

LEGAL MALPRACTICE IN MISSISSIPPI:
Causes of Action and Defenses*

Legal malpractice claims have risen above traditional levels.¹ This has provided the appellate courts of Mississippi with ample opportunity to explain the differences among the three causes of action, proof required for each, damages that are available, vicarious liability and the role of the Rules of Professional Conduct. The aim of this article is to provide practitioners with a simple guide to malpractice claims and to discuss recent developments in this area.

Legal malpractice claims can be lumped into three distinct categories: negligence, breach of fiduciary duty, and breach of contract. These types of claims correspond to the three broad duties lawyers owe to their clients, *i.e.*, the duties of care, loyalty, and those provided by contract.

While negligence and fiduciary duty claims require proof of very similar essential elements, they are distinct causes of action. The distinguishing characteristic is the duty allegedly breached by the attorney. As explained more fully below, negligence exists when the lawyer breaches his duty of care, *i.e.*, when the lawyer's actions or inactions fall below the standard of care of a reasonably prudent lawyer in similar situations. A breach of fiduciary duty, on the other hand, exists when the lawyer fails in his duty of loyalty to his client, *i.e.*, the duties of confidentiality, candor, disclosure, to avoid conflicts of interest, and to safeguard the client's confidences and property. Breach of contract claims are unique from both negligence and fiduciary duty claims. Instead, such claims are premised on the lawyer's failure to abide by the contractual terms between the lawyer and client. Different damages can flow from each breach.

These claims, along with their various defenses, the scope of vicarious liability, and other specific attorney-client relationships, are discussed in more detail below.

I. Attorney Negligence

To prevail on an attorney negligence claim, the plaintiff/client must prove the following by a preponderance of the evidence: "(1) the existence of a lawyer-client relationship, (2)

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¹ This topic was first presented to Summer School in 2012. At that time, various surveys showed as much as a 36% increase in malpractice claims. See Karen Sloan, *Legal Malpractice Claims Surge as the Economy Tanks*, The NAT'L L.J. (Feb. 23, 2009); see also Tom Huddleston, Jr., *Survey: Law Firm Malpractice Claims on the Rise* (July 5, 2011). Ames & Gough reports for 2013 & 2014 show that claims have now leveled off (though still above historic levels), but the number of "large claims," *i.e.*, greater than \$50 Million, has increased substantially. As of July 2, 2014, the practice areas with the highest experience of claims were real estate and corporate/securities work. See <http://www.insurancejournal.com/news/national/2014/07/02/333572.htm> (last visited June 6, 2015). Also, insurers are experiencing an increase in "cyber breach" cases. *Id.*

negligence on the part of the lawyer, (3) the negligence proximately caused the injury, and (4) the fact and extent of the injury.”²

A. The Attorney-Client Relationship

Obviously, there can be no negligence without the existence of legal duty or obligation. The existence of an attorney-client relationship alone imposes a legal duty on the lawyer to act with the requisite standard of care. The attorney-client relationship has been called the “quintessential principal-agent relationship.”³ As with any essential element of a plaintiff’s cause of action, the burden of proving the existence of an attorney-client relationship lies with the plaintiff/client.⁴

Traditionally, an attorney-client relationship is created under Mississippi law when: “(1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and (2)(a) the lawyer manifests to the person consent to do so, or (b) fails to manifest lack of consent to do so knowing that the person reasonably relies on the lawyer to provide the services, or (c) a tribunal with power to do so appoints the lawyer to provide the services.”⁵ Accordingly, the lawyer-client relationship is not dependent on the payment of fees by the client.⁶ Not infrequently, it is the lawyer “helping a friend” that finds himself sued for malpractice.

Recently, the Mississippi Supreme Court indicated that it may rely on the Restatement (Third) of the Law Governing Lawyers to determine whether an attorney-client relationship arises.⁷ According to the Restatement, there are two ways to form an attorney-client relationship: (1) by agreement of both the lawyer and the client, or (2) by the lawyer’s “failure to object” to the client’s request for representation when the lawyer should know that the client is relying on the lawyer to perform legal services.⁸

² Lane v. Oustalet, 873 So. 2d 92, 98-99 (Miss. 2004). See also Owen v. Pringle, 621 So. 2d 668, 670-71 (Miss. 1993) (“An action for malpractice will lie only where there is an attorney-client relationship, negligence in handling the client’s affairs, and causation (but for the attorney there would have been successful outcome in the underlying action).”).

³ CIR v. Banks, 543 U.S. 426, 436 (2005), quoted in O.W.O. Invs., Inc. v. Stone Inv. Co., 32 So. 3d 439 (Miss. 2010).

⁴ Lane, 873 So. 2d at 98.

⁵ Baker, Donelson, Bearman & Caldwell v. Seay, 42 So. 3d 474, 485 (Miss. 2010), quoting Singleton v. Stegall, 580 So. 2d 1242, 1244 n.2 (Miss. 1991).

⁶ Singleton, 580 So. 2d at 1244.

⁷ See Miss. Bar v. Thompson, 5 So. 3d 330, 335 (Miss. 2008); Grandquest v. Hershel, 18 So. 3d 324 (Miss. Ct. App. 2009).

⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000) states:

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.

In some circumstances, however, the lawyer may owe a duty of care to someone other than his direct client.⁹ Privity of contract is not required to prove a negligence case against a lawyer in all circumstances.¹⁰ Title attorneys, for instance, “may be liable to reasonably foreseeable persons who, for a proper business purpose, detrimentally rely on the attorney’s title work.”¹¹ As shown by the *Great American*¹² case, however, this rule is limited. There, the Court reaffirmed the limited nature of the *Century 21* ruling and refused to extend the exception to the excess carrier/insurance-defense counsel relationship. The Court held that, standing alone, the shared common interest (and even shared information) between an excess carrier and insurance-defense counsel did not give rise to an attorney-client relationship where the insurance-defense counsel was hired by the primary insurer.¹³

Other proposed extensions of *Century 21* have also been limited. For instance, where a lawyer is hired to represent an entity, that lawyer’s duty is to the entity, not the individual shareholders or members.¹⁴ Similarly, a party cannot bring suit against his adversary’s lawyer for malpractice. Quite simply, “an attorney has no duty to an adverse party.”¹⁵

The practical implications of these rules are sometimes clear and simple, and other times not. In most cases there is no doubt that such a relationship exists. In some circumstances, a lawyer will owe a duty of care to reasonably foreseeable third parties who will rely on the lawyer’s work. For a lawyer declining representation, the lawyer must explicitly state (and hopefully document) that he is not representing the potential client. Otherwise, the lawyer is potentially at risk of creating an attorney-client relationship by failing to object to the representation. And after declining the representation, the lawyer must not take any other action that can be construed as rendering legal services.

B. Negligence Actions - the Lawyer’s Duties to his Clients

To prove negligence on the part of a lawyer, the plaintiff/client must “prove by a preponderance of the evidence that a reasonably prudent lawyer faced with the same circumstances would either have done something the defendant did not do, or would have refrained from doing something the defendant did.”¹⁶

⁹ See *Century 21 Deep S. Prop., Ltd. v. Corson*, 612 So. 2d 359 (Miss. 1992) (abolishing the privity requirement for malpractice claims stemming from negligent title work performed by attorney).

¹⁰ *Id.*; see Miss. Code Ann. § 11-7-20 (1972) (abolishing the necessity of privity in “all causes of action for economic loss brought on account of negligence”).

¹¹ *Corson*, 612 So. 2d at 374.

¹² *Great American E&S Insurance Company v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So. 3d 420, 424-25 (Miss. 2012).

¹³ *Id.*

¹⁴ *Blanton v. Prins*, 938 So. 2d 847 (Miss. Ct. App. 2005) (barring suit by LLC member against LLC’s attorney for lack of attorney-client relationship and that attorney owed no legal duty to individual member).

¹⁵ *Roussel v. Robbins*, 688 So. 2d 714, 725 n.4 (Miss. 1996), *quoted in* *James v. Chase Manhattan Bank*, 173 F. Supp. 2d 544, 550 (N.D. Miss. 2001).

¹⁶ *Baker, Donelson, Bearman & Caldwell v. Muirhead*, 920 So. 2d 440, 449 (Miss. 2006); see also *Estate of St. Martin v. Hixson*, 145 So. 3d 1124, 1129-1130 (Miss. 2014) (reaffirming traditional malpractice standard).

A lawyer must exercise due care in handling the client's affairs. The duty of care can be summed up in one word: diligence. This duty requires a lawyer to conduct himself with the level of expertise which he holds himself out as possessing.¹⁷ In other words, if a lawyer undertakes a representation, he must act with the skill, knowledge, and promptness of a reasonably prudent lawyer facing a similar situation.¹⁸ "Failure to do so constitutes negligence on the part of the lawyer."¹⁹

Some examples of an attorney's breach of his duty of care are missing the statute of limitations,²⁰ failing to timely file an appeal,²¹ failing to properly and timely serve a defendant,²² failing to answer a complaint or counterclaim,²³ and failing to respond to requests for admission or other discovery.²⁴ Of course, even where a lawyer's actions or inactions give rise to negligence, the plaintiff/client must still prove causation and damages. In most malpractice cases, the fight is over the *consequences* of the lawyer's breach of the duty of care.

C. Causation and Damages

In a traditional legal malpractice case premised on a lawyer's breach of his standard of care, "the plaintiff must show that, but for [his] attorney's negligence, he would have been successful in the prosecution or defense of the underlying action."²⁵ This virtually always necessitates a "trial within a trial" whereby the plaintiff/client is burdened with presenting evidence to prove his underlying case and that he would have prevailed but for the attorney's negligence.

As the Court has explained "in fairly absolute 'but for' terms," even in clear-cut cases of attorney negligence, no recovery is permitted unless the plaintiff can prove that, "but for" the attorney's negligence, he would have prevailed in the underlying case.²⁶ "[T]he plaintiff/client carries this burden by trying the underlying . . . claim as a part of this legal malpractice case, not by trying to prove or recreate what would or may have happened in some other court at some other time and place."²⁷

¹⁷ Singleton v. Stegall, 580 So. 2d 1242, 1244 (Miss. 1991).

¹⁸ *Muirhead*, 920 So. 2d at 449.

¹⁹ Wilbourn v. Stennett, Wilkinson, & Ward, PC, 687 So. 2d 1205, 1215 (Miss. 1996), *quoted in Muirhead*, 920 So. 2d at 449.

²⁰ Hickox v. Holleman, 502 So. 2d 626 (Miss. 1987); Thompson v. Erving's Hatcheries, Inc., 186 So. 2d 756 (Miss. 1966).

²¹ Pope v. Schroeder, 512 So. 2d 905, 907 (Miss. 1987).

²² Luvane v. Waldrup, 903 So. 2d 745 (Miss. 2005).

²³ Chambers v. Campbell, 968 So. 2d 949 (Miss. Ct. App. 2005).

²⁴ *Id.*

²⁵ *Luvane*, 903 So. 2d at 748; *see also Chambers*, 968 So. 2d at 951 (affirming summary judgment for attorney that failed to answer counter-claim and discovery requests because "it is clear from this Court's ruling that the [plaintiffs] lost the underlying lawsuit because of their own actions rather than as a result of any negligence by [the attorney].").

²⁶ *Singleton*, 580 So. 2d at 1246; *see also Hickox*, 502 So. 2d at 634 (holding that – even where attorney negligently missed statute of limitations – plaintiff was still burdened with proving that but for the lawyer's negligence, he would have been successful in his underlying suit); *Pope*, 512 So. 2d at 907 (affirming summary judgment in favor of lawyer who failed to file client's appeal where "there was no possibility of reversal" in the underlying action).

²⁷ *Singleton*, 580 So. 2d at 1246.

In other words, the plaintiff/client cannot simply offer evidence about “what would have happened” in the underlying action; instead, plaintiff must call witnesses, present documentary evidence, and try his case just as if the underlying action were being tried. This is where many cases break down – no proof of causation, but if the plaintiff is successful, the range of damages are more encompassing than under the other theories of recovery.

II. Breach of Fiduciary Duty

Breach of fiduciary duty claims are premised on the lawyer’s role as his client’s fiduciary. Although not identical, the essential elements of a fiduciary duty claim are similar to those of a traditional negligence-based action. The plaintiff must prove by a preponderance of the evidence: “(1) the existence of an attorney-client relationship; (2) the acts constituting a violation of the attorney’s fiduciary duty; (3) that the breach proximately caused the injury; and (4) the fact and extent of the injury.”²⁸

A. Fiduciary Duty Actions – The Lawyer’s Duties to his Clients

Fiduciary duty claims do not implicate the lawyer’s duty of care as in a traditional negligence action. Instead, fiduciary duty claims require proof that the lawyer violated his duty of loyalty to his client. The duty of loyalty includes the duties of confidentiality, candor, disclosure, to avoid conflicts of interest, and to safeguard the client’s confidences and property.²⁹ “The relationship of attorney and client is one of special trust and confidence,” and “all dealings between them shall be characterized by the utmost fairness and good faith on the part of the attorney.”³⁰ These obligations are also referred to, collectively, as the lawyer’s “standard of conduct.”³¹

Some examples of a lawyer’s breach of fiduciary duty include taking unfair personal advantage in a business transaction with a client,³² overreaching in a fee calculation,³³ prematurely settling a case to maximize attorneys’ fees,³⁴ lack of candor to one client when representing two clients in a single transaction,³⁵ divulging confidential information obtained during the representation,³⁶ and failure to inform the client of a potential conflict of interest.³⁷ The facts creating the claimed fiduciary duty, and how that duty was breached, must be pled with particularity.³⁸

²⁸ *Crist v. Loyacono*, 65 So. 3d 817, 843 (Miss. 2011).

²⁹ *Owen v. Pringle*, 621 So. 2d 668, 670-71 (Miss. 1993); *Tyson v. Moore*, 613 So. 2d 817, 827 (Miss. 1992).

³⁰ *Baker, Donelson, Bearman & Caldwell v. Seay*, 42 So. 3d 474, 486 (Miss. 2010) (quoting *Lowery v. Smith*, 543 So. 2d 1155 (Miss. 1989)).

³¹ *Lane*, 873 So. 2d at 99.

³² *Tyson v. Moore*, 613 So. 2d 817 (Miss. 1992)

³³ *Id.*

³⁴ *Crist*, 65 So. 3d at 842.

³⁵ *Lane*, 873 So. 2d at 98.

³⁶ *Owen*, 621 So. 2d at 671.

³⁷ *Victory Lane Prods., LLC v. Paul, Hastings, Janofsky & Walker, LLP*, 409 F. Supp. 2d 773 (S.D. Miss. 2006).

³⁸ *Wilbourn*, 687 So. 2d at 1216.

The importance of avoiding conflicts of interest is highlighted by the recent Mississippi Supreme Court's recent opinion in *Baker & McKenzie, LLP v. Evans*, 123 So. 3d 387 (Miss. 2013). There, a lawyer represented two individuals and their respective companies in numerous transactions and financing deals related to oil and gas production. Plaintiff Evans claimed that in the course of those deals the lawyer took actions for the benefit of the other individual to Evans's detriment (*i.e.*, pledging Evans's drilling rigs as collateral against his express objection). Then, when litigation ensued between Evans and his business partner, the lawyer's firm pursued the case against Evans. Evans claimed that the lawyer and firm breached their fiduciary duties to him and engaged in an impermissible conflict of interest, which ultimately led to the destruction of his company.

Evans and his companies prevailed at trial, and the Circuit Court entered judgment for \$103 million. Although the Supreme Court's opinion was 59 pages and touched on numerous issues, all nine Justices easily affirmed the finding of liability against the lawyer and his firm. Ultimately, the case was remanded for a new trial on damages.

B. Causation and Damages

In a case involving a lawyer's duty of loyalty, causation must still be proven, but the "trial within a trial/but for" standard above may not be workable. Instead, for breach of fiduciary duty claims, "the proof of proximate cause" must be "tailored to the injury the client claims and the remedy he elects."³⁹

So long as some real injury was proximately caused by the lawyer's breach of loyalty, such breach may be actionable even if it did not cause "injury" to the underlying suit.⁴⁰ For example, in some circumstances, emotional distress damages may be recoverable as a result of a lawyer's breach of his duty of fidelity and loyalty. Such damages, however, are only recoverable to the extent they are proximately caused by the lawyer's defaults and can be differentiated from the typical stress attendant to the client's "legal plight."⁴¹

An important limitation to fiduciary duty claims is that a plaintiff may not recover unless the purported breach of loyalty was "related to the representation or arising therefrom."⁴² Therefore, a plaintiff must prove more than the lawyer was simply "not loyal" or took some self-interested action. To prevail, the plaintiff must show that the lawyer's breach of loyalty fell within the scope of the relationship.⁴³

³⁹ *Crist*, 65 So. 3d at 842 (quoting *Singleton*, 580 So. 2d at 1245).

⁴⁰ *See Singleton*, 580 So. 2d at 1247.

⁴¹ *Id.*

⁴² *Tyson*, 613 So. 2d at 827, *quoted in Seay*, 42 So. 3d at 487

⁴³ *Seay*, 42 So. 3d at 486 (quoting appellant's brief stating that "the scope of an attorney's fiduciary duty to his or her client does not exceed the scope of the legal representation."). In the *Seay* case, the Mississippi Supreme Court held that no genuine issue of material fact existed as to plaintiff's fiduciary duty claim where a lawyer allegedly used "confidential information" (*i.e.*, that the client was impotent) to seduce the client's wife. The underlying representation involved the lawyer advising the client in a breach of employment contract suit. Ultimately, the Court held that "no material facts [were] presented to support that the subject affair was in any way 'related to the representation'" *Id.* at 487.

The *Seay* case is somewhat difficult to square with *Pierce v. Cook*, 992 So. 2d 612 (Miss. 2008). *Pierce* suggests that a lawyer's affair with his client's wife was a breach of his fiduciary duty to the client and that the

Breach of fiduciary claims have always been around, but recent cases, including *Crist v. Loyacono*, have helped us understand that this brand of malpractice is not subject to the “case within a case” rule, and that the damage analysis is different and perhaps more limited.

III. Breach of Contract

A “lawyer owes any duties created by his contract with his client.”⁴⁴ Accordingly, where a lawyer undertakes a specific task – such as to file a petition for post-conviction relief – and fails in performing that task, the lawyer may be held liable for breach of contract.⁴⁵ Importantly, the plaintiff/client may not have to prove traditional “case-within-a-case/but for” causation.⁴⁶ Therefore, a breach of contract claim may prevail where a traditional negligence-based action fails.

The most illustrative case on this point is *Lancaster v. Stevens*.⁴⁷ There, a lawyer was hired to pursue a capital murderer’s federal habeas petition and all federal appeals. After the initial petition was denied, the lawyer filed an appeal, but the appellate brief was stricken for non-compliance with the Fifth Circuit’s rules. The lawyer failed to re-file a compliant brief. The client sued the lawyer for negligence and breach of contract, and the trial court granted summary judgment to the lawyer on all claims.

The Mississippi Court of Appeal affirmed summary judgment as to the negligence claim, stating there was no proof that “but for [the lawyers’] negligence, Lancaster would have been successful on appeal.”⁴⁸ The appellate court, however, reversed the trial court’s summary judgment on the breach of contract claim. Citing the plaintiff/client’s brief, the court stated that the plaintiff “can still succeed on a breach of contract claim because the ‘but for’ standard used by the trial court is not applicable to a breach of contract action.”⁴⁹ This is as it should be. A lawyer that does not do what he said he would do has probably violated the duty of loyalty as well. Importantly, the Supreme Court has not had an opportunity to address the full scope of remedies and damages available under this theory.

IV. Defenses

Legal malpractice claims – whether brought as negligence, fiduciary duty, or contract

plaintiff did not have to show “damage to the underlying action” to prove his damages. One should use caution, however, when relying on *Pierce* for this principle. The causation issue was not before the Court and, accordingly, was not addressed in the opinion.

⁴⁴ *Singleton*, 580 So. 2d at 1245.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1246. *See also* *Hurst v. Sw. Miss. Legal Servs.*, 708 So. 2d 1347 (Miss. 1998) (Hurst II) (affirming finding of liability against lawyer where lawyer failed to file appellate brief even where there was strong evidence “that the appeal was futile”).

⁴⁷ *Lancaster v. Stevens*, 961 So. 2d 768 (Miss. Ct. App. 2007).

⁴⁸ *Id.* at 771.

⁴⁹ *Id.* at 772 (citing *Hurst v. Sw. Miss. Legal Servs.*, 610 So. 2d 374, 377 (Miss. 1992) (Hurst I)).

claims – are governed by Mississippi’s general three-year statute of limitations.⁵⁰ The limitations period begins to run in a legal malpractice case “on the date the client learns or through the exercise of reasonable diligence should learn of the negligence of his lawyer.”⁵¹ Mississippi Code Section 15-1-49 incorporates the “discovery rule” when “it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act.”⁵² Where the plaintiff/client is sophisticated, such as another lawyer, the discovery rule may be inapplicable.⁵³ The statute may also be tolled if plaintiff can carry his burden of proving fraudulent concealment under Mississippi Code Section 15-1-67.⁵⁴

For the lawyer that needs to get out of a case, the only safe approach is via motion and order from the court. Securing an order permitting withdrawal insulates the lawyer from duties that accrue after the withdrawal.⁵⁵

A lawyer may not, however, avoid liability by seeking a “malpractice waiver” from the client.⁵⁶ There is an inherent conflict when a lawyer asks his client to sign a document waiving his right to sue the lawyer. Similarly, a waiver of an ineffective assistance of counsel is invalid where the advice to waive the claim was given by the same lawyer who was allegedly ineffective.⁵⁷ The prohibition against prospective “malpractice waivers” does not extend to arbitration clauses, so long as the lawyer adequately explains the meaning, advantages, and disadvantages of the arbitration clause.⁵⁸

V. Use of the Rules of Professional Conduct

The “violation of a Rule [of Professional Conduct] should not give rise to a cause of action, nor should it create any presumption that a duty has been breached.”⁵⁹ An infringement of the Rules does not establish negligence per se. The Rules are not “a measuring stick to determine civil liability for legal malpractice,”⁶⁰ and “nothing in the rules should be deemed to

⁵⁰ Miss. Code Ann. § 15-1-49 (1972). See *Evans v. Howell*, 121 So. 3d 919 (Miss. Ct. App. 2014) (malpractice claim accrued when client signed negligently drafted buyout agreement since the error should have been apparent to “an intelligent layman familiar only with the basics of English language”); *Channel v. Loyacono*, 954 So. 2d 415, 420 (Miss. 2007); *Hutchinson v. Smith*, 417 So. 2d 926 (Miss. 1982) (holding that proper statute of limitations was the state’s general statute, not Section 15-1-29 pertaining to unwritten contracts).

⁵¹ *Smith v. Sneed*, 638 So. 2d 1252, 1253 (Miss. 1994), quoted in *Channel*, 954 So. 2d at 421.

⁵² *Channel*, 954 So. 2d at 421 (quoting *McCain v. Memphis Hardwood Flooring Co.*, 725 So. 2d 788, 794 (Miss.1998)).

⁵³ *First Trust Nat’l Ass’n v. First Nat’l Bank of Commerce*, 220 F.3d 331, 338 n. 7 (5th Cir. 2000) (analyzing *Smith v. Sneed* and finding that sophisticated plaintiff could not rely on discovery rule in breach of fiduciary duty claim).

⁵⁴ *Suthoff v. Yazoo County Indus. Dev. Corp.*, 722 F.2d 133 (5th Cir. 1983); see also *Pickett v. Gallagher*, 159 So. 3d 587 (Miss. Ct. App. 2014) (finding fraudulent concealment to be inapplicable under the circumstances).

⁵⁵ *Allison vs. State*, 436 So.2d 792 (Miss. 1983) (fining lawyer who failed to file appellate brief because of non-payment of fees where lawyer failed to move court to withdraw.)

⁵⁶ *Sneed*, 638 So. 2d at 1260-63. See also M.R.P.C. 1.8(h).

⁵⁷ *McCamey v. Epps*, 696 F. Supp. 2d 667, 707 (N.D. Miss. 2010) (“A lawyer cannot ethically seek a waiver of their client’s rights and claims against the attorney because of the conflict between the lawyer’s and the client’s interest.”).

⁵⁸ *Slater-Moore v. Goeldner*, 113 So. 3d 521, 529-30 (Miss. 2013).

⁵⁹ *Singleton*, 580 So. 2d at 1244; see also Rules of Professional Conduct, Scope.

⁶⁰ *Wilbourn*, 687 So. 2d at 1216.

augment any substantive legal duty of lawyers.”⁶¹ Instead, under certain circumstances, the Rules may be relevant to the legal duty owed by the lawyer to his client.⁶²

These rules were explained in more detail by the Mississippi Supreme Court in *Estate of St. Martin v. Hixson*.⁶³ Plaintiffs, who had obtained a favorable settlement of a significant personal injury case, asserted a variety of claims against an out-of-state lawyer. Relevant here, plaintiffs argued that (1) the contingency fee agreement should be voided because the lawyer violated MRPC 1.8 regarding cash advances, and (2) the attorney engaged in the unauthorized practice of law, which should void the contingency fee agreement. As to the attorney’s improper advances, the Court relied on *Wilbourn* and found that, without more, a contingency fee agreement should not be voided as a result of a lawyer’s violation of the Rules of Professional Conduct.⁶⁴ Regarding St. Martin’s alleged failure to be properly admitted, the Court held that an unauthorized appearance alone “would not ‘give rise to a cause of action,’ nor does it ‘create any presumption that a duty has been breached.’”⁶⁵ Ultimately, the Court upheld the contingency fee agreement.

Accordingly, *St. Martin* reaffirms the longstanding rule that a violation of the Rules of Professional Conduct, without more, will not give rise to a *per se* malpractice claim.

VI. Scope of Liability: Innocent Members, Partners, and Associating Attorneys

One question that every member of a law firm should be concerned with is: “When can I, or my firm, be held responsible for the actions of one of my partners?” The answer is governed largely by statute.

While some firms continue to practice as traditional partnerships, the majority have chosen to organize as either a Professional Corporation (or Association)⁶⁶ or Professional Limited Liability Company.⁶⁷ And there is good reason for doing so. Pursuant to Mississippi’s Uniform Partnership Act⁶⁸ and traditional common law principles, an innocent partner may be personally liable for the misconduct of his partners if such conduct was “in the ordinary course of the partnership business.”⁶⁹ Thus, in a general partnership, joint venture, or joint

⁶¹ *Singleton*, 580 So. 2d at 1245.

⁶² *Waggoner v. Williamson*, 8 So. 3d 147 (Miss. 2009). Importantly, the lawyers in *Waggoner* specifically agreed *via* contract to “comply with Rule 1.8 of the ABA Model Rules of Professional Conduct or its state counterpart” in procuring multiple plaintiffs’ approval to a Multi-District Litigation settlement. *Id.* at 150. In reversing a trial court’s order granting the lawyers summary judgment, the Court specifically noted that the lawyers “had a contractual duty to comply with Rule 1.8 of the ABA Model Rules of Professional Conduct.” *Id.* at 154. Since a fact question existed as to whether the lawyers informed each settling client of all the required information in Rule 1.8, a genuine issue of material fact existed “as to whether this contract was breached.” *Id.* See also *Pierce v. Cook*, 992 So. 2d 612 (2008) (allowing jury instruction which stated “that a lawyer owes his clients duties falling into three broad categories, duty of care, duty of loyalty and duties provided by contract.”).

⁶³ *St. Martin*, 145 So. 3d at 1132-38.

⁶⁴ *Id.* at 1132-33.

⁶⁵ *Id.* at 1137.

⁶⁶ Miss. Code Ann. § 79-10-1, *et seq.*

⁶⁷ Miss. Code Ann. § 79-29-901, *et seq.*

⁶⁸ Miss. Code Ann. § 79-13-101, *et seq.*

⁶⁹ Miss. Code Ann. §§ 79-13-305 - 307.

representation, an innocent lawyer may potentially be held responsible for the wrongful conduct of his partners and the only limitation of the lawyer's personal liability is whether the wrongful partner's conduct was "in the ordinary course of the partnership business." The rules of partnership liability extend not only to formal partnerships, but also to counsel associated for a single particular case.⁷⁰

This point was recently litigated in *Barrett v. Jones, Funderburg, Sessums, Peterson & Lee, LLC*.⁷¹ In *Barrett*, the Court analyzed whether individual members of a joint venture could be sanctioned *via* vicarious liability for the fraudulent conduct of one of the joint venture's members. As to that general issue, the Court held that - in light of Mississippi's Uniform Partnership Act - an individual partner can be sanctioned for the fraudulent conduct of his partner. After answering that threshold question, the Court then analyzed "whether [the attorney's] misconduct [of attempting to bribe a judge] was within the ordinary course of [the joint venture's] business."⁷² Ultimately, the Court concluded that "[b]ecause the misconduct of [the attorney] was outside the ordinary course of [the venture's] business, the trial court abused its discretion in finding otherwise" and imposing sanctions on the venture's innocent members.⁷³

But what would the outcome have been as to the individual members of the venture had it been a PC or PLLC rather than a joint venture? The answer is simple: The individual members would have been statutorily shielded from personal liability and the only recourse would have been against the members who personally participated in the misconduct and professional entity.⁷⁴

While the innocent members and shareholders of PCs and PLLCs are shielded from personal liability for a lawyer's negligence, the entity itself may be held liable for the actions of its lawyers in some circumstances. Law firms organized as PCs and PLLCs are only liable for their lawyers' actions that are "within the scope of their employment or of their apparent authority to act for the [PC or PLLC]."⁷⁵ This is an important distinction since, obviously, not every action of a lawyer is "within the scope" of his employment or apparent authority. A prime

⁷⁰ See *Duggins v. Guardianship of Washington*, 632 So. 2d 420 (Miss. 1993) (holding lawyer responsible under predecessor of current Uniform Partnership Act for associated counsel's misconduct and misrepresentations in settling medical malpractice case).

⁷¹ 27 So. 3d 363 (Miss. 2009).

⁷² *Id.* at 373.

⁷³ *Id.* at 376.

⁷⁴ Miss. Code Ann. 79-29-920(1) (PLLC) ("A member or an employee of a domestic or foreign [PLLC], is not liable, however, for the conduct of other members or employees of the [PLLC], except a person under the member's direct supervision and control, while rendering professional services on behalf of the [PLLC] to the person for whom such professional services were being rendered."). See also *Keszenheimer v. Boyd*, 897 So. 2d 373 (Miss. 2005) (holding that innocent PLLC member-lawyers could only be personally liable for misconduct if they were personally negligent or supervised someone who committed a wrongful act).

Miss. Code Ann. § 79-10-67(1) (PC) ("An employee or shareholder of a domestic or foreign professional corporation is not liable, however, for the conduct of other employees or shareholders of the corporation, except a person under his direct supervision and control, while rendering professional services on behalf of the professional corporation to the person for whom such professional services were being rendered.").

⁷⁵ Miss. Code Ann. § 79-29-920(2) (PLLC); Miss. Code Ann. § 79-10-67(2) (PC).

example of this is the recent *Seay v. Baker Donelson Bearman Caldwell & Berkowitz, PC*⁷⁶ opinion.

In *Seay*, a lawyer was sued for breach of fiduciary duty, and his firm was sued for vicarious breach of fiduciary duty, direct breach of fiduciary duty, empowerment, and negligent supervision. The plaintiff was the lawyer's long-time friend, and he claimed that the lawyer engaged in an affair with his wife while simultaneously representing him in an employment-related legal matter. On interlocutory appeal, the Mississippi Supreme Court rendered judgment in favor of the firm on all claims.

As to the vicarious breach of fiduciary duty claim, Mississippi Code Section 79-10-67 applied, which holds a professional corporation responsible for the actions of its lawyers only where its lawyers "perform professional services within the scope of their employment or of their apparent authority to act for the corporation." The issue turned, then, on whether the lawyer's conduct was within the scope of his employment for the law firm. Ultimately, the Court concluded that the sexual relationship was unrelated to the representation and a "frolic 'so clearly beyond an employee's course and scope of employment that it cannot form the basis for a claim of vicarious liability, as a matter of law.'" ⁷⁷

With regard to the direct breach of fiduciary duty claim, the client asserted that the firm breached its fiduciary duty to him by hiring an investigator to conduct surveillance on him *after* the client demanded a large sum of money to avoid litigation. The Court held that the client's threat effectively severed the attorney-client relationship and authorized the firm to "respond to the extent that [it] reasonably believe[d] necessary to establish a defense."⁷⁸ Accordingly, the firm was entitled to defend itself as any other defendant, and the client's direct breach of fiduciary duty claim failed as a matter of law.

As to the remaining claims, the Court also found for the firm. First, it held that "empowerment" was more appropriately a factor in the "scope of employment" analysis than a stand-alone cause of action. Second, the firm had no duty to "supervise" the lawyer's alleged conduct since it was "outside the scope of his employment and purely for his own benefit."⁷⁹

These cases highlight the importance and benefits of forming a professional entity.

VII. Special Considerations

A. Real Estate Attorneys

Though the scope of representation may be limited by contract, closing attorneys generally have a duty to present appropriate documents to the parties at closing and ensure proper recording of deeds and security interests.⁸⁰ The Southern District of Mississippi has

⁷⁶ 42 So. 3d 474 (Miss. 2010).

⁷⁷ *Id.* at 489.

⁷⁸ *Id.* at 490.

⁷⁹ *Id.*

⁸⁰ *Neal v. 21st Mortgage Corp*, 601 F. Supp. 2d 828 (S.D. Miss. 2009).

noted that “real estate closings present a particularly thorny dilemma for the bar” because “several parties might reasonably rely on the closing attorney’s work.”⁸¹ Accordingly, the closing attorney must be “particularly vigilant in delineating whom the attorney represents . . . and should make sure that all parties involved in the transaction understand who is and is not the attorney’s client, and give unrepresented parties an opportunity to obtain counsel.”⁸² Similarly, an attorney who serves “merely [as] a scrivener” in closing a transaction must avoid providing legal advice to any party in a transaction.⁸³

Century 21 Deep South Prop. v. Corson,⁸⁴ is a watershed case that extends title attorneys’ obligations to subsequent purchasers of the property. In *Corson*, an attorney conducted a title opinion for the Meiers family before they purchased a house. When the Meiers sold the house to the Corsons, Century 21 only required an “update” title opinion (*i.e.*, a search for liens created after Meiers’ purchase). When Corson sought a second mortgage, the bank required a full title opinion which revealed two liens that were not found or disclosed by the Meiers’ closing attorney. The Corsons sued Meiers’ attorney. It was undisputed that the Corsons had no attorney-client relationship with Meiers’ attorney.

Nevertheless, in the title attorney context, the Mississippi Supreme Court abolished the “requirement of [proving an] attorney-client relationship and extend[ed] liability to foreseeable third parties who detrimentally rel[ied]” on the title attorney’s work.⁸⁵ Accordingly, attorneys performing title work may potentially be liable for negligence to subsequent purchasers to whom the attorney never had any connection.

The rule of *Corson* must be contrasted with the outcome of *Grandquest v. Estate of McFarland*.⁸⁶ In *Grandquest*, a seller’s attorney was instructed by his client to draft a deed conveying the property to the buyer and to prepare an “Authority to Cancel Deed of Trust” to terminate the seller’s mortgage. He did so and noted on the deed that the “TITLE TO SAID LAND NOT EXAMINED.” The buyer filed suit against the lawyer alleging “malpractice in failing to advise her of the lien on the property.”⁸⁷

Ultimately, and without addressing *Corson*, the Court of Appeals affirmed summary judgment for the attorney, stating, “we find nothing to suggest that the services at issue concerned anything but the mere preparation of a deed; there is no evidence that legal advice was sought from or offered by [the attorney].”⁸⁸ The court’s rationale was that the “‘legal services’ at issue were of limited scope – the preparation of a deed,” and that the lawyer “cannot be found to have committed malpractice for failing to advise where no advice was contemplated by the representation.”⁸⁹ Therefore, where an attorney is not engaged to conduct a title opinion, but

⁸¹ Marsh v. Wallace, 666 F. Supp. 2d 651, 674 (S.D. Miss. 2009).

⁸² *Id.* (quoting Miss. Bar Ethics Op. No. 248 (2001)).

⁸³ *Id.*

⁸⁴ 612 So. 2d 359 (Miss. 1992)

⁸⁵ *Id.* at 374.

⁸⁶ 18 So. 3d 324 (Miss. Ct. App. 2009).

⁸⁷ *Id.* at 326.

⁸⁸ *Id.* at 328.

⁸⁹ *Id.* at 327-28.

rather acts merely as scrivener preparing a deed, a purchaser may not be able to rely on the rule of *Century 21 v. Corson* to bring suit against an attorney.

B. Insurance Defense Counsel

1. The Attorney's Obligations to the Carrier and the Insured

An attorney paid by a defendant's insurer owes fiduciary duties to both the insurer and the insured. Indeed, "[t]he insured and the carrier are both clients."⁹⁰ In *Hartford Accident and Indemnity Company v. Foster*,⁹¹ the Mississippi Supreme Court thoroughly analyzed this potentially difficult tripartite relationship.

Where the insurer accepts full coverage for the insured's defense and indemnity, the insurer and insured's interests generally coincide, thereby avoiding the majority of potential conflicts. When either a settlement demand or discovery of facts shows that the case could potentially exceed policy limits, the possibility for conflict increases. This is particularly true when a plaintiff offers to settle the case within policy limits. The lawyer's violation of his duties to either client can potentially expose him to liability.

When a policy-limits settlement offer is made by the plaintiff, the lawyer's "first professional and ethical obligation is to see that both [the insurer and insured's] interests are protected insofar as he can do so, and that he does nothing to harm either."⁹² The lawyer must inform both clients as to the terms of the settlement offer. Next, the lawyer must explain the conflict of interest, advise the insured that he may need independent counsel to protect his interests, and "advise the insured that he cannot offer him any legal advice as to the offer other than it is obviously to his monetary advantage that the offer be accepted, and that he should promptly inform the carrier what he wants the carrier to do regarding the offer."⁹³ The lawyer should also advise the carrier that a conflict exists and that he can make no recommendation that "places his insured client in peril."⁹⁴ The Court summed up the lawyer's remaining obligation best:

The best this Court can offer is that the attorney, after informing his clients of the settlement terms, and giving them the advice as above noted, should not be prohibited from honestly and carefully answering questions pertaining to the law and facts of the case, his impressions of the witnesses, the jury, and the trial judge, such as he would normally be asked as attorney, and expected to be able to answer. At the same time, he must scrupulously guard against violating his absolute, nondelegable responsibility not to urge, recommend or suggest any course of action to the carrier which violates his conflict of interest obligation. This is a tortuous, perilous path.⁹⁵

⁹⁰ *Hartford Acc. & Indem. Co. v. Foster*, 528 So. 2d 255, 270 (Miss. 1988).

⁹¹ *Id.*

⁹² *Id.* at 270.

⁹³ *Id.* at 273.

⁹⁴ *Id.*

⁹⁵ *Id.*

2. The Attorney's Obligations when the Carrier Defends the Insured Under a Reservation of Rights

When the carrier refuses to provide full and unfettered indemnity and offers the insured a defense under reservation of rights, it is unquestioned that a single lawyer cannot represent the interests of both the carrier and the insured.⁹⁶ This conflict may occur either at the onset of litigation based upon the plaintiff's pleadings, or it may arise during discovery. Perhaps the most common time an insurer reserves its rights to deny coverage is when plaintiff pleads some claims that are covered by the policy and other claims that are excluded.

Regardless, all attorneys representing an insured client must "remain on alert and be ever watchful for any possible conflict of interest arising between the two, because the moment that happens, counsel should not attempt to represent them both."⁹⁷ Once a true conflict of interest arises between carrier and insured, the lawyer hired by the insurer "should undertake to represent only the interest of the insurance carrier for the part covered."⁹⁸ The client must then be advised that he is entitled to select his own independent counsel at the carrier's expense.⁹⁹

3. The Attorney's Obligations to Excess Carriers

As touched on earlier in this paper, the insurance defense lawyer owes duties – at least to some extent – to an excess carrier whose policy may be implicated. In *Great American*,¹⁰⁰ *supra*, a Florida firm was hired to represent a Mississippi nursing home. The firm provided case evaluations in the \$250,000-\$500,000 range, and the excess carrier's coverage only applied to damages beyond \$1,000,000.

The firm designated experts in the underlying nursing home case late, and plaintiffs succeeded on a motion to strike. The next day, the firm provided an updated case evaluation increasing the settlement value to between \$3 and \$4 million. The primary insurer tendered its full policy limits, and the excess carrier later settled the case for an undisclosed sum. The excess carrier filed suit against the firm alleging claims for equitable subrogation, legal malpractice, negligence, gross negligence, negligent misrepresentation, and negligent supervision.

The trial court granted the firm's motion to dismiss as to all claims, stating that "because of the different interest and goals of the primary carrier and excess carrier particularly as to the varying risks of recovery with potential damages, it is unwise to require the same counsel to be responsible and liable to both at the same time."¹⁰¹ The Court of Appeals disagreed and reversed as to all claims.

⁹⁶ Moeller v. Am. Guar. & Liab. Ins. Co., 707 So. 2d 1062, 1070 (Miss. 1998).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Great Am. E&S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A., No. 2009-CA-01063-COA, 2012 WL 266858 (Miss. Ct. App. Jan. 31, 2012).

¹⁰¹ *Id.* at *3.

The Mississippi Supreme Court reversed the Court of Appeals, in part, and held that the excess carrier could not state *directly* a legal malpractice claim against the insurance-defense counsel. The Court affirmed and adopted, however, the appellate court’s ruling on the carrier’s equitable subrogation claim. The Court explained: “We do not expand or change the duty owed by counsel to the client. We hold only that, when lawyers breach the duty they owe to their clients, excess insurance carriers, who – on behalf of the clients – pay the damage, may pursue the same claim the client could have pursued.”¹⁰² To say it another way, barring an independent basis establishing the existence of an attorney-client relationship, the excess carrier cannot state a direct malpractice claim against insurance-defense counsel, but it *may* be able to assert the rights of *its insured* against the insured’s insurance-defense counsel.

C. Representing Multiple Plaintiffs

The attorney who represents multiple plaintiffs in the same matter owes particular duties to his clients. In undertaking to represent many plaintiffs, the lawyer commits “to represent *each plaintiff*,” and to make “a contemporaneous commitment to conduct sufficient investigation to form a good faith belief that *each plaintiff* has a viable cause of action against a particular defendant.”¹⁰³

The lawyer’s duties obviously extend beyond the initial case evaluation, and carry through the conclusion of the litigation. Indeed, the majority of such malpractice claims implicate settlement negotiations or the distribution of settlement funds.¹⁰⁴ In conducting such settlements, the lawyer should negotiate in good faith, keeping the clients’ best interest as the chief consideration and never put the interests of one client over those of another. Upon receiving the settlement offer, the attorney must advise each client of the offer and the benefits and potential consequences of accepting or rejecting the offer. For distribution of funds, meticulous records must be kept to ensure proper distribution and allocation of the funds.

D. Duties of Guardians Ad Litem

Guardians ad litem appointed in Chancery Court may owe their wards the same fiduciary duties as privately hired lawyers. Significant confusion has surrounded the role of guardians. In some instances, Chancellors appoint the guardian to serve as an extension of the court and to investigate a case for the purpose of presenting the court with all facts necessary and material to making its decision. At other times, a guardian may “serve as the ward’s lawyer, with all the duties, responsibilities, and privileges required by the attorney-client relationship.”¹⁰⁵

¹⁰² *Great American*, 100 So. 3d at 423-24.

¹⁰³ *Ill. Central R.R. Co. v. Adams*, 922 So. 2d 787, 791 (Miss. 2006) (emphasis in the original). The Court further stated that “at a minimum,” plaintiffs’ attorney should “interview each plaintiff and conduct some investigation.” *Id.* Counsel should associate additional counsel if unable to complete the work himself. *Id.*

¹⁰⁴ *See Crist v. Loyacono*, 65 So. 3d 837 (Miss. 2011) (alleging improper premature settlement by attorneys to purportedly maximize attorneys’ fees); *Edmunds v. Williamson*, 13 So. 3d 1283 (Miss. 2009) (alleging impropriety in calculating attorneys’ fees from settlement proceeds); *Channel v. Loyacono*, 954 So. 2d 415 (Miss. 2007) (alleging improper settlement of multiple plaintiffs’ claims).

¹⁰⁵ *S.G. v. D.C.*, 13 So. 3d 269, 280 (Miss. 2009).

Where appointed to serve as a ward's attorney, the duties of care and loyalty are owed to his ward, and a breach of those duties may result in a malpractice action.

E. The Use of Expert Testimony

Typically, expert testimony is required in a legal malpractice case, regardless of whether it is premised on the duty of care or the duty of loyalty.¹⁰⁶ The expert's role is to explain the relevant duties to the jury (*i.e.*, what a reasonably prudent lawyer should have done) and opine as to whether the lawyer violated those duties or not. This is particularly true where "a jury is confronted with issues which require specialized knowledge or experience in order to be properly understood, and which cannot be determined intelligently merely from the deductions made and the inferences drawn on the basis of ordinary knowledge, common sense, and practical experience gained in the ordinary affairs of life."¹⁰⁷

In certain situations, however, the Court has "carved out some exceptions to the general rule that expert testimony is required in a legal malpractice case."¹⁰⁸ It is the exceptional case that expert testimony can be done away with. Indeed, the absence of expert testimony is only justified where the lawyer's conduct – as a matter of law – is a clear breach of duty to the client.¹⁰⁹

VIII. Conclusion

With legal malpractice claims on the rise – both against individual lawyers and against firms – it is important to understand both the legal issues and the practical considerations involved. We hope that this article helps in that regard.

¹⁰⁶ Byrd v. Bowie, 933 So. 2d 899, 904 (Miss. 2006) ("Clearly established law provides that expert testimony is necessary to establish the breach of a duty of care in a claim of legal malpractice.").

¹⁰⁷ Dean v. Conn, 419 So. 2d 148, 151 (Miss. 1982).

¹⁰⁸ *Id.*

¹⁰⁹ Hickox v. Holleman, 502 So. 2d 626 (Miss. 1987) (holding that failure to file a lawsuit within the applicable statute of limitations "was negligence as a matter of law and the plaintiff in such case was entitled to directed verdict on liability."); *quoted in* Byrd, 933 So. 2d at 904. *See also* Pierce v. Cook, 992 So. 2d 612 (2008) (holding that no expert testimony was needed because "[o]rdinary jurors possess the requisite knowledge and lay expertise to determine if an adulterous affair between an attorney and his client's wife is a breach of a duty owed by an attorney to his client.").