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lpAdvisory

A newsletter from The ABA Standing Committee on Lawyers' Professional Liability

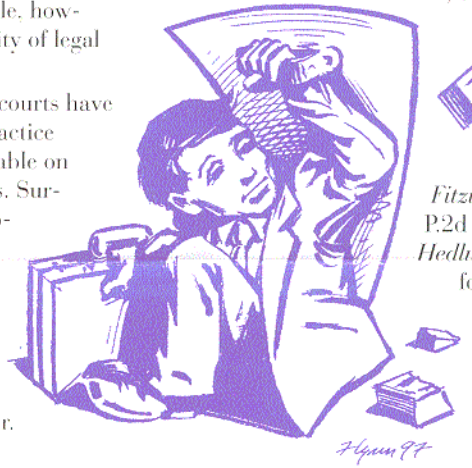
Can Legal Malpractice Claims Be Assigned?

by Edward C. Mendrzycki

At early common law, a chose in action was not assignable and no one could transfer his right to suit to another. Annotation, *Assignability of Claim for Legal Malpractice*, Francis M. Dougherty, 40 A.L.R. 4th 684 (1985). Assignments of choses in action were first approved by courts of equity and today the general rule is that a party may assign his claim to another, regardless of the nature of the claim. An exception to this general rule, however, is the assignability of legal malpractice claims.

The majority of courts have held that legal malpractice claims are not assignable on public policy grounds. Surprisingly, the issue apparently was first considered in 1976 in the seminal decision in *Goodley v. Wank and Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976), where the California appellate court held that legal malpractice cases should not be assignable. *Goodley* has been cited repeatedly in almost every other case that has considered the question and the *Goodley* court's summary of its argument in support of its ruling is usually quoted in full. The court focused on 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; concluded that allowing the assignment of legal malpractice claims could relegate them to the market place and convert them to a commodity to be sold to purchasers who never had a professional relationship with the attorney; and expressed concern that allowing assignment could only debase the legal profession. Id. at 397.

The minority view rejects the argument that public policy should prevent the assignment of legal malpractice claims. See *Thurston v. Continental Casualty Co.*, 567 A.2d 922 (Me. 1989); *Hedlund Mfg. Co., Inc. v. Weiser, Stapler & Spivak*, 517 Pa. 522, 539 A.2d 357 (1988); *Collins v. Fitzwater*, 277 Ore. 401, 560 P.2d 1074 (1977). The *Hedlund* court reasoned as follows: "We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. Where the attorney has caused harm to his or her client, there is no relationship that remains to be protected." 517 Pa. at 526; 539 A.2d at 359. Similarly, the *Thurston* court concluded that the attorney-client relationship "does not justify preventing a client . . . from realizing the value of its malpractice claim in what may be the most efficient way possible, namely, its assignment to someone else with a clear interest in the claim who also has the time, energy and resources to bring the suit." 567 A.2d at 923.



"not allow . . . the attorney-client relationship to be used as a shield . . ."

CALENDAR

SEPTEMBER 17-19
Fall 1997 National Legal Malpractice Conference
The Hilton
New York City, NY

APRIL 1 - 3, 1998
Spring 1998 National Legal Malpractice Conference
The Four Seasons
Vancouver, BC

SEPTEMBER 23-25, 1998
Fall 1998 National Legal Malpractice Conference
Grove Park Inn
Asheville, N.C.

A recent decision by a Texas appellate court contains a comprehensive treatment of the issue and traces the development of the issue in Texas and other states. *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App. 1997). Plaintiffs, individually and as assignees, sued Vinson & Elkins alleging claims for legal malpractice, breach of fiduciary duty, conspiracy, and violations of the Texas Deceptive Trade Practices Act. The claims arose out of the law firm's alleged misconduct and mishandling of legal matters in connection with the administration of an estate. The beneficiaries of the estate assigned their claims against the law firm to the two plaintiffs who were also beneficiaries. A jury verdict in favor of plaintiffs resulted in a judgment in excess of $35,000,000. Holding that claims for legal malpractice, conspiracy, violations of the Texas Deceptive Trade Practices Act, or other intentional torts are not assignable, the appellate court reversed and remanded the case for a new trial on liability and damages.

The *Vinson & Elkins* court relied on the public policy considerations articulated in *Goodley* in reaching its holding. The court expressly rejected plaintiffs' argument that a holding of another Texas appellate court, that an assignment of a legal malpractice action arising from litigation is invalid, should be limited to instances where a judgment-proof defendant assigns his legal malpractice claim to the plaintiff. The court's opinion is very informative in that it analyzes the public policy considerations in depth and it cites decisions from fourteen jurisdictions which concluded that legal malpractice claims are not assignable. These jurisdictions include Arizona, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska and Nevada. 946 S.W.2d at 393.

The *Vinson & Elkins* court may have made new law by holding that the claims for conspiracy, violations of the Texas Deceptive Trade Practices Act, or other intentional torts are not assignable. But note the court's comment that the numerous allegations raised by the claimants were really nothing more than legal malpractice claims. 946 S.W.2d at 396.

While the *Goodley* decision will continue to be cited as the seminal one on assignability of legal malpractice claims, the *Vinson & Elkins* court's exhaustive and scholarly analysis of the issue will likely become one that others will consult for guidance.

Edward C. Mendrzycki is a partner at Simpson Thacher & Bartlett.

Special Concerns of Employment Practices Liability

by Mary Scott

Employment related litigation is the fastest growing area of litigation in America. The insurance industry has responded to this new business exposure by introducing employment practices liability (EPL) policies, but some carriers decline to write law firms altogether, and most consider law firms to be at high risk for EPL claims. The following factors tend to distinguish, and exacerbate, the EPL exposure in law firms.

Involvement in recruitment

Law firms generally have many individuals involved in the recruitment process who are not trained in employment law and human resources considerations. Discriminatory failure to hire is a concern for firms. In small firms, each partner is probably involved in recruitment. In larger law firms, several principals and associates will probably spend time with a candidate. The risk is that someone will ask illegal questions. Questions regarding an individual's age, marital status, living arrangements and availability for weekend work are among those potentially violative of Title VII of the Civil Rights Act of 1964. Will all involved attorneys manage to avoid all of these topics and others while interviewing and making small-talk at recruitment lunches?

Work Issues

Work assignments are particularly sensitive, because courts have held that firms cannot acquiesce to clients' discriminatory preferences regarding work assignments. This is a problem particularly with negative preferences ("We don't think a woman would do well for us in front of this judge . . .") but also with positive preferences ("We think an African American female attorney is just what we need for this case.") which may set up claims of reverse discrimination. Mentoring relationships have also been the basis for discrimination claims: they arise when a key partner with a specialized practice routinely mentors only certain types of associates. Law firms high stress environments, makes them susceptible to requests for accommodations for "mental disabilities" under the Americans with Disabilities Act. Claims have arisen from the inadequate and insensitive response of firms to attorneys experiencing problems such as depression and chronic fatigue syndrome — attorneys viewed as slackers by some firm members.

"We don't think a woman would do well for us in front of this judge. . ."

Advancement Decisions

The basis of appropriate advancement decisions, in the eyes of the law, are evaluations done according to established critical criteria that have been enunciated and communicated to candidates. This is a real area of failing with law firms. Partners don't have a lot of time to spend doing careful documentation, even if criteria have been established. The attorney who doesn't receive the partnership nod is now a disgruntled attorney with a new client — him- or herself. These cases are notoriously difficult to defend because the decision-making process is so subjective, and because each unsuccessful associate will likely have supporters as well as detractors.

Involuntary Retirements

With the aging of the boomers and growing expense pressures in the profession, firms may be seeking to remove the less productive senior members of their firms. Attempts to phase out older attorneys may lead to age discrimination charges. Bona fide partners are not employees for the purpose of statutory protections such as Title VII or the Age Discrimination in Employment Act, but if an older partner is first made "Of Counsel," or is marginalized (i.e., no longer has a say in management and receives a share of the firm's compensation partially based on individual performance), employee status —with all its protections — may be found. While the question is still unsettled, the emerging majority view is that shareholders of firms organized as professional corporations or associations or limited liability partnerships or companies will be deter-

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Comings, Goings, and Rare Stayings

by G. Michael Bourgeois

More comings and goings in the industry. . . . A flow chart helps but . . .

Mike Dailey has found greener pastures at Garden State Indemnity. His former position at Zurich American has been filled by **Mark Wade.** Also at Zurich American is **Margaret Hepper,** a frequent lecturer at the Standing Committee Meetings, who heads up ZA's LPL loss prevention efforts.

After ten years of building a very successful LPL book at Reliance National, **Penn Way** recently announced he will seek other opportunities and challenges. Penn oversaw Reliance National's Excess & Surplus Lines Division. **Dave McElroy,** Executive Vice President of Reliance National's Financial Products division, assumes Penn's responsibility for the company's lawyers' book. Additionally, **Joe Mon-leone** has consolidated all of Reliance ational's separate E&O claims departments under one roof and is now the senior claims officer in charge of LPL claims. **Lucille Sgaglione** has been promoted to Vice President and, as such, is the day-to-day manager of Reliance National's LPL Claims Department. Best wishes to all.

Peter Szendro is now with ZRC, where he was last spotted helping some of its reinsureds focus on changes in the law. **Jim Swearingen,** reported in the last issue as a PLUM alum, is now also a Coregis alum; he labors at AON as of this writing. His replacement as Coregis LPL program director is **Scott Williams. Lorrie Vick's** duties at Coregis have expanded; she now coordinates litigation management for all E&O and D&O claims. **Jim O'Brien** succeeds to the position of Claims Vice President at Coregis; he replaces **Robert Knowles,** who moved to Interstate as Claims Vice President.

G. Michael Bourgeois is first vice president of Claims at Reliance National.

Employment *(from page 3)*

mined to be partners rather than employees if they function as partners according to the factors generally used in such analysis.

Sex

Many reasons have been suggested for the high incidence of sexual harassment charges against law firms. Although all forms of harassment have been reported in law firms (male-female, female-male, same sex), most harassment is of women by men. Law is a profession that is currently top-heavy with men, creating a disparity of power between male partners and female associates. The nature of law practice often means long hours, travel, and close mentoring, and this also increases the risk of fraternization or abuse. Even when sexual relationships begin as "consensual," when they deteriorate, it is generally the more junior member of the firm whose career suffers, and this is usually the woman. A discrimination action may result. Various surveys have indicated that between thirty and fifty-five percent of female attorneys have experienced sexual harassment on the job in the past five years. There is also the obvious, but not unique, problem regarding the treatment of secretaries and paralegals, which remains a significant concern.

Conclusion

The traditional structure of law practice, the growing diversity in the profession, and the pressures on firms to operate more profitably all fuel the trend toward increased employment practices liability for law firms. Firms are well advised to review their policies and procedures related to employment and should also explore transferring some of this risk through the purchase of employment practices liability insurance.

Mary Scott is the Vice President for CNA.

ALPS Serves Small Places

by Robert W. Minto, Jr.

In the early 1970s, the market hardened and many state bar associations found themselves in need of options for lawyers' professional liability insurance, and the first of the NABRICO companies was born. In the 1980s, the cycle came around again and this time even the smallest bars were looking for options. Most found that they didn't have the critical mass required to form a single state company and from this dilemma the Attorneys Liability Protection Society, ALPS was born. The company was formed in 1987 as a mutual insurer, the result of the 1986 Risk Retention Act. Over the years, the number of ALPS jurisdictions has now grown to thirteen — operating from Alaska to Vermont to the Virgin Islands.

Geographic diversity has been the company's greatest challenge in providing quality services to its insured lawyers. ALPS provides a wide array of risk management, educational, claims management and policyholders' services out of its Montana office. These services are delivered with local perspective and personal service in mind. ALPS' risk managers provide on-site risk assessment visits for law firms, and they participate in CLE programs with affiliated bar associations. Claims are managed by legal specialists in Missoula, with the assistance of attorneys on our state-by-state defense panel. ALPS' marketing effort is personalized to each firm and conducted in-person, by phone, fax and e-mail as the individual situation dictates.

ALPS' geographic diversity also affects the manner in which we compete with commercial carriers. We must understand each marketplace, and also know other companies' coverages and their varying appetite for writing and renewing firms.

Governance is another distinguishing factor from other NABRICO entities. The Board, comprised of practicing attorneys

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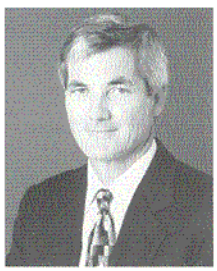
LPL Advisory is a bi-annual newsletter published by the **American Bar Association Standing Committee on Lawyers' Professional Liability.**

Joseph P. McMonigle, Chair; G. Michael Bourgeois, Pamela A. Bresnahan, E. Gregory Martin, Melvin G. McCartney, Edward C. Mendrzycki, William B. McGuire, Mary Scott • **Board Liaison** — Robert H. Fiebach

Message from the Chair



It is truly an honor and a pleasure to serve as your chair of the ABA Standing Committee for Lawyers' Professional Liability.

On behalf of the Committee, I want to thank my good friend Pam Bresnahan for her total commitment as chair to this Committee these last two years. Under Pam, the Committee has continued to produce high quality educational programs, complete the National Data Project for malpractice claims, and begin numerous other projects. I look forward to working with her on the Committee this next year.

One of the missions of the Committee is to deliver affordable malpractice insurance to the legal profession. While we have played a small role to accomplish this objective, the marketplace for lawyers' malpractice from the lawyer's prospective is the healthiest it has been in the last 20 years. The challenge to the industry will be to survive this extended "soft" market and to make a reasonable return on its investment in legal malpractice insurance.

The Committee provides a forum for all of us in this unique business. Risk prevention specialists, underwriters, insurance executives, insurance claims professionals, in both commercial and NABRICO companies have a place. The Committee will continue to provide the forum for all of its constituents and insure that there is a balanced prospective.

Many of you attended the National Legal Malpractice Program in New Orleans on how to try a legal malpractice action. This was a very successful program and will probably be repeated by the Standing Committee every two or three years.

The Committee has also begun a program to publish treatises in the field of malpractice prevention and professional liability. These works include a survival guide for new practitioners, tips for solo and small firm practitioners and a case book on legal malpractice. One of the goals of the Committee is to reach out to the almost 50% of the profession that practices in solo and small firms to help them practice law more competently in the 1990's.

My goal in being active in the ABA has been to assist this Committee with its work. I appreciate the opportunity to achieve my goal and look forward to assisting the Standing Committee in all of its work.

YOU SHOULD BE AN ASSOCIATE OF THE MALPRACTICE DATA CENTER!

Membership pays for itself through conference registrations alone...

The National Legal Malpractice Data Center is a project of the Standing Committee on Lawyers' Professional Liability of the American Bar Association which disseminates and develops solutions for the malpractice environment for attorneys.

Associate Benefits:

- Free attendance for two persons per office at the Committee's semi-annual Legal Malpractice Conferences. (An annual $1,200 value for your $600 membership fee.)
- A copy of each new publication produced, including the Lawyer's Professional Liability Update (articles and case law on professional liability, a bibliography of resources, and a state-by-state list of malpractice insurance carriers).

The Associate Year is from September 1, 1997 - August 31, 1998.

CALL PAMELA HOLLINS AT 312/988-5763 FOR AN ASSOCIATE ENROLLMENT FORM.

ALPS at Work

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and other professionals from various jurisdictions is elected by the company's policyholders. The board provides vision and direction that will allow the company to continue to meet the needs of its insured lawyers and the challenges of the market well into the next millennium.

Robert W. Minto, Jr. is President & CEO of ALPS.

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