



Fund Assembly

Coulda, Shoulda, Woulda: Avoiding Claims of Legal Malpractice in Real Estate Transactions

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Statistics

- Real property law has become the largest source of professional malpractice claims (20% of all claims)
- One in five attorneys will be faced with a claim during their careers

Lawyer As Defendant

Malpractice insurance is a “deep pocket”

Jury prejudice

- “He said, she said” usually resolved against attorney
- “Reasonably prudent attorney” standard causes juries to expect more than the law requires

Real Estate Attorney Malpractice Claims

The Hanover Insurance Group
(Apr. 2018)

Lawyers Mutual Liability Co. of
North Carolina
(Oct. 2017)

Hanover Insurance Group

- Inaccurate property description
- Cash back at closing fraud
- Vague lease language (use of forms)
- Inadvertent attorney-client relationship
- Attorney acting as escrow agent

Lawyers Mutual Liability Co.

- Wire transfer security
- Satisfaction of Home Equity Lines of Credit
- Disbursements against uncollected funds
 - Caution: E&O Policy may exclude claims based upon disbursements of uncollected funds

Professional Malpractice

Elements of a cause of action

- Employment
- Neglect of a reasonable duty
- Proximate cause of loss

Dingle v. Dellinger, 134 So.3d 484 (Fla. 5th DCA, 2014)

Employment – Privity

- Word of art derived from common law of contracts and used to describe relationship of persons who are parties to a contract
- Plaintiff must either be in privity with the attorney (or) an intended third-party beneficiary

Espinosa v. Sparber, 612 So.2d 1378 (Fla. 1993)

Employment – Client

- Any person who consults a lawyer with purpose of obtaining legal services or who is rendered legal services (Sec. 90.502(1)(b), F.S.)
- Subjective intent of the client based upon reasonable conclusions

Dean v. Dean, 607 So.2d 494 (Fla. 4th DCA 1992)

Employment – Inadvertent relationship

- Attorney represented debtor/partner and handled mortgage closing on behalf of client and the partnership
 - Provided partnership with “clean” title commitment and unapproved mortgage
 - Did attorney also represent partnership?

Blackhawk v. Waltemyer, 900 F.Supp. 414 (M.D. Fla., Apr. 17, 1995)

Employment – Inadvertent relationship

- Law firm represented president in stock purchase from corporation
- Legal services benefitted corporation which paid all law firm's bills
- Did firm represent corporation?

In re Lentek Int'l, Inc., 337 B.R. 396 (M.D. Fla., Oct. 1, 2007)

Employment – 3rd party beneficiary

- Quitclaim deed failed because POA did not authorize gift
- Attorney drafted and recorded it with POA
- Was attorney liable to intended grantees?

Dingle v. Dellinger, 134 So.3d 484 (Fla. 5th DCA 2014)

Employment – 3rd party beneficiary

- Estate planning, ante-nuptial agreement review and probate advice given by three law firms
- Did frustrated heirs have standing to sue?

Nieburg v. Sulzberger, 260 So.3d 363 (Fla. 3d DCA, 2018)

Employment – 3rd party beneficiary

- Services provided to condominium association related to reconstruction following hurricane
- Association owed fiduciary duty to owners
- Did owners have standing to sue attorneys?

Silver Dunes v. Beggs and Lane, 763 So.2d 1274 (Fla. 1st DCA, 2000)

Employment – Assignment of claim

- Attorneys prepared misleading private placement memoranda for corporation leading to bankruptcy
 - Corporation gives assignment for benefit of creditors
 - Was malpractice claim assignable?

Cowan, Liebowitz & Latman v. Kaplan, 902 So.2d 755 (Fla. 2005)

Employment – Assignment of claim

- Botched foreclosure caused loss of lien
 - Mortgage assigned while appeal of mortgage foreclosure dismissal was pending
 - Was assignor's potential malpractice claim included in assignment of mortgage?

Law Office of David J. Stern v. Security Nat., 969 So.2d 962 (Fla. 2007)

Neglect of a reasonable duty

- Attorney and client (purchaser) were aware of suit between association and builder
 - Attorney closed purchase without investigating nature of lawsuit
 - Did attorney have duty to investigate?

Maillard v. Dowdell, 538 So.2d 512 (Fla. 3d DCA 1988)

Neglect of a reasonable duty

- Law firm unable to clear title in time to save contract of sale
 - Subsequent sale for \$500K less
 - Was allegation attorney “failed to timely act” sufficient?

Rios v. McDermott, Will & Emery, 613 So.2d 544 (Fla. 3d DCA 1993)

Neglect of a reasonable duty

- Attorney did not prepare buy-sell agreement to accompany formation of closely held corporation
 - Attorney had previously provided one for same clients on similar incorporation
 - Did attorney have duty absent client direction?

Lane v. Cold, 882 So.2d 436 (Fla. 1st DCA 2004)

Neglect of a reasonable duty

- Attorney hired to stall bail bond foreclosure
 - Failed to plead absolute defense to foreclosure
 - If instructions were followed is attorney liable for not asserting the absolute defense?

Boyd v. Brett-Major, 449 So.2d 952 (Fla. 3d DCA 1984)

Neglect of a reasonable duty

- Legal description error fatal to validity of first foreclosure sale
 - Mortgagee “winning bid” set aside; reforeclosure resulted in mortgagor redemption
 - Was a duty to assist client in obtaining title reasonable?

Lawyers Professional Liability v. McKenzie, 470 So.2d 752 (Fla. 3d DCA 1985)

Neglect of a reasonable duty

- Client closed on vacant lot and then was refused building permit because of lot size
 - Clause added to form contract allowed termination if lot non-conforming
 - Did lawyer have duty to investigate?

Atkin v. Tittle and Tittle, 730 So.2d 376 (Fla. 3d DCA 1999)

Neglect of a reasonable duty

- Unpermitted downstairs enclosure in the Keys cited following closing and had to be removed
 - Attorney reviewed mortgage documents with “client” at closing
 - Is attorney required to advise client of adverse legal problems of which the attorney becomes aware?

McCarty v. Browning, 797 So.2d 30 (Fla. 3d DCA 2001)

Neglect of a reasonable duty

- Investor caught up in mobile home mortgage fraud hired attorney to cut his losses
 - Attorney unsuccessful in negotiation loses at trial when unable to prove mortgagee complicity
 - Should attorney have recommended settlement?

Proto v. Graham, 788 So.2d 393 (Fla. 5th DCA 2001)

Neglect of a reasonable duty

- “Due on sale” clause held enforceable by Florida Supreme Court on conflict certiorari
 - Mortgagee forecloses client who closed upon lawyer’s assurance it was legally assumable
 - Does attorney awareness of unsettled law require disclosure?

Stake v. Harlan, 529 So.2d 1123 (Fla. 2d DCA 1988)

Proximate cause

- Homestead devise of life estate to mother fails when decedent's minor child survives
 - Alternative planning to benefit mother was possible
 - Is an attorney required to do more than carry out testator's expressed directions in will drafting?

Lorraine v. Grover, 467 So.2d 315 (Fla. 3d DCA 1976)

Proximate cause

- Attorneys represented terminated employee in age discrimination administrative proceeding
 - Statute of limitations ran before civil proceedings filed
 - Was client required to prove age discrimination allegations to succeed in malpractice action?

Bolves v. Hullinger, 629 So.2d 198 (Fla. 5th DCA 1993)

Proximate cause

- Bankruptcy trustee alleges malpractice committed in criminal defense of debtor
 - Plea agreement did not protect defendant against tax consequences
 - Is a defendant's guilt proximate cause of damages?

Orr v. Black & Furci, P.A., 876 F.Supp. 1270 (M.D. Fla., Feb. 3, 1995)

Statute of limitations

- Law firm took voluntary dismissal of suit for fees to eliminate counterclaim for malpractice
 - Compulsory counterclaim to suit for fees
 - Can otherwise barred malpractice claim stand alone as counterclaim to withdrawn suit for fees?

Johnson v. Allen, 621 So.2d 507 (Fla. 2d DCA 1993)

Bassingthwaighte and Nance, ABA Techshow (April 2006)

Top Ten Causes of Malpractice –
and How You Can Avoid Them

Bassingthwaighte and Nance

1. Missed deadlines
2. Lack of professionalism
3. Stress and substance abuse
4. Conflicts of interest
5. Poor client relations

Bassingthwaighte and Nance

6. Substantive legal errors
7. Ineffective client screening
8. Malpractice counterclaim (suit for fees)
9. Inadequate documentation of work
10. Technology traps

Best Practices

Screen prospective clients

- Demanding, emotionally invested, or unrealistic about outcome
- Engagements with other attorneys

*How Incorporating These Best Practice Tips
Will Help You Defend Against a Legal Malpractice Claim*

Patrick Causey

DRI Trial Tactics (Oct. 2014)

Screen prospective clients

- Comfort with associated costs
- Acceptance of their obligations
- Communication expectations

Keep expectations realistic

- Guaranteeing result creates a breach of contract cause of action
 - Attorney of ordinary skill standard irrelevant
 - Expert witness no longer necessary
- Don't oversell the strength of your representation

Document everything

- Nonengagement letter
- Attorney-client relationship does not exist
 - Date of consultation • Matter discussed
 - Nonengagement decision • Seek other counsel

Document everything - Tip

- Begin every potential client conversation by gathering contact information
 - Name • Address • Phone number
 - General nature of the matter

Top Ten Causes of Malpractice, Bassingthwaighe and Nance (ABA Techshow Apr. 2006)



Document everything

- Disengagement Letter
- Attorney-client relationship no longer exists
 - Limits client expectations
 - Starts statute of limitations clock

Document everything

- Engagement letter (retainer agreement)
- Memorializes relationship and scope of representation
 - Timelines • Matters discussed and agreed to
 - Fees and costs • Communication protocols

Document everything

- Client decisions and instructions
 - Engagement letter informs client all oral communications reduced to writing (letter or email)
 - Benefits clients with little experience in complex legal issues

Document everything

- Client decisions and instructions
 - Claim: access easement noted on survey but no evidence on the ground; client tells his lawyer “don’t worry about it”

Steer clear of conflicts

- Multiple parties
 - Request to “write the agreement for both of us”
 - Do not meet with both
 - Unintended attorney-client relationship
 - Conflict with one means conflict with all

Steer clear of conflicts

- Attorney as settlement agent
 - Responsibilities regarding nonlegal services
 - Services not distinct from legal services
 - Services distinct from legal services
 - Services by nonlegal entity (e.g., title company)

Substantive legal errors

- Don't dabble
 - No such thing as “simple will” or “simple contract”
 - Favors for friends or relatives also require professionalism

Substantive legal errors

- Prioritize CLE and take relevant courses
- Peer review your office's closed files
- Deal with mistakes immediately

Professional internal communications

- Subject to discovery
- Attorney-client privilege waived
 - Mistakes made
 - Client criticism
 - Fee boasting

Professional internal communications

- Subject to discovery
- Claim:
 - “We’re already \$200,000 over estimate”
 - “Churn that bill, baby!”
 - “That bill shall know no limits”

Professionalism

- Breach of confidentiality
- eMail (spelling and grammar; signature block)
- Poor housekeeping (uncluttered office, dress professionally, courtesy and civility)

Top five real estate attorney malpractice claims, The Hanover Insurance Group (Apr. 2018)



Handling stress

- Time management
 - Calendar for “professional reading”, “business development”, and “personal time”
- Staffing
 - Adequate resources and training
 - Delegate

Technology traps

- “Delete” does not delete
- Metadata
- Portable storage devices (e.g., “flash” drive)
- Confidentiality disclaimers (“chat” messaging)

Fee disputes

- Is amount collectible?
- Is amount substantial?
- Was a good result obtained?
- Has independent lawyer reviewed file?
- Invitation to a malpractice counterclaim

**“He who represents himself
has a fool for a client.”**

— Abraham Lincoln



Thank You!
for attending