 3d Dist. Ct. App. 2000).

416. *Id.* at 762.

417. *Id.* at 763.

THE SUPREME COURT'S RESOLUTION OF THAT REVIEW,
OR DOES THE PERIOD RUN FROM THE DATE OF THE
DISTRICT COURT'S MANDATE?⁴¹⁸

Judge Sorondo's concurring opinion in *Watkins* emphasizes the importance of exercising caution in applying the statute of limitations defense:

The statute of limitations is an onerous defense which should be limited in its application to those cases where its applicability is unavoidable. See *Pezzi v. Brown*, 697 So. 2d 883, 886 (Fla. 4th DCA 1997) ("statutes restricting access to the courts must be narrowly construed in a manner favoring access."); *Angrand v. Fox*, 552 So. 2d 1113, 1116 (Fla. 3d DCA 1989) ("it is well established that a limitations defense is not favored, . . . and that therefore any substantial doubt on the question should be resolved by choosing the longer rather than the shorter possible statutory period."). This Court has historically emphasized that "Florida policy dictates a strong preference that cases be decided on their merits." *City of Miami v. Rivas*, 723 So. 2d 393, 393 (Fla. 3d DCA 1999); *Venero v. Balbuena*, 652 So. 2d 1271 (Fla. 3d DCA 1995); *Cinkat Transp., Inc. v. Maryland Cas. Co.*, 596 So. 2d 746 (Fla. 3d DCA 1992). Where courts have discretion in determining the applicability of a statute of limitations, such discretion should be exercised in favor of affording the Florida Constitution's guarantee of access to courts contained within Article I, Section 21.⁴¹⁹

The Supreme Court of Florida accepted review of *Watkins*,⁴²⁰ approved the Third District Court of Appeal's ruling, and held "the statute of limitations begins to run from the date the decision becomes final by this Court's resolution of the case."⁴²¹

A transactional malpractice case that resulted in the client's litigation with a third party ultimately puts the accrual of the cause of action, the running of the statute of limitations, and five of the cases on the issues into perspective. *Taracido v. Perez-Abreu, Zamora & De La Fe, P.A.*,⁴²² involved an allegedly improperly prepared contract for sale of corporate

418. *Id.*

419. *Id.* (Sorondo, J., concurring).

420. *Watkins*, 783 So. 2d at 225.

421. *Id.*

422. 705 So. 2d 41 (Fla. 3d Dist. Ct. App. 1997).

stock that later became the subject of litigation.⁴²³ The client filed the malpractice suit within two years of the settlement of the litigation with the third party.⁴²⁴ In reversing a summary judgment in favor of the attorneys, the court stated:

The existence of legal malpractice is often difficult to ascertain. A client should not be placed in the position of having to file a potentially baseless claim prematurely fearing that otherwise an action will be precluded by the statute of limitations. Thus we hold that a cause of action for legal malpractice based upon a prior transaction accrues at the conclusion of subsequent litigation between the client and a third party.⁴²⁵

Taracido was accepted for review by the Supreme Court of Florida due to conflict with *Edwards v. Ford*,⁴²⁶ although *Peat, Marwick, Mitchell & Co. v. Lane*⁴²⁷ found *Edwards* to be “clearly distinguishable.”⁴²⁸ In *Edwards*, the law firm had drafted a contract for its clients and a third party that was later asserted by the third party to be usurious.⁴²⁹ The drafter allegedly agreed on behalf of the law firm, sometime during 1963, to undertake corrective measures without charge.⁴³⁰ The client filed the malpractice suit in 1968, in response to a suit by the law firm, to recover its unpaid attorneys fees.⁴³¹ The client was unsuccessful as a result of the court’s holding that the statute of limitations had expired.⁴³² The *Edwards* court quoted at length from the case of *Downing v. Vaine*,⁴³³ in holding that “the event which triggers the running of the statute of limitations is notice to or knowledge by the injured party that a cause of action has accrued in his favor, and not the date on which the negligent act which caused the damages was actually committed.”⁴³⁴ The damages incurred in *Edwards* were only minimal at the time their cause of action accrued.⁴³⁵

423. *Id.* at 42.

424. *Id.*

425. *Id.* at 43 (citations omitted).

426. 279 So. 2d 851 (Fla. 1973).

427. 565 So. 2d 1323 (Fla. 1990).

428. *Id.* at 1327.

429. *Edwards*, 279 So. 2d at 851.

430. *Id.*

431. *Id.* at 852.

432. *Id.*

433. 228 So. 2d 622 (Fla. 1st Dist. Ct. App. 1969).

434. *Edwards*, 279 So. 2d at 853; see *Zakak v. Broida & Napier, P.A.*, 545 So. 2d 380 (Fla. 2d Dist. Ct. App. 1989); *Diaz v. Piquette*, 496 So. 2d 239, 240 (Fla. 3d Dist. Ct. App.

The Supreme Court of Florida in *Perez-Abreu, Zamora & De La Fe, P.A. v. Taracido*⁴³⁶ approved the Third District Court of Appeal's decision and receded from *Edwards*.⁴³⁷

Consistent with *Peat, Marwick*, we hold that, in the circumstances presented here, a negligence/malpractice cause of action accrues when the client incurs damages at the conclusion of the related or underlying judicial proceedings or, if there are no related or underlying judicial proceedings, when the client's right to sue in the related or underlying proceeding expires. If a negligence/malpractice action is filed prior to the time that a client's right to sue in the related or underlying judicial proceeding has expired, or if a negligence/malpractice action is filed during the time that a related or underlying judicial proceeding is ongoing, then the defense can move for an abatement or stay of the claim on the ground that the negligence/malpractice action has not yet accrued. The moving party will have the burden of demonstrating that the related or underlying judicial proceeding will determine whether damages were incurred which are causally related to the alleged negligence/malpractice. The determination of this will be for the trial court. Similarly, if a party raises an affirmative defense that a negligence/malpractice action has expired, the party bringing the action may file a reply asserting the avoidance of the statute of limitations due to a related or underlying judicial proceeding.⁴³⁸

The court in *Taracido* held that "even though the related or underlying judicial proceeding was not complete until 1967, the cause of action accrued in 1963, and therefore the statute of limitations began to run at that time."⁴³⁹ The Supreme Court of Florida tied together the previous three most significant cases dealing with the statute of limitations by stating, "[m]oreover, this Court's decisions in *Peat, Marwick, Mitchell & Co. v. Lane, Silvestrone v. Edell*, and *Blumberg* were intended to: (1) provide certainty and reduce litigation over when the statute starts to run and (2)

1986); *Richards Enter., Inc. v. Swofford*, 495 So. 2d 1210, 1212 (Fla. 5th Dist. Ct. App. 1986), *cause dismissed*, 515 So. 2d 231 (Fla. 1987).

435. *Edwards*, 279 So. 2d at 853.

436. 790 So. 2d 1051 (Fla. 2001).

437. *Id.*

438. *Id.* at 1054 (citing *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1065 (Fla. 2001)).

439. *Taracido*, 790 So. 2d at 1054.

prevent clients from having to take directly contrary positions in the two actions.”⁴⁴⁰

4. Resurrecting, Delaying, & Tolling the Statute of Limitations

The appellate courts have disagreed as to whether an otherwise time-barred action for legal malpractice may be resurrected as a counterclaim to an action by the attorney against the former client to collect attorneys fees. The First District Court of Appeal allowed affirmative relief against the attorney in the guise of recoupment in *Cherney v. Moody*.⁴⁴¹ However, in non-legal malpractice cases, two other decisions only allow recoupment to be used defensively as a set off rather than offensively as a counter claim.⁴⁴²

An attorney who misleads his client as to his ability to cure a known problem may also extend the time period in which a lawsuit may be brought. In *Burnside v. McCrary*,⁴⁴³ the attorney reassured the client that the attorney could cure the dismissal of the client’s cause of action by filing motions.⁴⁴⁴ The court found that the claim of the attorney’s reassurances was sufficient to create an issue of material fact as to whether the malpractice action had yet accrued.⁴⁴⁵ No such question as to the accrual of the cause of action was evident in *Howard v. Minnesota Muskies, Inc.*⁴⁴⁶ Several years before he filed the malpractice suit, the client learned that a judgment had been entered against him allegedly because of his attorney’s withdrawal from the case without the client’s knowledge or consent.⁴⁴⁷ The appellate court affirmed the summary judgment in favor of the attorney.⁴⁴⁸

In a legal malpractice case, the statute of limitations does not commence until after the attorney no longer represents the aggrieved client. In *Wilder v. Meyer*,⁴⁴⁹ the court explained Florida’s continuing representation doctrine:

440. *Id.* (internal citations omitted).

441. 413 So. 2d 866, 869 (Fla. 1st Dist. Ct. App. 1982).

442. *Allie v. Ionata*, 503 So. 2d 1237, 1242 (Fla. 1987) (stating no affirmative right of recovery, whether by recoupment or setoff, once it is barred by statute of limitations); *Horace Mann Ins. Co. v. DeMirza*, 312 So. 2d 501 (Fla. 3d Dist. Ct. App. 1975).

443. 382 So. 2d 75 (Fla. 3d Dist. Ct. App. 1980).

444. *Id.*

445. *Id.* at 76; *accord Smith v. Hussey*, 363 So. 2d 1138 (Fla. 2d Dist. Ct. App. 1978).

446. 420 So. 2d 652 (Fla. 3d Dist. Ct. App. 1982).

447. *Id.* at 653.

448. *Id.*

449. 779 F. Supp. 164 (S.D. Fla. 1991).

The Plaintiff's negligence and breach of fiduciary duty claims are governed by a two-year statute of limitations applicable to professional malpractice claims. This two-year statute of limitations begins to run from the date the cause of action is discovered or should have been discovered with the exercise of due diligence.

However, this two-year statute of limitations is subject to the continuing representation doctrine. The continuing representation tolls the statute of limitations as long as the attorney continues to represent the client.⁴⁵⁰

The Second District has confirmed the federal district court's understanding of Florida law: "we note that in Florida the statute of limitations for legal malpractice generally does not begin to run while the attorney continues to represent the client."⁴⁵¹

"The continuing representation [doctrine] tolls the statute of limitations as long as the attorney continues to represent the client."⁴⁵² The attorney-defendant in *Wilder* provided advice on tax issues through the date of filing suit.⁴⁵³ Therefore, the suit was timely filed.⁴⁵⁴ The impact of *Silvestrone v. Edell*,⁴⁵⁵ holding that a litigation legal malpractice case must be commenced within two years of the judgment becoming final, upon the continuous representation doctrine, is uncertain.⁴⁵⁶ It is unclear if the statute of limitations is to be extended if an attorney were to continue to represent the client more than two years after the final judgment becomes final.

The issue for determination in *Garrido v. Markus, Winter & Spitale Law Firm*,⁴⁵⁷ was "whether the amended complaint relates back to the original complaint so as to toll the statute of limitations."⁴⁵⁸ The former client sought to amend the legal malpractice complaint to add individual partners of a law partnership after the statute of limitations had expired against the individual partners.⁴⁵⁹ In finding that the statute of limitations

450. *Id.* at 169 (quoting *Birnholz v. Blake*, 399 So. 2d 375 (Fla. 3d Dist. Ct. App. 1981) (citations omitted)).

451. *Abbott v. Friedsam*, 682 So. 2d 597, 599 n.1 (Fla. 2d Dist. Ct. App. 1996).

452. *Wilder*, 779 F. Supp. at 169 (quoting *Birnholz*, 399 So. 2d at 375).

453. *Id.*

454. *Id.*

455. 721 So. 2d 1173 (Fla. 1998).

456. *Id.* at 1175.

457. 358 So. 2d 577 (Fla. 3d Dist. Ct. App. 1978).

458. *Id.* at 579.

459. *Id.* at 578.

barred the addition of the individual partners, the court stated that the general rule for "relation back" of party defendants as follows:

"Corporations, partnerships, associations or individuals. Generally, whether an amendment of process or pleading, or both, will be allowed which changes the description or characterization of a party after the statute of limitations has run, from a corporation to an individual, partnership, or other association, or vice versa, seems to depend upon whether the misdescription or mischaracterization is interpreted as merely a misnomer or defect in the description or characterization, or whether it is deemed a substitution or entire change of parties; in the former case an amendment will be held to relate back to the commencement of the action, while in the latter the amendment will be held to amount to the institution of a new action."⁴⁶⁰

The court noted "a total absence of covert behavior" on the part of the lawyers as to who the proper parties were and implied that such conduct would have altered the result in the case.⁴⁶¹ Under any circumstances, "[i]f the face of the complaint does not show the cause is time barred, but the defendant wishes to challenge the suit on that basis, the defendant must raise the affirmative defense of statute of limitations in his answer."⁴⁶²

5. The Premature Legal Malpractice Suit

The premature filing of a legal malpractice suit occurred in *Zuckerman v. Ruden, Barnett, McCloskey, Smith, Schuster & Russell, P.A.*⁴⁶³ The law firm had prepared a mortgage on which the client had to foreclose.⁴⁶⁴ However, the borrower contested the validity of the mortgage because the property was homestead property and the wife did not join in the mortgage.⁴⁶⁵ The foreclosure proceeding was ongoing when the client filed a legal malpractice suit.⁴⁶⁶ The appellate court reversed a summary judgment

460. *Id.* at 581 (quoting 51 AM. JUR. 2D *Limitation of Actions* § 295 (1970)).

461. *Id.* at 580.

462. *Jelenc v. Draper*, 678 So. 2d 917, 919 (Fla. 5th Dist. Ct. App. 1996) (citations omitted).

463. 670 So. 2d 1050 (Fla. 3d Dist. Ct. App. 1996).

464. *Id.* at 1051.

465. *Id.*

466. *Id.*

in favor of the attorneys premised upon the client's knowledge of the potential defect more than two years before suit was filed.⁴⁶⁷

Here, unless Zuckerman is unable to foreclose on the mortgage, he will not have suffered damages proximately caused by Ruden Barnett's alleged failure to obtain the wife's signature on the mortgage.

Only when the foreclosure action has been entirely resolved will the statute of limitations on the malpractice action begin to run.⁴⁶⁸

The filing of a legal malpractice suit was also found to be premature in *Bierman v. Miller*,⁴⁶⁹ resulting in a stay until the underlying federal case was finalized.⁴⁷⁰ Miller sued his former lawyer, Bierman, during the pendency of a lawsuit brought against Miller by a corporation with whom he had entered into a severance agreement containing a covenant not to sue.⁴⁷¹ The corporation claimed the severance agreement was unenforceable because of Miller's fraud, which induced the corporation to sign the severance agreement.⁴⁷² The viability of the severance agreement had not been determined at the time Miller brought suit against his former attorney in which he claimed that Bierman's negligence in drafting the severance agreement permitted the corporation to sue him resulting in considerable attorneys fees.⁴⁷³ "Until the validity of the agreement is decided in federal court there can be no determination in the malpractice action as to whether Bierman was negligent in negotiating and drafting that agreement."⁴⁷⁴ In *Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., v. Sun NLF Ltd.*,⁴⁷⁵ the client was also deemed to have been premature in having a stay lifted prior to the resolution of the pending unjust enrichment action upon which the malpractice was based.⁴⁷⁶

When there is a concern about the expiration of a statute of limitations, a practical safety net is to enter into a tolling agreement with the potentially

467. *Id.*

468. *Zuckerman*, 670 So. 2d at 1051 (citations omitted).

469. 639 So. 2d 627 (Fla. 3d Dist. Ct. App. 1994). *See also* *Miller v. Lindback Constr. Corp.*, 782 So. 2d 903 (Fla. 3d Dist. Ct. App. 2001) (legal malpractice action severed and abated, determination of redressable harm was premature).

470. *Bierman v. Miller*, 639 So. 2d 627, 628 (Fla. 3d Dist. Ct. App. 1994).

471. *Id.* at 627.

472. *Id.* at 628.

473. *Id.*

474. *Id.*

475. 719 So. 2d 1029 (Fla. 3d Dist. Ct. App. 1998).

476. *Id.*

culpable attorney in which the parties agree that the statute of limitations will not commence until a certain date. Alternatively, as suggested in *Birnholz v. Blake*,⁴⁷⁷ the malpractice action can be stayed pending a resolution of the claim giving rise to the malpractice action.⁴⁷⁸ Dismissing the malpractice complaint until the underlying case is resolved was found to be an error in *Bartlett v. Bennett*.⁴⁷⁹

E. Abandonment

“The circumstances in which a client’s subsequent actions constitute an abandonment of a legal malpractice claim, as a matter of law, are very narrow.”⁴⁸⁰ A summary judgment in favor of an attorney was overturned in *Lenahan v. Russell L. Forkey, P.A.*, holding that the dismissal of a lawsuit in Virginia did not preclude a malpractice suit in Florida.⁴⁸¹ However, the court stated that if proof of the viability of the Virginia lawsuit, independent of the actions of the attorney in Florida, were sufficiently established, then “the voluntary dismissal of the Virginia lawsuit may very well constitute an intervening superseding cause.”⁴⁸²

Abandonment can occur when the client settles the underlying action while the malpractice action is pending. In *Pennsylvania Insurance Guarantee Ass’n v. Sikes*,⁴⁸³ an insurance company, which hired an attorney to defend a client in a personal injury case, sued the attorney that it had hired for malpractice, and then settled the personal injury case rather than appeal a loss deemed to have been caused by judicial error, which “in all likelihood” would have been corrected on appeal.⁴⁸⁴ Accordingly, the summary judgment in favor of the attorney was affirmed.⁴⁸⁵ “We hold, on the facts of this case, that the settlement of the underlying personal injury case, while the

477. 399 So. 2d 375 (Fla. 3d Dist. Ct. App. 1981).

478. A judicial stay was imposed upon the legal malpractice claims in *Watts v. Buck* because the right to maintain the suit was suspended due to the plaintiff’s status as a felon. 454 So. 2d 1079 (Fla. 2d Dist. Ct. App. 1984).

479. 360 So. 2d 1144 (Fla. 2d Dist. Ct. App. 1978).

480. *Lenahan v. Russell L. Forkey, P.A.*, 702 So. 2d 610, 611 (Fla. 4th Dist. Ct. App. 1997).

481. *Id.* at 612.

482. *Id.*

483. 590 So. 2d 1051 (Fla. 3d Dist. Ct. App. 1991). *Accord* *Bradley v. Davis*, 777 So. 2d 1189 (Fla. 4th Dist. Ct. App. 2001).

484. *Sikes*, 590 So. 2d at 1053.

485. *Id.*

appeal was pending, constituted an abandonment of any claim that PIGA's loss resulted from legal malpractice rather than judicial error."⁴⁸⁶

Although not cited in *Sikes*, the Third District dealt with a similar issue two years before in *Oteiza v. Braxton*.⁴⁸⁷ *Oteiza* involved a summary judgment in favor of an attorney who had been sued by his former doctor client for failing to perfect an appeal of a final order by the Board of Medical Examiners.⁴⁸⁸ The standard for not timely filing an appeal was explained as follows:

In order to recover damages for legal malpractice, a party who has been denied his right to appeal due to an attorney's failure to timely file a petition for review to the appropriate court must show that but for the attorney's negligence, the appeal most probably would have been successful.⁴⁸⁹

After examining what would have been the appellate issue, the *Oteiza* court reversed the summary judgment holding that "but for the attorney's negligence, the appeal most probably would have been successful."⁴⁹⁰

The Third District, in *Segall v. Segall*,⁴⁹¹ helped to clarify when a client must file an appeal in order to perfect a later malpractice case, but it did not adopt a bright line test.

Our cases should not be read to require every party who suffers a loss and attributes that loss to legal malpractice to obtain a final appellate determination of the underlying case before asserting a claim for legal malpractice. The test for determining when a cause of action for attorney malpractice arises remains when "the existence of redressable harm has been established." *Diaz v. Piquette*, 496 So.2d 239, 240 (Fla. 3d DCA 1986), *rev. denied*, 506 So.2d 1042 (Fla.1987). In some cases, redressable harm caused by errors in the course of litigation can only be determined upon completion of the appellate process. *See Sikes*, 590 So.2d at 1053. In other cases, the failure to obtain appellate review should not bar an action for malpractice. *See, e.g., Zitrin*, 621 So.2d 748 (where attorney failed to include requested provisions in employment contract, malpractice plaintiff not required to confirm attorney's error on ap-

486. *Id.*

487. 547 So. 2d 948 (Fla. 3d Dist. Ct. App. 1989).

488. *Id.* at 949.

489. *Id.* (citations omitted).

490. *Id.* at 950.

491. 632 So. 2d 76 (Fla. 3d Dist. Ct. App. 1993).

peal); *Breakers of Fort Lauderdale, Ltd. v. Cassel*, 528 So.2d 985 (Fla. 3d DCA 1988)(when attorney improperly failed to consummate settlement of lawsuit, cause of action for legal malpractice accrued when client learned that lawsuit was revived). We are unable to establish a bright-line rule that complete appellate review of the underlying litigation is a condition precedent to every legal malpractice action. To do so would, in many cases, violate the tenet that the law will not require the performance of useless acts.⁴⁹²

Segall was somewhat unusual in that the court dismissed the appeal of the underlying jury verdict for the plaintiff's failure to comply with discovery orders.⁴⁹³ The deemed waiver of the malpractice case was predicated upon the conduct that led to the appeal being dismissed which "foreclosed any determination that judicial error rather than attorney malpractice caused their loss in the underlying litigation."⁴⁹⁴

The abandonment defense was narrowly construed in *Parker v. Graham & James*.⁴⁹⁵ The malpractice plaintiffs had retained Graham & James to prosecute a federal suit for crop loss. The verdict form in the federal suit required the jury to itemize the damages under theories of contract, negligence, and strict liability. The jury awarded \$50,000 on the contract and negligence theories and \$6,800,000 on strict liability. The Eleventh Circuit Court of Appeals remanded for a new trial on damages because of the discrepancies in the verdict.⁴⁹⁶ The plaintiffs discharged Graham & Jones and settled for \$4,000,000. The clients sued Graham & Jones for malpractice and sought damages for the attorneys' failure to submit a general verdict form that requested a single damage amount on all three theories and for failure to seek prejudgment interest. The trial court dismissed the case with prejudice on the notion that the plaintiffs had abandoned their legal malpractice suit when they settled the underlying case.

The Third District reversed the trial court since "the settlement did not thwart any review process which could have cured the malpractice After issuance of the *Overseas Private Investment* opinion, anything further that plaintiffs could have done would only have served to mitigate their damages."⁴⁹⁷ Only considerations of appeal were viewed in this abandon-

492. *Id.* at 78.

493. *Segall v. Downtown Assocs.*, 546 So. 2d 11 (Fla. 3d Dist. Ct. App. 1989).

494. *Segall*, 632 So. 2d at 78.

495. 715 So. 2d 1047 (Fla. 3d Dist. Ct. App. 1998).

496. *See Overseas Private Inv. Corp. v. Metro. Dade County*, 47 F.3d 1111 (11th Cir. 1995).

497. *Parker*, 715 So. 2d at 1048.

ment analysis. The plaintiffs were not required to retry the case and obtain the same, or even a larger verdict, than the first trial in order to avoid the abandonment defense. Seemingly, the attorney-defendants would be able to claim that no damages would have been suffered if a second trial had occurred.

The directed verdict, based upon the abandonment defense, was reversed in favor of the law firm in *Hunzinger Construction Corp. v. Quarles & Brady*.⁴⁹⁸ Before an appeal was completed, Hunzinger settled the underlying case in which the trial court held that a mechanic's lien was filed late. During the malpractice case, the attorneys argued that the client could not proceed on a malpractice claim because Hunzinger had not completed the appeal. However, the client was successful because the appellate court could not "say, as the court could in *Sikes*, that the mistake in the original proceedings would 'in all likelihood' have been corrected on appeal."⁴⁹⁹

In *Eastman v. Flor-Ohio, Ltd.*,⁵⁰⁰ the law firm urged the court to expand the abandonment defense to require the filing and prosecution of an appeal before filing a legal malpractice case based upon negligence occurring in the underlying case. The following three policy reasons were set forth for not extending the abandonment theory as requested:

Perhaps the least compelling reason is the negative effect such a ruling would have on the work load of the appellate courts [S]uch a ruling would also discourage parties from settling pending appeals and would be inconsistent with the party's legal duty to mitigate their damages A more important reason is that such a ruling would require litigants to spend yet more of their resources prosecuting an appeal to judicial conclusion even though they may disagree with the theory of the appeal they would be required to maintain.⁵⁰¹

IX. COLLECTIBILITY

The collectibility of the judgment that would have been recovered in the underlying action may be an issue depending upon the circumstances. The

498. 735 So. 2d 589 (Fla. 4th Dist. Ct. App. 1999). See also *Coble v. Aronson*, 647 So. 2d 968 (Fla. 4th Dist. Ct. App. 1994) (reversing summary judgment since malpractice cause of action was not eliminated by settlement of related lawsuit against third party).

499. *Hunzinger Constr. Corp.*, 735 So. 2d at 595.

500. 744 So. 2d 499 (Fla. 5th Dist. Ct. App. 1999).

501. *Id.* at 504.

attorney who filed suit in *Fernandes v. Barrs*⁵⁰² failed to do so in a timely fashion against Lake Community College for personal injuries sustained by his client at the college campus. After an award of \$398,670 rendered at the conclusion of a bench trial, the attorney appealed claiming, in part, that damages were limited by section 768.28 of the *Florida Statutes*, which caps damages against state agencies at \$100,000. The court indicated the “general rule is that the client/plaintiff in a legal malpractice action must prove both that a favorable result would have been achieved in the underlying litigation but for the negligence of the attorney/defendant and that any judgment which could have been recovered would have been collectible.”⁵⁰³ The policy reason for this general rule is to prevent “a windfall to the client by preventing him from recovering more from the attorney than he could have actually obtained from the tortfeasor in the underlying action.”⁵⁰⁴

“The plaintiff may ordinarily satisfy this burden with evidence of the original tortfeasor’s financial status, insurance coverage, property ownership, and so forth if such evidence can be obtained.”⁵⁰⁵ If such evidence cannot be obtained because the negligence of the attorney makes it impossible, then the burden shifts to the attorney to prove that the judgment or any portion thereof was uncollectible.

X. IMMUNITY

In some situations, an attorney is immune to a malpractice suit by his client. This is exemplified where an attorney represents the Department of Revenue as a program attorney in child support proceedings and where an attorney represents union members at the behest of a labor union. *Mensch and Macintosh, P.A.* represented the Department of Revenue as program attorneys in a child support proceeding for Donna Hand.⁵⁰⁶ Hand later sued the law firm for malpractice in a complaint that alleged “many facts which would be sufficient to support an action for negligence.”⁵⁰⁷ The case was

502. 641 So. 2d 1371 (Fla. 1st Dist. Ct. App. 1994) *disapproved* by *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180 (Fla. 1995).

503. *Id.* at 1375 (citing *Hand v. Hustad*, 440 So. 2d 518 (Fla. 4th Dist. Ct. App. 1983)) (reversing directed verdict in favor of defendant-attorney because plaintiff had offered sufficient evidence of collectibility to present a jury question).

504. *Id.* at 1376.

505. *Id.*

506. *Hand v. Mensch & MacIntosh, P.A.*, 718 So. 2d 234 (Fla. 2d Dist. Ct. App. 1998).

507. *Id.* at 235.

dismissed with prejudice because of the immunity provisions set forth in section 409.2564(6) of the *Florida Statutes*, which provides:

The department and its officers, employees, and agents and all persons and agencies acting pursuant to contract with the department are immune from liability in tort for actions taken to establish, enforce, or modify support obligations if such actions are taken in good faith, with apparent legal authority, without malicious purpose, and in a manner not exhibiting wanton and willful disregard of rights or property of another.⁵⁰⁸

Donna Hand represented herself in the proceeding against her former attorneys.⁵⁰⁹ She informed the trial judge that she was unable to amend her complaint to avoid statutory immunity.⁵¹⁰ This fact undoubtedly influenced both the trial judge and appellate court in not allowing the complaint to be further amended.

A Dade County School Board employee was denied the opportunity to sue her attorney who represented her on behalf of the United Teachers of Dade in an administrative dismissal proceeding in *Stafford v. Meek*.⁵¹¹ The *Stafford* court cited to *DeGrio v. American Federation of Government Employees*⁵¹² for the following proposition that “attorneys may not be held individually liable for their malpractice in representing union members where the union provides the attorneys’ services as part of its duty of fair representation to an employee in a grievance or termination proceeding.”⁵¹³ Although the *Stafford* court acknowledged that the *DeGrio* court’s language was dicta, it provided the weight of persuasive authority in affirming a final judgment in favor of the attorney.⁵¹⁴

The public defender has not escaped liability for malpractice under the doctrine of judicial immunity. As stated in *Windsor v. Gibson*:⁵¹⁵

Considerations which require that a judge and prosecutor be immune from liability for the exercise of duties essential to the administration of justice, do not require that the same immunity be

508. FLA. STAT. § 409.2564(6) (1995).

509. *Hand*, 718 So. 2d at 235.

510. *Id.*

511. 762 So. 2d 925 (Fla. 3d Dist. Ct. App. 2000).

512. 484 So. 2d 1, 3 (Fla. 1986).

513. *Stafford*, 762 So. 2d at 926.

514. *Id.*

515. 424 So. 2d 888 (Fla. 1st Dist. Ct. App. 1982).

extended to the public defender. While the prosecutor is an officer of the state whose duty it is to see that impartial justice is done, the public defender is an advocate, who once appointed owes a duty only to his client, the indigent defendant. His role does not differ from that of privately retained counsel.⁵¹⁶

The Third District Court of Appeal, in *Wilcox v. Brummer*,⁵¹⁷ quoted the above language from *Windsor* and also held that the public defender's exposure for malpractice is equal to that of private counsel. Both of the courts' certified questions to the Supreme Court of Florida, concerning whether a public defender is shielded from liability due to judicial immunity, went unanswered.

XI. DAMAGES

A. Attorneys' Fees

In Florida, absent a contractual or statutory basis, attorneys' fees are not compensable.⁵¹⁸ However, if a client sues a third party to recover a portion of the damages caused by the negligent attorney, the attorney's fees incurred in suing the third party may be recovered pursuant to the Wrongful Act Doctrine,⁵¹⁹ which provides as follows:

One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney's fees and other expenditures thereby suffered or incurred in the earlier action.⁵²⁰

The client in *De Pantosa Saenz v. Rigau & Rigau, P.A.*⁵²¹ alleged that without her authorization, her attorney filled in a blank deed that she signed at his request with the name of his mother-in-law in return for the mother-in-

516. *Id.* at 889.

517. 739 So. 2d 1282 (Fla. 5th Dist. Ct. App. 1999).

518. See generally *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1148 (Fla. 1985).

519. See *State Farm v. Pritcher*, 546 So. 2d 1060 (Fla. 3d Dist. Ct. App. 1989) (stating an attorney is not entitled to fees under the "wrongful act doctrine" against third party after client dismissed malpractice action).

520. RESTATEMENT (SECOND) OF TORTS § 914(2) (1977).

521. 549 So. 2d 682 (Fla. 2d Dist. Ct. App. 1989).

law's assumption of a mortgage.⁵²² The mother-in-law agreed to rescind the transaction after reimbursement of her investment in the property.⁵²³ The Second District permitted a claim for attorney's fees in the malpractice suit for the attorney's fees incurred in the litigation against the mother-in-law.⁵²⁴ "Typically, a plaintiff has the right to recover attorneys' fees incurred in litigation with a third party, as an element of compensatory damages, if that litigation was caused by the defendant's breach of contract or wrongful act."⁵²⁵

In *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*,⁵²⁶ the court dismissed the complaint with prejudice for failure (and inability) to plead the necessary privity requirement. The Third District Court of Appeal affirmed, stating that the pretermitted heir could not maintain the malpractice action; however, the court reversed as to the Estate.⁵²⁷ The appellate court held that the law firm was responsible to the Estate for the costs of defending the pretermitted heir's lawsuit holding that:

Clearly, the testator's estate should be entitled to a return of the attorney's fee paid by the testator to the lawyer, as well as any costs and fees incurred in defending the estate against any action generated by the lawyer's negligence, such as an action brought by the omitted beneficiary to receive a share of the estate.⁵²⁸

B. *Prejudgment Interest*

A malpractice plaintiff is entitled to prejudgment interest from the date of loss. Since the amount of damages was disputed and there was no date certain upon which such damages were owed, the First District Court of Appeal upheld a trial court ruling denying prejudgment interest in *Chadwick v. Corbin*.⁵²⁹ The requirements for prejudgment interest were satisfied in *deManio v. Burns*.⁵³⁰ "[W]hen a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, [the] plaintiff is entitled, as a matter of law,

522. *Id.* at 685.

523. *Id.*

524. *Id.*

525. *De Pantosa Saenz*, 549 So. 2d at 685.

526. 586 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1991), *approved by* *Espinosa v. Sparber, Shevin*, 612 So. 2d 1378 (Fla. 1993).

527. *Espinosa*, 586 So. 2d at 1224–25.

528. *Id.* at 1223–24 (citations omitted).

529. 476 So. 2d 1366, 1368–69 (Fla. 1st Dist. Ct. App. 1985).

530. 642 So. 2d 807 (Fla. 2d Dist. Ct. App. 1994).

to prejudgment interest at the statutory rate from the date of that loss."⁵³¹ The verdict in *deManio* awarded pecuniary losses as of a certain date.⁵³² Therefore, the court awarded prejudgment interest.⁵³³ The court also awarded prejudgment interest in *Fisher v. Ackerman*⁵³⁴ and *Tarleton v. Arnstein & Lehr*,⁵³⁵ since the jury awards had the effect of liquidating damages as of a certain date.

C. Punitive Damages

An attorney who gives improper or erroneous advice to a client who suffers damage as a result may be subject to a malpractice action for compensatory damages. However, such negligence, if it exists, and even if gross, does not warrant an award of punitive damages absent the necessary allegations and proof of wantonness or reckless indifference.⁵³⁶ The fact that an attorney who allegedly gave bad advice had listed his name with a lawyer referral service as being proficient in that particular field of law, by itself, does not rise to the level of wantonness or reckless indifference required for punitive damages.⁵³⁷ Similarly, an attorney's failure to file a security interest with the Secretary of State was not sufficient to warrant punitive damages in *Chadwick v. Corbin*.⁵³⁸

Another Florida case involving legal malpractice and punitive damages is *De Pantosa Saenz v. Rigau & Rigau, P.A.*⁵³⁹ The former client sought punitive damages, alleging fraud in the sale of certain real estate.⁵⁴⁰ The Court stated, "[m]oreover, the plaintiff seeks punitive damages against Mr. Rigau. Assuming the plaintiff can establish facts warranting punitive

531. *Id.* (citing *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985)).

532. *deManio*, 642 So. 2d at 807.

533. *See also* *Gomez v. Hawkins Concrete Constr. Co.*, 623 F. Supp. 194 (N.D. Fla. 1985).

534. 744 So. 2d 582 (Fla. 2d Dist. Ct. App. 1999).

535. 719 So. 2d 325 (Fla. 4th Dist. Ct. App. 1998).

536. *De Pantosa Saenz v. Rigau & Rigau, P.A.*, 549 So. 2d 682 (Fla. 2d Dist. Ct. App. 1989); *Solodky v. Wilson*, 474 So. 2d 1231, 1233 (Fla. 5th Dist. Ct. App. 1985); *see also* *DeToro v. Dervan Investments Ltd. Corp.*, 483 So. 2d 717 (Fla. 4th Dist. Ct. App. 1985) (allowing evidence of punitive damages to be introduced against an attorney in a breach of fiduciary duty lawsuit).

537. *Solodky*, 474 So. 2d at 1232.

538. 476 So. 2d 1366, 1367-68 (Fla. 1st Dist. Ct. App. 1985).

539. 549 So. 2d 682 (Fla. 2d Dist. Ct. App. 1989).

540. *Id.* at 684.

damages, the previously received remedy of rescission would not bar an additional award of punitive damages.”⁵⁴¹

Punitive damages were awarded against the attorneys in *Stinson v. Feminist Women's Health Center, Inc.*⁵⁴² The Court found that the trial judge properly awarded punitive damages since the lawyers' behavior was “egregious,” “self-serving,” and “unconscionable.”⁵⁴³ The attorney's conduct in *Medel v. Republic National Bank of Miami*⁵⁴⁴ was determined to be an issue for trial rather than summary judgment.

Applying Florida law, federal courts have also found punitive damages against attorneys to be warranted.⁵⁴⁵ Florida law is clear: under appropriate circumstances punitive damages can be awarded against an attorney in a malpractice proceeding.

XII. ATTORNEY-CLIENT PRIVILEGE

Communications between attorneys and their clients are generally protected from discovery.⁵⁴⁶ However, there are at least three exceptions to the attorney-client privilege that are relevant to a malpractice action: (1) the defense exception, (2) the common interest exception, and (3) the fraud exception. The defense exception to the attorney-client privilege found in section 90.502(4)(c) of the *Florida Statutes*, provides “[t]here is no lawyer-client privilege under this section when . . . [a] communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.”⁵⁴⁷

541. *Id.* at 685.

542. 416 So. 2d 1183, 1185 (Fla. 1st Dist. Ct. App. 1982).

543. *Id.*

544. 365 So. 2d 782, 784–85 (Fla. 3d Dist. Ct. App. 1978).

545. *See, e.g., Singleton v. Foreman*, 435 F.2d 962, 971 (5th Cir. 1970) (holding “that Foreman's alleged conduct was sufficient to state an independent tort action, and, since that alleged conduct was both oppressive and showed such a great indifference to the persons and property rights of others, malice may be imputed, thus justifying punitive damages”); *Gay v. McCaughan*, 272 F.2d 160, 162 (5th Cir. 1959) (holding that the action of the attorney would form the basis on which a jury could award punitive damages).

546. Documents not related to any pending claim, defense, or that are not reasonably calculated to lead to the discovery of admissible evidence, as in all litigation, are also protected. *See Richard Mulholland & Assocs. v. Polverari*, 698 So. 2d 1269, 1270 (Fla. 2d Dist. Ct. App. 1997).

547. FLA. STAT. § 90.502(4)(c) (2001).

Exceptions to the attorney-client privilege have been interpreted very narrowly.⁵⁴⁸ The case of *Shafnaker v. Clayton*⁵⁴⁹ is particularly illustrative.⁵⁵⁰ In *Shafnaker*, the clients claimed the second law firm, which represented them in a case involving a lawsuit against Orkin for negligent application of hazardous chemicals, committed malpractice.⁵⁵¹ The defendant law firm in the malpractice proceeding sought production of documents from the first law firm that had represented the clients.⁵⁵² The court held that the documents maintained by the first law firm were not discoverable.⁵⁵³ The law firm in *Shafnaker* claimed that the privileged information was vital to their defense.⁵⁵⁴ The First District Court of Appeal was not impressed with this argument and stated that the “mere possibility that petitioners may not have been fully candid with respondents does not constitute a waiver of attorney-client privilege with other attorneys.”⁵⁵⁵ However, if a party has introduced issues in the litigation that go to the very heart of the litigation, discovery cannot be avoided because of the attorney-client privilege.⁵⁵⁶

548. *Courville v. Promedco of S.W. Fla., Inc.*, 743 So. 2d 41, 42–43 (Fla. 2d Dist. Ct. App. 1999) (waiving the attorney-client privilege is limited to communications on the same matter); *see also Reed v. State*, 640 So. 2d 1094, 1097–98 (Fla. 1994) (waiving privilege only as to matters specifically at issue in court action); *Del Prado v. Robert K. Estes, P.A.*, 532 So. 2d 1101, 1101 (Fla. 3d Dist. Ct. App. 1988) (lacking any basis to claim privilege as to requested documents for matter allegedly mishandled); *Procacci v. Seitlin*, 497 So. 2d 969, 969–70 (Fla. 3d Dist. Ct. App. 1986) (finding that exception applies only to a particular transaction which resulted in malpractice and not to any other aspect of the attorney-client relationship).

549. 680 So. 2d 1109, 1110–11 (Fla. 1st Dist. Ct. App. 1996).

550. *See also Adelman v. Adelman*, 561 So. 2d 671, 673 (Fla. 3d Dist. Ct. App. 1990) (holding that an ex-lawyer may only reveal confidential information necessary to defend against malpractice claim).

551. *Shafnaker*, 680 So. 2d at 1110.

552. *Id.*

553. *Id.*

554. *Id.*

555. *Id.* at 1111 (citing *Cuillo v. Cuillo*, 621 So. 2d 460, 462 (Fla. 4th Dist. Ct. App. 1993)) (holding that the occurrence of privileged communications regarding a specific transaction, which is later litigated, does not eliminate the privilege, even if there is a possibility that the credibility of a party could be impeached by such communications); *Long v. Murphy*, 663 So. 2d 1370, 1372 (Fla. 5th Dist. Ct. App. 1995) (holding that proof of privileged communications to dispute reasonable reliance may well be relevant to the defense, but that alone does not waive the privilege).

556. *First S. Baptist of Mandarin, Fla., Inc. v. First Nat’l Bank*, 610 So. 2d 452, 454 (Fla. 1st Dist. Ct. App. 1992).

The *Shafnaker* decision was cited with approval in both *Coyne v. Schwartz, Gold, Cohen, Zakarin & Kotler, P.A.*⁵⁵⁷ and *Volpe v. Conroy, Simberg & Ganon, P.A.*⁵⁵⁸ In both cases, decided less than one month apart, certiorari review was sought of trial court orders seeking production of communications between the plaintiffs and attorneys who were not defendants in the malpractice proceeding.⁵⁵⁹ The defendant lawyers' claim that communications with other lawyers were critical to the defense of the plaintiffs' allegations did not override the attorney-client privilege.⁵⁶⁰ "The attorney-client privilege cannot be set aside simply because the opposing party claims that the information held by the attorney is necessary to prove the opposing party's case."⁵⁶¹

Interestingly, the clients obtained different relief in *Volpe* and *Coyne*. In *Coyne*, the court remanded the case with instructions for the trial court to hold an in camera inspection to determine the applicability of the privilege.⁵⁶² The *Volpe* court merely quashed the trial court's order.⁵⁶³ The relief afforded in *Volpe* seems more logical and promotes closure on the issue.

The Second District Court of Appeal in *Barnett Banks Trust Co. v. Compson*⁵⁶⁴ was required to answer the question of "whether a trust beneficiary who litigates a position adverse to the trust may obtain from the trustee materials ordinarily protected by the attorney-client privilege and work product doctrine."⁵⁶⁵ The court responded negatively to the inquiry.⁵⁶⁶ The court found that the attorney-client privilege is paramount to section 737.303(3) of the *Florida Statutes*, which requires a trustee to provide any vested beneficiary with relevant information about the assets of a trust relating to administration.⁵⁶⁷

The attorney in *Ferrari v. Vining*⁵⁶⁸ wanted to take the deposition in the malpractice lawsuit of the prior counsel in the underlying action.⁵⁶⁹ The

557. 715 So. 2d 1021, 1023 (Fla. 4th Dist. Ct. App. 1998).

558. 720 So. 2d 537, 539 (Fla. 4th Dist. Ct. App. 1998).

559. *Coyne*, 715 So. 2d at 1021; *Volpe*, 720 So. 2d at 538.

560. *Id.*

561. *Volpe*, 720 So. 2d at 539-40.

562. *Coyne*, 715 So. 2d at 1023.

563. *Volpe*, 720 So. 2d at 540.

564. 629 So. 2d 849 (Fla. 2d Dist. Ct. App. 1993).

565. *Id.* at 849.

566. *Id.*

567. *Id.* at 851.

568. 744 So. 2d 480 (Fla. 3d Dist. Ct. App. 1999).

569. *Id.* at 480-81.

trial court allowed the discovery.⁵⁷⁰ In overturning the trial court's decision, the Third District Court of Appeal cited to *Adelman v. Adelman*,⁵⁷¹ and stated:

Adelman supports the proposition that the attorney-client privilege between Ferrari and Vining as to what they discussed pertinent to the issue of Vining's alleged malpractice could be reached. That does not mean the court could order the deposition and violation of attorney-client privilege as to *other counsel* with whom Ferrari discussed Vining's performance.⁵⁷²

The court in *Ferrari* went on to limit the client's waiver of the attorney-client privilege to "confidential information relating to his representation only to the extent necessary to defend *himself*."⁵⁷³ Therefore, an attorney cannot disclose everything about the attorney-client relationship; he may only respond to specific allegations.⁵⁷⁴

The common interest exception to the attorney-client privilege found in section 90.502(4)(e) of the *Florida Statutes* reads as follows:

A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.⁵⁷⁵

This "common interest exception" was examined in *Cone v. Culverhouse*.⁵⁷⁶ The court held that the prism through which this exception must be examined is "from the perspective of an objectively reasonable client, not from a particular client's subjective expectations or from the attorney's perspective."⁵⁷⁷ The client who sued her attorneys for negligence and intentional infliction of emotional distress in *Richard Mulholland and Associates v. Polverari*⁵⁷⁸ requested production of every "authority to represent" agreement between the law firm and its clients for a five-year

570. *Id.* at 481.

571. 561 So. 2d 671 (Fla. 3d Dist. Ct. App. 1990).

572. *Ferrari*, 744 So. 2d at 481-82.

573. *Id.* at 482.

574. *See id.* at 481-82.

575. FLA. STAT. § 90.502(4)(e) (2001).

576. 687 So. 2d 888, 891 (Fla. 2d Dist. Ct. App. 1997).

577. *Id.* at 892.

578. 698 So. 2d 1269 (Fla. 2d Dist. Ct. App. 1997).

period.⁵⁷⁹ The court issued a protective order in favor of the law firm since the “representation agreements between . . . [the attorneys] and their other clients are not related to any pending claim or defense, nor was the information shown to be reasonably calculated to lead to the discovery of admissible evidence.”⁵⁸⁰

Finally, the crime-fraud exception to the attorney-client privilege was at issue in *State v. Marks*.⁵⁸¹ The court indicated that “the ‘crime fraud’ exception to the attorney-client privilege is simply a shorthand expression recognizing that the privilege may not be used to protect communications with a lawyer for the purpose of receiving advice for the commission of a future criminal fraud.”⁵⁸² Once the privilege is asserted, “the state must make an evidentiary showing plausibly implicating the possible application of the exception.”⁵⁸³ The “party invoking [the] privilege has absolute right to be heard by testimony and argument.”⁵⁸⁴ The criminal charges against the attorneys in the case were dismissed because of *ex parte* communications between the prosecutor and the judge.⁵⁸⁵

XIII. ACTION NOT ASSIGNABLE

A legal malpractice action is not assignable. The assignability of a legal malpractice action in Florida was first raised in *Washington v. Fireman’s Fund Insurance Co.*⁵⁸⁶ The *Washington* court as a matter of public policy agreed with the “majority of jurisdictions [which] prohibit the assignment of such actions because of the personal nature of legal services which involve highly confidential relationships.”⁵⁸⁷ The *Washington* case was cited with approval, but little discussion, in *Mickler v. Aaron*⁵⁸⁸ and *Kozich v. Shahady*.⁵⁸⁹ The Supreme Court of Florida delved into the reasoning behind the prohibition of assigning a cause of action for legal malpractice in responding to a certified question regarding the assignability

579. *Id.* at 1270.

580. *Id.*

581. 758 So. 2d 1131, 1132 (Fla. 4th Dist. Ct. App. 2000).

582. *Marks*, 758 So. 2d at 1133 n.2 (citing *United States v. Zolin*, 491 U.S. 554, 565 (1989)).

583. *Id.* at 1134.

584. *Id.*

585. *Id.* at 1133.

586. 459 So. 2d 1148 (Fla. 4th Dist. Ct. App. 1984).

587. *Id.* at 1149.

588. 490 So. 2d 1343 (Fla. 4th Dist. Ct. App. 1986).

589. 702 So. 2d 1289 (Fla. 4th Dist. Ct. App. 1997).

of a cause of action against an insurance agent in *Forgione v. Dennis Pirtle Agency, Inc.*:⁵⁹⁰

As an Illinois appellate court noted in *Christison v. Jones*, 83 Ill.App.3d 334, 39 Ill. Dec. 560, 562, 405 N.E.2d 8, 10 (1980), the duty breached in legal malpractice arises out of a contract for legal services and the resulting injuries are pecuniary injuries to intangible property interests, rather than personal injuries in the strict sense of injuries to the body, feelings, or character of the client. While these aspects might indicate that legal malpractice falls within the class of actions that are assignable, the Illinois court concluded that legal malpractice is not subject to assignment because “the real basis and substance of the malpractice suit” is a breach of the duties within the personal relationship between the attorney and client. *Id.* Thus, it is “the unique quality of legal services, the personal nature of the attorney’s duty to the client[,] and the confidentiality of the attorney-client relationship” that have led other courts to conclude that legal malpractice claims are not subject to assignment. *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal.Rptr. 83, 87 (1976).⁵⁹¹

The next opportunity to review the assignability doctrine was presented in *National Union Fire Insurance Co. v. Salter*.⁵⁹² Using a subrogation theory in its malpractice action, National Union sued the attorneys who had represented one of its insureds. The dismissal of the case was affirmed upon a holding that the same analysis that prohibited the assignment of a legal malpractice claim also prohibited “the subrogation of a debtor’s legal malpractice claim.”⁵⁹³ The fact that the actual client was not a party to the lawsuit was critical to the court’s holding which noted that the client “may not even be interested or believe that it has a legal malpractice action against its attorneys,” and the attorneys might need to reveal the “work product” and “confidences” of its client in order to properly defend its position.⁵⁹⁴

After acknowledging that a cause of action for legal malpractice is not assignable under Florida law, the court in *Northcutt v. BankAtlantic*⁵⁹⁵ discussed whether or not a bankruptcy trustee could assign a legal

590. 701 So. 2d 557, 559 (Fla. 1997).

591. *Id.*

592. 717 So. 2d 141 (Fla. 5th Dist. Ct. App. 1998).

593. *Id.* at 143.

594. *Id.*

595. 767 So. 2d 563 (Fla. 4th Dist. Ct. App. 2000).

malpractice claim.⁵⁹⁶ Without deciding the issue, the court cited to several cases from other jurisdictions,⁵⁹⁷ suggesting that a tort action that arose during a bankruptcy proceeding could not be sold or assigned.⁵⁹⁸ Northcutt went on to argue that if the assignment was void, the trustee had abandoned the claim and the claim then reverted to Northcutt.⁵⁹⁹ The summary judgment, which held that certain proceeds of a legal malpractice claim could be garnished, was reversed due to a finding that there were issues of material fact.⁶⁰⁰

Northcutt was also involved in *Northcutt v. Bryan*,⁶⁰¹ in which he argued that the sale of his legal malpractice claim by the trustee appointed in his bankruptcy case to the attorney he had sued was void because such a claim was not assignable.⁶⁰² Although the court held that Northcutt “may well be correct on his theory that, because legal malpractice claims are not assignable under Florida law, a bankruptcy trustee cannot assign a claim,”⁶⁰³ since the bankruptcy order approving the sale was not appealed,⁶⁰⁴ he did not have standing to bring his legal malpractice claim.⁶⁰⁵

XIV. EXPERT TESTIMONY

A trial court erred in determining that an affidavit as to breach of duty or causation was sufficient to shift the burden of proof in a summary judgment hearing to the client, notwithstanding the lack of any contrary affidavit in *Heitmeyer v. Sasser*.⁶⁰⁶ The conclusory nature of the affidavit was the underlying basis of the court’s ruling. This ruling is in direct contrast to *Manner v. Goldstein Professional Ass’n*,⁶⁰⁷ in which a summary

596. *Id.* at 564.

597. *Id.* See also *Integrated Solutions, Inc. v. Serv. Support Specialties, Inc.*, 124 F.3d 487 (3d Cir. 1997); *In re J.E. Marion, Inc.*, 199 B.R. 635 (Bankr. S.D. Tex. 1996); *Baum v. Duckor, Spradling & Metzger*, 84 Cal. Rptr. 2d 703 (C. Ct. App. 1999).

598. *Northcutt*, 767 So. 2d at 564.

599. *Id.* (citing to *In re Bennett*, 13 B.R. 643 (Bankr. W.D. Mich. 1981)).

600. *Northcutt*, 767 So. 2d at 565.

601. 775 So. 2d 976 (Fla. 4th Dist. Ct. App. 2000).

602. *Id.* at 977.

603. *Id.*

604. *Id.*

605. *Id.* at 978.

606. 664 So. 2d 358 (Fla. 4th Dist. Ct. App. 1995).

607. 436 So. 2d 431 (Fla. 3d Dist. Ct. App. 1983). See also *Dadic v. Schneider*, 722 So. 2d 921 (Fla. 4th Dist. Ct. App. 1998) (withholding comment as to the propriety of both sides filing affidavits).

judgment in favor of an attorney was upheld due to “an un rebutted affidavit by a prominent member of the bar of this state on file stating that the action of her counsel . . . did not depart from the expected degree and care of conduct of counsel for a mother of [sic, in] a domestic relation [sic] matter.”⁶⁰⁸ Under any circumstances, the court cannot review affidavits and make a credibility judgment in a summary judgment context.⁶⁰⁹

The case of *Willage v. Law Offices of Wallace and Breslow, P.A.*,⁶¹⁰ held that legal malpractice can not be inferred merely because of a defendant’s verdict in a slip and fall case.⁶¹¹ “Without expert testimony, a lay jury could only speculate as to whether an attorney’s conscious decision not to call a purported witness constituted negligence, where in the attorney’s opinion, the witness on cross examination could have given testimony damaging to plaintiff’s case.”⁶¹² The plaintiff in *Warwick, Paul & Warwick v. Dotter*,⁶¹³ sued his divorce lawyer for failure to attend a divorce trial on behalf of the husband.⁶¹⁴ The attorney for the wife was called as an expert in the malpractice proceeding and asked a “hypothetical question to prove the possibility that a more financially favorable divorce decree could have been obtained had not the firm been negligent.”⁶¹⁵ The court found such testimony sufficient to establish the appropriate standard of care and pointed out that with the exception of the chancellor, the wife’s attorney was “the most informed available person as to the facts and law involved in the divorce case.”⁶¹⁶

Certain kinds of malpractice may be so apparent that expert testimony is not mandatory. The client suffered a dismissal of his suit in *Suritz v. Kelner*,⁶¹⁷ due to his attorney’s failure to tell his client to respond to interrogatories.⁶¹⁸ “In the instant case, if the jury finds the facts to be as

608. *Manner*, 436 So. 2d at 432.

609. *Sierra v. Shevin*, 767 So. 2d 524, 525 (Fla. 3d Dist. Ct. App. 2000) (citations omitted).

610. 415 So. 2d 767 (Fla. 3d Dist. Ct. App. 1982).

611. *Id.* at 768.

612. *Id.* (citations omitted).

613. 190 So. 2d 596 (Fla. 4th Dist. Ct. App. 1966).

614. *Id.*

615. *Id.* at 597.

616. *Id.* at 598.

617. 155 So. 2d 831 (Fla. 3d Dist. Ct. App. 1963).

618. *Id.* at 832.

presented by the plaintiff, the negligence of the attorney may appear from these facts without the need of expert testimony.”⁶¹⁹

Galloway v. Law Offices of Merkle, Bright and Sullivan, P.A.,⁶²⁰ involves both an affidavit and the need for expert testimony.⁶²¹ A summary judgment in favor of the attorney was obtained based upon the attorney’s un rebutted affidavit.⁶²² Such affidavit “merely stated that appellant’s file was handled in accordance with the community standard of care, but the affidavit nowhere attempts to explain why this case was not filed within the statute of limitations as alleged in the complaint.”⁶²³ The summary judgment was reversed upon a finding that a counter affidavit was not necessary.⁶²⁴ The court went on to state, “[w]e think the unexplained failure to file within a statute of limitations as described in this complaint is such an apparent breach of a duty of care as to obviate the need for expert testimony from appellant on a motion for summary judgment.”⁶²⁵

XV. JURY INSTRUCTIONS

Florida Standard Jury Instruction 4.2(c) can be used in an attorney malpractice case.⁶²⁶ Since all attorney malpractice proceedings involve a “case within a case,” the jury instructions often reflect the cause of action from the underlying case. The plaintiff’s theory against the lawyer in *Cunningham v. Koon*,⁶²⁷ was that he drafted a note that was usurious.⁶²⁸ A deficient jury instruction on usury resulted in the reversal of the verdict in favor of the client.⁶²⁹

In *Spaziano v. Price*,⁶³⁰ the court discussed the distinction in jury instructions between negligence and liability.⁶³¹ *Florida Standard Jury*

619. *Id.* at 834. Without indicating the extent of expert testimony in the trial court, the appellate court in *Spaziano v. Price* found the attorneys’ conduct “clearly fell below a reasonable standard of care.” 763 So. 2d 1047 (Fla. 4th Dist. Ct. App. 1999).

620. 596 So. 2d 1205 (Fla. 4th Dist. Ct. App. 1992).

621. *Id.* at 1206.

622. *Id.*

623. *Id.* at 1207.

624. *Id.*

625. *Galloway*, 596 So. 2d at 1207.

626. See FLA. STD JURY INSTR. IN CIVIL CASES § 4.2(c) (1967) (amended 2001).

627. 762 So. 2d 572 (Fla. 4th Dist. Ct. App. 2000).

628. *Id.*

629. *Id.*

630. 763 So. 2d 1047 (Fla. 4th Dist. Ct. App. 1999).

631. *Id.* at 1050.

Instruction (Civil) 3.1(c) and 3.6(c) are to be used when negligence has been determined either by admission or a directed verdict.⁶³² This set of instructions leaves open the question of whether the attorney's acts were the cause of the injury. *Florida Standard Jury Instruction (Civil) 3.1(d)* applies when there is a directed verdict on liability and only requires the jury to determine the amount of damages.⁶³³

XVI. CONCLUSION

In Florida, a plaintiff in a legal malpractice action must prove that he is in privity with the attorney or the third-party beneficiary to the attorney's work, that the attorney neglected a reasonable duty, and that the attorney's negligence proximately caused the plaintiff's loss. Further, the plaintiff may have to prove that the judgment in the underlying transaction was collectible. An attorney may be absolved of liability by the involvement of a subsequent attorney, and the attorney's loss may be spread between or among others sharing in the representation. Proving malpractice in criminal defense means proving different elements and perhaps a higher standard of proof than in transactional and civil litigational malpractice. Generally, the malpractice plaintiff will need expert testimony to make his case. The malpractice plaintiff may not assign his cause of action. The successful plaintiff is entitled to compensatory fees and prejudgment interest; however, punitive damages are limited in their availability.

The attorney defendant may affirmatively defend using various estoppel defenses, comparative negligence, *in pari delicto* and fraud, statute of limitations, and abandonment. Under some circumstances, the attorney may affirmatively defend that the underlying judgment was not collectible. In certain limited circumstances, the attorney may be immune to suit. Although defense of a malpractice suit is a situation that allows invasion of the attorney-client privilege, the invasion is not an unlimited one.

Revisiting Sir Thomas More's thoughts in *A Man for All Seasons*, "The law is not a 'light' for you or any man to see by; the law is not an instrument of any kind. The law is a causeway upon which so long as he keeps to it a citizen may walk safely."⁶³⁴ As with any other "citizen," the law provides an attorney a causeway. If the attorney keeps to the causeway, he avoids professional liability and legal malpractice.

632. *Id.*

633. *Id.*

634. Bolt, *supra* note 1.