LEGAL MALPRACTICE LAW IN PENNSYLVANIA

December 10, 2007

JAMES M. PRAHLER
JAMES R. KAHN

HARRISBURG OFFICE
P.O. Box 932
Harrisburg, PA 17106-0932
717-975-8114

PITTSBURGH OFFICE
525 William Penn Place
Suite 3300
Pittsburgh, PA 15219
412-281-4256

SCRANTON OFFICE
220 Penn Avenue
Suite 305
Scranton, PA 18503
570-342-4231

MARGOLIS EDELSTEIN
The Curtis Center, 4th Floor
Independence Square West
Philadelphia, PA 19106-3304
(215)922-1100
FAX (215)922-1772

jprahler@margolisedelstein.com
jkahn@margolisedelstein.com

CENTRAL PA OFFICE
P.O. Box 628
Hollidaysburg, PA 16648
814-224-2119

WESTMONT OFFICE
P.O. Box 2222
216 Haddon Avenue
Westmont, NJ 08108-2886
856-858-7200

BERKELEY HEIGHTS OFFICE
300 Connell Drive
Suite 6200
Berkeley Heights, NJ 07922
908-790-1401

WILMINGTON OFFICE
750 South Madison Street
Suite 102
Wilmington, DE 19801
302-888-1112

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ATTORNEY CLIENT RELATIONSHIP

Pennsylvania follows the principle that a plaintiff may not sue an attorney, for alleged negligence in the performance of professional duties in the absence of an attorney-client relationship. Schenkel v. Monheit, 266 Pa. Super. 396, 405 A.2d 493 (1979), Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983)

Implied Relationship

Absent an express contract, an implied attorney/client relationship will be found if:

1) the purported client sought advice or assistance from the attorney;

2) the advice sought was within the attorney's competence;

3) the attorney expressly or impliedly agreed to render such assistance; and

4) it is reasonable for the putative client to believe the attorney was representing him. Atkinson v. Haug, 424 Pa. Super. 406; 622 A.2d 983, (1993), Cost v. Cost, 450 Pa. Super. 685, 677 A. A.2d 1250

Privity of Contract

It is commonly held that privity is required to bring a claim against an attorney for professional negligence. There are two notable exceptions. The first is that a third party beneficiary may have a claim against an attorney whose negligence deprives the beneficiary of an intended benefit. Scarpitti v. Weborg, 530 Pa. 366, 609 A.2nd 147 (Pa. 1992) The Supreme Court found that an agreement which expressly intends to benefit a third party, such as a beneficiary under a will, can be the basis of a claim by the person against an attorney although no privity exists. Guy v. Liederbach, 459 A. 2nd 744 (Pa. 1983). That theory is to be narrowly construed. Minnich v. Yost, 817 A.2d 538 (Pa. Super. 2003). It does not apply where a beneficiary under a will is alleging that the deceased intended to give more to the beneficiary than the will provided. Hess v. Fox Rothschild, 925 A.2d 798 (Pa. Super. 2007).

The second exception allows an attorney to be responsible for his intentional torts, including fraud. Eisenberg v. Gagnon , 766 F.2d.770 (3rd Cir. 1985).

Agency relationship

As a general rule the attorney acts as an agent of his client within the authority he has been granted. In this regard, a client is charged with notice given to his attorney in the context of litigation. Garcia v. Community Legal Services, 362 Pa. Super. 484, 524 A.2d 980 (Pa. Super. 1987). Notice from a court to a person's attorney is considered notice to the client as long as it concerns a matter within the scope of the representation. Yeager v. United Natural Gas Co., 197 Pa. Super. 25, 176 A.2d 455 (1961). An admission by the attorney during the course of a trial is binding upon the client. Sule v. W.C.A.B (KRAFT, INC.), 550 A. 2d 847 (Pa. Cmwlth. 1988), Bartholomew v. State Ethics Commission, 202 Pa. Commw. LEXIS 161(2002). An out of court statement by an attorney does not, however, bind the client unless given expressly for the purpose of dispensing with formal proofs at trial. The rule has been expressed as barring the introduction of evidence of admissions made out of court and not in the presence of the client, unless authority to make them or knowledge or assent of the client thereto is affirmatively shown. Eldridge v. Melcher, 226 Pa. Super. 381, 313 A.2d 750 (1973).

CASE WITHIN A CASE

In Williams v. Bashman et al., 457 F.Supp. 322 (E.D.Pa.1978), the court stated:

> "The orthodox view, and indeed virtually the universal one, is that when a plaintiff alleges that the defendant lawyer negligently provided services to him or her as a plaintiff in the underlying action, he or she must establish by the preponderance of the evidence that he or she would have recovered a judgment in the underlying action in order to be awarded damages in the malpractice action, which are measured by the lost judgment."

The Pennsylvania Supreme Court declined to abolish the case within a case requirement in Ferenz v. Milie, 535 A.2d 59 (Pa 1987). . The Court cited, with approval, Williams v. Bashman, 457 F. Supp. 322 (E.D.Pa.1978).

> "Hence, the requirement, which Appellant was bound by here, was to try a 'case within a case.' The Superior Court upheld this requirement and Appellant urges us to adopt a different standard. We may not consider that issue at this time, however, given our disposition of this appeal on other grounds, as explained below."

In Kituskie v. Corbman, 552 Pa 275, 282, 714 A.2d 1027 (1988) the Pennsylvania Supreme Court held that a plaintiff must prove a case within a case since he must initially establish by a preponderance of the evidence that he would have recovered a judgment in the underlying action. See also Nelson v. Heslin, 2002 Pa. Super. 244, 806 A. 2d 873 (Pa. Super. 2002).

CAUSE OF ACTION

The elements of a legal malpractice claim are:

1. The employment of the attorney or other basis for duty;

2. Failure of the attorney to exercise ordinary skill and knowledge;

3. That such failure to exercise ordinary skill and knowledge was the proximate cause of damage to the Plaintiff. Rizzo v. Haines, 520 Pa. 484, 499, 555 A.2d 58, 65 (1985), Hughes v. Consol-Pennsylvania Coal Company, 945 F.2d 594, 616-17 (3d Cir. 1991), cert denied, 112 S.Ct. 2300. (1992).

An essential element to this cause of action is proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or the threat of future harm. Rizzo, 520 Pa. at 504-505, 555 A.2d at 68. Damages are considered remote or speculative only if there is uncertainty concerning the identification of the existence of damages rather than the ability to precisely calculate the amount or value of damages. Ibid. In essence, "a legal malpractice action in Pennsylvania requires the plaintiff to prove that he had a viable cause of action against the party he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case (often referred to as proving a 'case within a case')." Kituskie v. Corbman, 552 Pa. 275, 281, 714 A. 2d 1027 (1998).

Pennsylvania does not apply an increased risk of harm analysis to connect the attorney's conduct with a claimed economic injury. The case within a case requirement applies to damages, and actual loss must be proven. Meyers v. Robert Lewis Seigle, P.C., 2000 Pa. Super. 136, 751 A. 2d 1182 (2000).

CERTIFICATES OF MERIT

Pa.R.C.P. 1042.1 to 1042.8 require a certificate of merit to be filed within 60 days of the filing of a Complaint in any case where it is alleged that the professional deviated from a required professional standard of care. Such a certificate of merit must state wither one of three things, that an appropriate licensed professional provided a written statement that the treatment was below the standard of care and caused harm to the plaintiff, or that a claim against a professional defendant is based solely on allegations that other professionals for whom the defendant is responsible were negligent (a vicarious liability claim - there must be a certificate for the agent even if the agent is not a named defendant), or that expert testimony is unnecessary for prosecution of the claim. The certificate itself only need state that there has been a report by a licensed professional but it does not need to identify what the statement says specifically or the identity of the licensed professional. The Superior Court has affirmed that this rule can be applied retroactively to a situation where the malpractice occurred before the enactment date. *Warren v. Folk*, 886 A.2d 305 (Pa. Super. 2005).

On December 5, 2005, the Pennsylvania Supreme Court amended Rules 1042.3(b) and 1042.8 to clarify that where a plaintiff in a medical malpractice case is raising claims against a defendant for both the defendant's own independent actions and for the actions of others for whom the defendant is responsible, the plaintiff must file certificates of merit for each claim or a single certificate of merit that references both claims.

If no certificate is timely filed then a praecipe can be filed by the defendant which will result in automatic dismissal of the claim for *non pros* (failure to prosecute). Under the holding in *Moore v. Luchsinger*, 862 A.2d 361 (Pa. Super. 2004), a praecipe to dismiss may be filed after the 60th day, but only if no certificate has been filed by the plaintiff. Accordingly, it is incumbent upon defense attorneys to file on the 61st day to avoid a plaintiff from being able to file after the 60th day simply because a praecipe was not filed. However, under these rules, a plaintiff may ask for more time to file the praecipe, particularly if the plaintiff has not been supplied the professional's records, and the filing of a motion before the 60th day tolls the ability of the defendant to file a praecipe for *non pros*. Presumably the certificate may be filed as soon as the motion is ruled upon unless the order provides additional time.

Even if a case is not expressly stated in the complaint to be a professional negligence case, the procedure suggested by the rule, *non pros* is still proper where the substance of the allegations assert a claim for professional malpractice. *Ditch v. Waynesboro Hosp.* 2007 Pa. Super 5 (Pa. Super. 2007); *Varner v. Classic Communities Corp.*, 890 A.2d 1068 (Pa. Super. 2006); *Grossman v. Barke,* 868 A.2d 561 (Pa. Super. 2005). There must be a certificate for a claim against any type of entity which is sued for the actions of a licensed professional as defined by the rules. *Dobos v. Pennsbury Manor*, 878 A.2d 182 (Pa. Commw. 2005). However, where a hospital was sued for failure to perform a clerical function like forwarding diagnostic films, a certificate is not necessary. *Rostock v. Anzalone*, 904 A.2d 943 (Pa. Super. 2006).

After a *non pros* is entered, a dismissed plaintiff may still file a petition to open and contend that there is a reasonable explanation or legitimate excuse for the failure to timely submit the certificate. *Womer v. Hilliker*, 908 A.2d 269 (Pa. 2006). Illness and death of an in-law is a

legitimate excuse. *Almes v. Burket*, 881 A.2d 861 (Pa. Super. 2005). Ignorance of the rule, however, is *not* a legitimate excuse, even for a *pro se* plaintiff. *Hoover v. Davila*, 2004 Pa. Super. 314 (2004). Nor is uncertainty about whether the case states a professional negligence claim. *Ditch v. Waynesboro Hosp.* 2007 Pa. Super 5 (Pa. Super. 2007).

In the *Hoover* case, the court also held that the 60-day period runs from the initial filing of the complaint even if it is later reinstated due to service problems. The 60-day period also runs from the initial complaint even if there is an amended complaint. *Ditch v. Waynesboro Hosp.* 2007 Pa. Super 5 (Pa. Super. 2007); *O'Hara v. Randall*, 879 A.2d 240 (Pa. Super. 2005). A Common Pleas judge in Philadelphia has published two opinions holding that "administrative oversight" or an attorney being out of town are not reasonable excuses for failing to file the certificate. *Vansouphet v. Justman*, 2005 Phila. Ct. Com. Pl. LEXIS 208 (Phila. C.P. 2005) and *Feiner v. Temple Northeastern Hosp.*, 2005 Phila. Ct. Com. Pl. LEXIS 102 (Phila. C.P. 2005).

An expert report served in lieu of filing a certificate of merit does not meet the certificate of merit requirement but it is within the trial judge's discretion whether to grant a petition to open under such circumstances; failure to open the judgement will not be reversed. *Womer v. Hilliker*, 908 A.2d 269 (Pa. 2006); *Harris v. Neuberger*, 877 A.2d 1275 (Pa. Super. 2005). A certificate which is not docketed does not suffice to require opening the judgment. *Warner v. Univ. of Pa. Health Sys.*, 874 A.2d 644 (Pa. Super. 2005). However, the failure to cite the proper portion of the rule may be excused. *Kennedy v. Butler Memorial Hosp.*, 901 A.2d 1042 (Pa. Super. 2006).

Under the applicable rules, during the time before a certificate is filed, the professional does not need to answer the complaint, nor may any discovery be obtained from the professional, although requests for production of documents and for entrance upon land are allowed.

If the cases is concluded by voluntary dismissal, defense verdict or court order dismissing the case, the defendant may then ask to see a copy of the written statement obtained from the licensed professional upon which the certificate of merit was based. If the underlying written statement is not adequate after the case has been concluded favorably to the defendant, then the defendant can seek sanctions against the plaintiff.

This certificate of merit has been held to also be required in a malpractice case in federal court although the mandated procedures, including entry of judgment of *non pros* by praecipe, were not adopted and a more lenient procedure was permitted before a case could be dismissed. *Scaramuzza v. Sciolla*, 345 F.Supp. 2d 508 (E.D. Pa. 2004). A similar holding was made in *Abdulhay v. Bethlehem Medical Arts*, 2005 U.S. Dist. LEXIS 21785 (E.D. Pa. 2005). In *Velazquez v. UPMC Bedford Memorial Hosp.*, 328 F.Supp. 2d 549 and 338 F. Supp 2d 609 (W.D. Pa. 2004), the requirement and the state procedures were held to apply.

Any complaint alleging deviations from the standard of care against a medical provider must have specific language identifying it as such. A defendant may raise by preliminary objections the failure to include this language. But appellate courts have held that preliminary objections are not required before the defendant could enter a judgment of *non pros* where the complaint on its face asserted a claim against a licenses professional even though the Complaint did not state

specifically that it was a professional liability claim. *Ditch v. Waynesboro Hosp.* 2007 Pa. Super 5 (Pa. Super. 2007); *Varner v. Classic Communities Corp.,* 890 A.2d 1068 (Pa. Super. 2006); *Yee v. Roberts*, 878 A.2d 906 (Pa. Super. 2005); *Dobos v. Pennsbury Manor*, 878 A.2d 182 (Pa. Commw. 2005); *Koken v. Lederman,* 840 A.2d 446 (Pa. Commw. 2004).

Pennsylvania Supreme Court has under consideration changes to the Rules concerning Entry of a Non Pros for failure to file a Certificate of Merit

CIVIL RIGHTS

Barring a claim of conspiracy with a State Official, an attorney is not liable to his client under 42 U.S.C. §1983, for damages alleged to have arisen from the violation of a Constitutionally protected right.

In order to bring a viable action under 42 U.S.C. §1983, the Civil Rights Act, a plaintiff must prove that:

> (1) he was deprived of rights, privileges, or immunities secured by the Constitution or laws of the United States; and
>
> (2) that such deprivation was the result of the conduct of a person acting under color of State law, Cohen v. City of Philadelphia, 736 F.2d 81, 83 (3rd Cir.1984), cert. denied, 469 U.S. 1019 (1984), (citing Parrat v. Taylor, 41 U.S. 527, 535 (1981).

A criminal defense attorney does not act under color of State law, even if Court appointed or employed by the Public Defender's office. A lawyer representing a client is not, by virtue of being an officer of the court, a state actor "under color of state law." A defense lawyer characteristically opposes the designated representatives of the state. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. A defense lawyer best serves the public, not by acting on behalf of the state or in concert with it, but rather by advancing the undivided interests of his client. This is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed. Polk County v. Dodson, 454 U.S. 312, 70 L.Ed. 509, 102 Sup.Ct. 445 (1981), Henderson v. Fisher, 631 F.2d 1115 (3rd Cir. 1980)

A prosecutor enjoys absolute immunity from suit for conduct "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 409, 430, 96 S. Ct. 984, (1976). In determining whether to grant such immunity courts will focus on the nature of the function performed, not the identity of the actor who performed it and evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of that function. Light v. Haws, 472 F.3d 74, 78 (3d Cir. 2007). Still, "a prosecutor is absolutely immune when acting as an advocate in judicial proceedings." Donahue v. Gavin, 280 F.3d 371, 377 n.15 (3d Cir. 2002). Activities included under that category are "initiating and pursuing a criminal prosecution and presenting the state's case in court." Hughes v. Long, 242 F.3d 121, 125 (3d Cir. 2001). Courts have also found that "a prosecutor's decision whether to dispose of a case by plea bargain--because dependent on delicate judgements affecting the course of a prosecution--is protected by the doctrine of absolute prosecutorial immunity." Davis v. Grusemeyer, 996 F.2d 617, 629 (3d Cir. 1993).

COLLATERAL ESTOPPEL

The doctrine of collateral estoppel or issue preclusion, like res judicata, has the two-fold purpose of protecting litigants from the burden of re-litigating an issue which has previously been decided and of promoting judicial economy by preventing endless litigation. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979). In Pennsylvania, the collateral estoppel rule bars an issue from being re-litigated where four conditions are met:

> (1) the issue decided in the prior litigation was identical with the one presented in the later action;
>
> (2) there was a final judgment on the merits;
>
> (3) the party against whom the defense is asserted was a party or in privity with a party to the prior adjudication; and
>
> (4) the party against whom the defense is asserted had a full and fair opportunity to litigate the issue in question in the prior action. Day v. Volkswagenwerk, 318 Pa. Super. 225, 464 A.2d 1313 (1983), Robins v. Buck, 2003 Pa. Super. 264, 827 A. 2d 1213, (Pa. Super. 2003)

The doctrine of collateral estoppel is much broader in its scope and in its application than res judicata and serves to prevent a question of fact or issue of law which has been previously litigated and determined in a court of competent jurisdiction from being re-litigated in a subsequent lawsuit. The doctrine of collateral estoppel is a potential defense to any legal malpractice action. One application of the doctrine, however, is unique to criminal malpractice suits. A client who has unsuccessfully raised the constitutional claim of ineffective assistance of counsel in the underlying criminal action is estopped from relitigating identical issues in a subsequent malpractice action against his defense attorney. Applying this form of estoppel in a criminal malpractice action is justified only when the issue barred from relitigation is identical to the issue necessarily decided or actually adjudicated in the prior proceeding. Also, the party against whom the defense is asserted must have had a full and fair opportunity to litigate the issues in the prior proceeding. Alberici v. Tinari, 374 Pa. Super 20, 542 A.2d 127 (1988), alloc. denied, 627 A.2d 730 (Pa. 1993). Collateral estoppel applies even where the subsequent action differs from the original suit. Murphy v. Landsburg, 490 F.2d 319 (3d Cir. 1973), cert. denied, 416 U.S. 939 (1974).

In addition, collateral estoppel may be used as either “a word or a shield” by a stranger to a prior action as long as the party again whom the defense is invoked is the same. Thompson v. Karastan Rug Mills, 228 Pa. Super 260, 323 A.2d 341 (1974). Collateral estoppel will also apply where either a court or a jury decided an issue of fact or a question of law in the prior case. Day v. Volkswagenwerk, 318 Pa. Super. 225, 464 A.2d 1313 (1983).

CONTRACT ACTION

In Pennsylvania, the client has a choice: either to sue the attorney in assumpsit, on the theory that the attorney committed a breach of contract; or to sue the attorney in trespass, on the theory that the attorney failed to exercise the standard of care that he was obliged to exercise. Duke & Co. v. Anderson, 275 Pa. Super. 65, 71, 418 A. 2d 613 (1908). In Bailey v. Tucker , 533 Pa. 237, 621 A. 2d 108, 115 (1993) the Pennsylvania Supreme Court advised:

> "An assumpsit claim based on breach of the attorney-client agreement is a contract claim and the attorney's liability in this regard will be based on terms of that contract. Thus, if an attorney agrees to provide his or her best efforts and fails to do so an action will accrue. Of course an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large."

A plaintiff's successful establishment of a breach of contract claim against an attorney does not require proof by a preponderance of the evidence that an attorney failed to follow a specific instruction of the client. If a plaintiff demonstrates by a preponderance of the evidence that an attorney has breached his or her contractual duty to provide legal service in a manner consistent with the profession at large, then the plaintiff has successfully established a breach of contract claim against the attorney. Gorski v. Smith, 2002 Pa. Super. 334, 812 A. 2d 683 (Pa. Super 2002). But see Costello v. Primavera, 39 D&C 4th 502 (Phila. C.P. 1988), aff'd mem., 748 A.2d 1257 (Pa. Super. 1999), alloc. den'd, 563 Pa. 687, 760 A.2d 854 (Pa. 2000).

An assumpsit claim based on breach of the attorney-client agreement is a contract claim, and the attorney's liability in this regard is based on terms of that contract. Thus, if an attorney agrees to provide his or her best efforts and fails to do so, an action will accrue. An attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large. When an attorney enters into a contract to provide legal services, there automatically arises a contractual duty on the part of the attorney. Hence, a breach of contract claim may properly be premised on an attorney's failure to fulfill his or her contractual duty to provide the agreed upon legal services in a manner consistent with the profession at large.

CONTRIBUTORY NEGLIGENCE

Contributory negligence is a complete bar to recovery in cases not involving bodily injury or property damage. The Pennsylvania Comparative Negligence Act 42 P.S. § 7102 applies only to actions seeking damages for death, bodily injury, or property damage. A legal malpractice claim is for economic loss, and hence the negligence of the client in bringing about the loss, acts as a complete bar. Rizzo v. Michner, 584 A.2d 973(Pa. Super. 1990).

The Pennsylvania Comparative Negligence Act, 42 P.S.§ 7102 does not apply to all actions for negligence, but only to those resulting in death or injury to person or property. The term "property" in the act means tangible property. Thus, a purely monetary loss does not constitute damage to tangible property and, as a result, the statute will not apply. Where the comparative negligence statute does not apply, it is necessary to revert to the common law doctrine of contributory negligence in Pennsylvania which bars recovery if the plaintiff's negligence has contributed in any manner to his loss. Gorski v. Smith, 2002 Pa. Super. 334, 812 A. 2d 683 (Pa. Super 2002).

CRIMINAL ATTORNEY

Liability Of Criminal Attorney Limited

In Bailey v. Tucker, 621 A.2d 108 (Pa. 1993), the Pennsylvania Supreme Court reviewed the requirements of a Civil Action in Malpractice based upon the attorney's representation in a prior criminal case. The Pennsylvania Supreme Court held:

> "Consequently, today we hold that a plaintiff seeking to bring a trespass action against a criminal defense attorney, resulting from his or her representation of the plaintiff in criminal proceedings, must establish the following elements: (1) The employment of the attorney; (2) Reckless or wanton disregard of the defendant's interest on the part of the attorney; (3) the attorney's culpable conduct was the proximate cause of an injury suffered by the defendant/plaintiff, i.e., (4) the attorney's conduct, the defendant/ plaintiff would have obtained an acquittal or complete dismissal of the charges (or) as a result of the injuries, the criminal defendant/ plaintiff suffered damages. (5) Moreover, the plaintiff will not prevail in an action in criminal malpractice unless and until he has pursued post-trial remedies and obtained relief which was dependent upon attorney error..." Bailey, at pp. 114-115.

Damages Limited in Assumpsit Action

An assumpsit claim is based on breach of the attorney-client agreement. If an attorney agrees to provide his or her best efforts and fails to do so, an action will accrue. The attorney who agrees for a fee to represent a client, is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large. This cause of action would proceed along the lines of all established contract claims and would not require a determination by an appellate court of ineffective assistance of counsel, nor would the client need to prove innocence.

> "However, in anticipation of potential problems it is necessary to comment on the aspect of recoverable damages in such an action; quite simply, such damages will be limited to the amount actually paid for the services plus statutory interest. " Bailey, 115.

DAMAGES

Damages Recoverable

In order to establish a claim of legal malpractice, a plaintiff/aggrieved client, must demonstrate that the negligence of the attorney was the proximate cause of damage to the plaintiff. An essential element to this cause of action is proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or the threat of future harm. Rizzo v. Haines, 520 Pa. 484, 499, 555 A.2d 58, 65 (1989)

Damages are considered remote or speculative only if there is uncertainty concerning the identification of the existence of damages rather than the ability to precisely calculate the amount or value of damages. In essence, a legal malpractice action in Pennsylvania requires the plaintiff to prove that he had a viable cause of action against the party he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case (proving a "case within a case"). Kituskie v. Korbman 552 Pa. 275, 714 A. 2d 1027 (1998).

Measure Of Damages

The measure of damage in legal malpractice actions is the actual loss sustained by the client. Duke & Co v. Anderson, 418 A.2d 613 (Pa. Super. 1980). Two types of damages recoverable. For , liquidated Claims recover is the amount of loss has been liquidated and there is no factual determination on this issue in the case against the attorney. Levy v. First Pa. Bank, 338 Pa. Super. 73, 487 A.2d 857 (1985), Ramage v. Cohn, 124 Pa. Super. 525, 189 A. 96 (1937), Zurich General Accident v. Klein, 181 Pa. Super 48, 121 A.2d 893 (1956). For unliquidated claims, the amount recovered by the client against the attorney is the amount the client would have received from in the underlying case, or through settlement in certain cases.

Collectibility of Judgment in Underlying Action

Under Pennsylvania law the collectibility of damages in the underlying action is to be asserted as an affirmative defense by the attorney. The attorney must plead and prove that if the former client obtained a judgment in the underlying case only a portion of it would have actually been paid because of insurance limits or assets of the defendant. The Pennsylvania Supreme Court recognized that a legal malpractice action is distinctly different from any other type of lawsuit because a plaintiff must prove a case within a case and establish that he would have recovered a judgment in the underlying action. It is only after the plaintiff proves he would have recovered a judgment in the underlying action that the plaintiff can then proceed with proof that the attorney he engaged to prosecute or defend the underlying action was negligent in the handling of the underlying action and that negligence was the proximate cause of the plaintiff's loss.

The client should be compensated for actual losses and it would be inequitable for the plaintiff to be able to obtain a judgment against the attorney which is greater than the judgment that the plaintiff could have collected from the third party. The plaintiff should not receive a windfall at the attorney's expense. Kituskie v. Korbman, 552 Pa. 275, 714 A. 2d 1027 (1998).

DELAY DAMAGES

Rule 238

Delay damages pursuant to Pa. R.C.P. 238 are not recoverable against an attorney for claims of legal malpractice since monetary relief for bodily injury or property damage is not sought. Rizzo v. Haines, 515 A.2d 321 (Pa. Super. 1986), aff'd, 555 A.2d 58 (Pa. 1989) The Court held: "The Rule is explicitly limited by its own language, and we, therefore, do not find it applicable to a legal malpractice action." Id at 32. A claim for economic injury due to the fault or neglect of an attorney is not within the scope of Rule 238, even if the underlying action involved a claim for bodily injury or property damage. Wagner v. Orie and Zivic, 431 Pa. Super. 337, 636 A. 2d 679 (Pa. Super. 1994).

Pre-Judgement Interest

Interest on tort claims has been historically precluded under Pennsylvania common law, Marrazzo v. Scranton Knehi Bottling Co., 438 Pa. 72, 263 A.2d 336 (1970), but can be allowed in certain cases involving fraud or conversion. Interest can be awarded on liquidated damages if the amount is fixed, the liability of the defendant certain and the delay was brought about by conduct of the defendant. The party is not awarded interest but rather compensation for delay.

The Pennsylvania Supreme Court in Rizzo v. Haines, 555 A2d 58 (Pa 1989) allowed interest on an award against an attorney who "borrowed" funds from his client and made the following observations.

> " In [tort] cases the party chargeable cannot pay or make tender until both the time and the amount have been ascertained, and his default is not therefore of that absolute nature that necessarily involves interest for the delay. But there are cases sounding in tort, and cases of unliquidated damages, where not only the principle on which the recovery is to be had is compensation, but where also the compensation can be measured by market value, or other definite standard . . . . Into these cases the element of time may enter as an important factor, and the plaintiff will not be fully compensated unless he receive, not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages, in the nature of interest, for the lapse of time".

The flexible approach that this Court has taken concerning interest was articulated in Murray Hill Estates, Inc. v. Bastin, 442 Pa. 405, 276 A.2d 542 (1971):

> " Courts in this Commonwealth should not permit a person guilty of fraudulently withholding the funds of another to profit therefrom. Brooks v. Conston, 364 Pa. 256, 72 A.2d 75 (1950). See also Lexington Ins. Co. v. The Abington Co., 621 F. Supp. 18 1985). Accordingly, where funds are wrongfully and intentionally procured or withheld from one who seeks their restoration, the court should calculate interest on these monies at the market rate."

EXPERT TESTIMONY

Expert testimony is generally required in legal malpractice cases, unless the issue is so simple or the lack of skill or want of care is so obvious as to be within the range of an ordinary layperson's experience and comprehension. See Rizzo v. Haines, 520 Pa. 484, 502, 555 A. 2d 58, 67, n. 10 (1989). In a legal malpractice action the question of whether expert testimony is required depends on whether the issue of negligence is sufficiently clear so lay persons could understand and determine the outcome , or whether the alleged breach of duty involves complex legal issues which require expert testimony to amplify and explain it for the fact finder. Storm v. Golden, 538 A.2d 61 (Pa. Super. 1988). A legal malpractice action that alleges breach of contract requires expert testimony when the assumpsit claims are not true contract causes of action, but sound in negligence by alleging an attorney failed to exercise the appropriate standard of care. See Storm, Supra.

In Rizzo v. Haines, 555 A.2d 58, 66 (Pa. 1989) the Supreme Court found the breach of duty by an attorney to be so clear that an expert was not needed. (The attorney borrowed funds from his client's personal injury recovery, and failed to advise his client of a settlement offer.)

LIBEL AND SLANDER

Defamatory Statement

In considering whether a statement or communication is defamatory, the court must initially "make a determination as to whether the communication can be construed to have the defamatory meaning ascribed to it by the complaining party." Baker v. Lafayette College, 532 A.2d 399, 402 (Pa. 1987); Bogash v. Elkins, 405 Pa. 437, 176 A.2d 677 (1962). In making this determination, the court must view the statements in context and determine whether the statement was maliciously written or published, and whether its purpose was to "blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession". Thomas Merton Center v. Rockwell International Corporation, 442 A.2d 213 (Pa. 1981), cert. denied, 457 U. S. 1134 (1982).

Burden Of Proof

The Pennsylvania legislature has established the burden of proof of plaintiffs in defamation actions. Specifically, 42 Pa.C.S. § 8343 states, with respect to the burden of the plaintiff, that:

"(a) Burden of plaintiff - In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(1) The defamatory character of the communication.
(2) Its publication by the defendant.
(3) Its application to the plaintiff.
(4) The understanding by the recipient of its defamatory meaning.
(5) The understanding by the recipient of it as intended to be applied to the plaintiff.
(6) Special harm resulting to the plaintiff from its publication.
(7) Abuse of a conditionally privileged occasion. 42 Pa.C.S. §8343.

Statements Made By Attorney In Context Of Litigation Absolutely Privileged

In the context of libel and slander claims arising from litigation, there is an absolute privilege recognized. Thus, statements by a party, a witness, counsel, or a judge cannot be the basis of a defamation action whether they occur in the pleadings or in open court. Binder v. Triangle Publications,442 Pa. 319, 275 A.2d 53 (1971). This has been held to apply to a brief, writ of Habeus Corpus, and statements to a client. In this case it was applied to letters written to the Judge and oral communications to the Court as well. It extends to negotiations, demands and settlement discussions after litigation has started or when it is contemplated. Smith v. Griffiths, 476 A.2d 22 (Pa. Super. 1984).

Statements Out of Court

When an attorney acts outside of his court capacity to state claims against a third person before the media there is only a qualified privilege under the circumstances. The court held that these extrajudical communications were not absolutely privileged. Pelagatti v. Cohen, 536 A.2d 1337 (Pa. Super. 1987). An attorney who forwards a communication to the State Disciplinary Board regarding conduct of opposing counsel likewise was afforded only a qualified privilege. Post v. Mendel, 510 Pa. 213, 507 A. 2d 351 (1986). There is no privilege where an attorney gratuitously forwards a copy of a complaint to the media. Bochetto v. Gibson, 580 Pa. 245, 860 A.2d 67 (2004).

LIMITATION OF ACTIONS

Negligence Claims Subject to Two-Year Statute Of Limitations

The applicable statute of limitation for a claim of negligence against an attorney is two years. Moore v. McComsey, 313 Pa. Super. 264, 459 A. 2d 841(1983). Garcia v. Community Legal Services Corporation, 362 Pa. Super, 524 A. 2d 980 (Pa. Super. 1987).

Negligence Claims Subject to Four-Year Statute Of Limitations

Claims for breach of contract are governed by a four year statute and courts have applied the four-year statute where there has been a written or oral retainer agreement and the plaintiff claims that there was a breach of an implied duty of proper professional service or explicit promises. Gorski v. Smith, 812 A. 2d 683 (Pa. Super 2002), alloc. den'd, 2004 Pa. LEXIS 1566 (Pa. 2004). But see Costello v. Primavera, 39 D&C 4th 502 (Phila. C.P. 1988), aff'd mem., 748 A.2d 1257 (Pa. Super. 1999), alloc. den'd, 563 Pa. 687, 760 A.2d 854 (Pa. 2000) (only allowing a beach claim if there was a violation of explicit promises).

Accrual of Claim

A cause of action based in tort or contract runs from when the negligence occurred, or at least when the plaintiff could have known of the attorney's breach, even if that is before any harm actually occurred. Wachovia Bank, N.A. v. Ferretti, 2007 Pa. Super. 320 (2007); Garcia v. Community Legal Services Corp., 362 Pa. Super. 484, 524 A.2d 980 (1987). Further, the appeal of the underlying action upon which the claim of malpractice is based does not operate to toll the statute of Limitations. Robbins & Seventko v. Geisenberger, 449 Pa. Super 367, 674 A. 2d 244 (1996); Garcia v. Community Legal Services Corp., 362 Pa. Super. 484, 524 A.2d 980 (1987). Nor does continuous representation by the attorney toll the statute of limitations. Glenbrook Leasing Co. v. Beausang. 839 A.2d 437 (Pa. Super. 2003), aff'd *per curiam*, 564 Pa. 129, 881 A.2d 1266 (2005).

Discovery Rule

The statute begins to run as soon as the right to institute and maintain a civil action arises and the lack of knowledge, mistake or misunderstanding does not toll the statute of limitations. Pocono International Raceway v. Pocono Produce, Supra, page 47l. An exception to the running of the Statute of Limitations is the "discovery rule" which provides a specific and limited exception to the running of the Statute:

> The "discovery rule" is such an exception, and arises from the inability of the injured, despite the exercise of due diligence, to know the injury or its cause.... The salient point giving rise to equitable application of the exception of the discovery rule

> is the inability, despite the exercise of diligence by the plaintiff, to know of the injury. A court presented with the assertion of the applicability of the "discovery rule" must, before applying the exception of the rule, address the ability of the damaged party, exercising reasonable diligence, to ascertain the fact of a cause of action."

Pocono International Raceway, supra. at 471.

The discovery rule does apply to legal malpractice claims. Wachovia Bank, N.A. v. Ferretti, 2007 Pa. Super. 320 (2007). It was initially applied in the medical malpractice area. Ayers v. Morgan, 397 Pa. 282, l54 A.2d 788 (l959). In Ayers, the Supreme Court of Pennsylvania held that the injury is in fact done when the damage is physically objective and ascertainable. l54 A.2d at 792. Knowledge of actual negligence is not required. DiMartino v. Albert Einstein Medical Center, 460 A.2d, 295 (Pa. Super. l983). Mere mistake, misunderstanding or lack of knowledge does not toll the running of the statute of limitations. Schaffer v. Larzelere, 4l0 Pa. 402, l89 A.2d 267 (l963), Pocono International Raceway, supra.

The Superior Court held that due diligence also includes a requirement under certain circumstances that the plaintiff hire professionals in the field of inquiry to ascertain whether a cause of action exists and to follow through and institute suit within two years of the statute of limitations. Todays Express, Inc. v. Barkan, 626 A.2d l87 (Pa. Super. l993). The court in Todays Express indicated that the standard is not whether the facts were actually discovered within the statutory period but rather whether the plaintiff had the ability using reasonable diligence to determine the cause of his injury:

> The standard by which one's efforts to learn of a cause of action, so as to forestall the running of the statute of limitations, is measured by the inability, despite the exercise of diligence, to determine the injury or its cause, not upon a retrospective view of whether the facts were actually ascertained within the period.

Fraudulent Concealment

The doctrine of fraudulent concealment serves to toll the running of the statute of limitations. The doctrine is based on a theory of estoppel, and provides that the defendant may not invoke the statute of limitations, if through fraud or concealment, he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. The doctrine does not require fraud in the strictest sense encompassing an intent to deceive, but rather, fraud in the broadest sense, which includes an unintentional deception. The plaintiff has the burden of proving fraudulent concealment by clear, precise, and convincing evidence. While it is for the court to determine whether an estoppel results from established facts, it is for the jury to say whether the remarks that are alleged to constitute the fraud or concealment were made.

The standard of reasonable diligence, which is applied to the running of the statute of limitations when tolled under the discovery rule, also should apply when tolling takes place under the doctrine of fraudulent concealment. A party who seeks to assert a cause of action against another is required to be reasonably diligent in informing himself of the facts upon which his

recovery may be based. A statute of limitations that is tolled by virtue of fraudulent concealment begins to run when the injured party knows or reasonably should know of his injury and its cause. Fine v Checcio, 582 Pa. 253, 870 A. 2d 850 (2005).

MALICIOUS CIVIL PROCEEDINGS

Elements of Claim

To prevail in a claim for Wrongful use of Civil Proceedings, a plaintiff must prove :

1. the proceedings terminated in his favor,

2. the defendant caused those proceedings to be instituted without probable cause,

3. malice. Rosen v. Bank of Rolla, 426 Pa. Super. 376, 627 A 2d 190, 191 (1993), Shaffer v. Stewart, 326 Pa. Super. 135, 138, 473 A.2d 1017, 1019 (1984)

The statutory definition of the tort agrees with the Restatement (Second) Torts § 674. Robinson v. Robinson, 362 Pa.Super. 568, 574, 525 A.2d 367, 370 (1987), Ludmer v. Nernberg, 640 A.2d 939 (Pa. Super.. 1994).

Dragonetti Act

Claims for Wrongful use of civil proceedings are governed by Statute, 42 Pa. C.S. 8351 which provides:

> "(a) Elements of Action - A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:
>
> (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) The proceedings have terminated in favor of the person against whom they are brought."

Probable Cause

> There is a statutory definition of probable cause; 42 Pa.C.S. §8352 provides:
>
> "A person who takes part in the procurement, initiation or continuation of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based and either;
>
> (1) reasonably believes that under those facts the claim may be valid under the existing or developing law;

(2) believes to this effect and reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or

(3) believes as an attorney of record, in good faith, that the initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party".

Attorney's Conduct

An attorney has probable cause for bringing an action if he believes in good faith that bringing the lawsuit is not intended to maliciously injure or harass the other party. Kelly Springfield Tire Co. v. D'Ambro, 408 Pa. Super. 301, 596 A.2d 867(1991). The Restatement (Second) Torts Sec. 674 describes the responsibility of the attorney:

"An attorney who initiates a civil proceeding on behalf of his client even if he has no probable cause and is convinced that his client's claim is unfounded,.is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim. An attorney is not required to or expected to prejudge his client's claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of the chances.

"If, however, the attorney acts without probable cause for belief in the possibility that the claim will succeed, and for an improper purpose, as, for example, to put pressure upon the person proceeded against in order to compel payment of another claim of his own or solely to harass the person proceeded against by bringing a claim known to be invalid, he is subject to the same liability as any other person."

Restatement (Second) Torts Sec. 674 comment (d)

Abuse of Process

A claim of abuse of process relates to the improper use of process after proceedings have started. The action is grounded upon wrongful use of legitimate process of the court. It is distinguished from wrongful use of civil proceedings which relates to the improper commencement of a lawsuit without probable cause and with malicious motive to harm the opponent. Abuse of process deals with perversion of the legitimate process of the court for an improper purpose. To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff. Rosen v. American Bank of Rolla, 426 Pa.Super.376, 627 A. 2d 190 (1993).

Abuse of process is, in essence, the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process. McGee v. Fegee, 517 Pa. 247, 259, 535 A.2d 1020, 1026 (1987).

MALICIOUS PROSECUTION

Elements of Action

The elements of a claim for malicious prosecution are:

1. Malicious Institution of criminal proceedings;

2. Lack of probable cause for instituting criminal proceedings

3. Termination of criminal proceedings in favor of the claimant. Kelley v. Local Union, 249, 518 Pa. 517, 520-21, 544 A.2d 940, 941 (1988). Motheral v. Burkhart , 583 A.2d 1180, 1187 (Pa. Super. 1990)

Malicious prosecution is distinguished from the claim of wrongful use of civil proceedings by being related to the institution of criminal proceedings. Supra.

Institution of Criminal Proceedings

Pennsylvania follows the Restatement of Torts (Second) §§653 and 654. Shelton v. Evans, 292 Pa. Super. 228, 437 A.2d 18 (1981). A "criminal proceeding" is any proceeding in which the government seeks to prosecute a person for an offense and impose criminal penalties. A criminal proceeding is instituted:

1. When process is issued by an official or tribunal who have the function to determine whether the individual is guilty of the offense charged or,

2. An indictment is returned or information filed, or

3. An individual is arrested. (Restatement Torts (Second) Sec 654)

In an action for malicious prosecution, compensatory damages may include all of the plaintiff's actual expenses in defending himself, compensation for loss of liberty or time, harm to reputation, physical discomfort, interruption of business, mental anguish, humiliation, and injury to feelings.

MISREPRESENTATION

Intentional Misrepresentation

It is well settled that intentional misrepresentation can be proved only when it is shown that the false representation was made knowingly or in conscious ignorance of the truth or recklessly without caring whether it be true or false. Warren Balderston Co. v. Integrity Trust Co., 314 Pa. 58, 170 A. 282 (1934).

The basic elements of a cause of action for intentional misrepresentation are

> "(1) misrepresentation of a material fact;
> (2) knowledge that the representation is false;
> (3) intention to induce plaintiff to act or refrain from acting;
> (4) justifiable reliance on the misrepresentation; and
> (5) damages as a proximate result of the misrepresentation."

Kuehner v. Parsons, 107 Pa. Commw. 61, 527 A.2d 627 (1987). Rizzo v. Michener, 401 Pa. Super. 47, 584 A. 2d 973 (1990)

Negligent Misrepresentation

The elements of this cause of action are set forth in the Restatement (Second) of Torts 552 (1965):

> "(1) One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. (2) Except as stated in (3), the liability stated in (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them. "

See Restatement (Second) of Torts 552 (1965) adopted by Bilt Rite v. Architectural Studio, 479, 866 A. 2d 270, 285 (2005).

SETTLEMENT

In Absence Of Fraud The Attorney Cannot be Liable To His Client For An Inadequate Settlement

In Muhammed v. Strassburger, 526 Pa. 541, 587 A.2d 1346 (1991) the Supreme Court of Pennsylvania precluded negligence or breach of contract actions against lawyers subsequent to the negotiation and acceptance of a settlement.

> "This case must be resolved in light of our longstanding public policy which encourages settlements. Simply stated, we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action. An action should not lie against an attorney for malpractice based on negligence and/or contract principles when that client has agreed to a settlement. Rather, only cases of fraud should be actionable." supra. at 547.

In explaining their holding, the Court was concerned that "[l]awyers would be reluctant to settle a case for fear some enterprising attorney representing a disgruntled client will find a way to sue them for something that 'could have been done, but was not'". Id. at 1349. The holding in Muhammed v. Strassburger, "bars litigants who have entered a settlement agreement from subsequently maintaining a suit against their attorney for legal malpractice, unless fraud is alleged in the inducement of the agreement".

Attorney's Advice Regarding Terms of Settlement

Where an attorney gives inappropriate advise regarding the effect of a settlement on remaining claims the holding in Muhammad does not bar an action by a client who claims to be adversely affected. Collas v. Garnick, 624 A.2d 117 (Pa Super 1993). In Collas, the plaintiff asked her lawyer for specific advice as to whether the execution of a General Release would have any impact upon her plan to sue the manufacturer of the vehicle in which she had been riding, or any other tortfeasor. Her lawyer, provided her with incorrect advice assuring her that a viable cause of action would lie against the designer and manufacturer of the car's seat belt system, in spite of the General Release. Supra. 119.

The necessity for an attorney's use of ordinary skill and knowledge extends to the conduct of settlement negotiations. An attorney may not shield himself from liability in failing to exercise the requisite degree of professional skill in settling the case by asserting that he was merely following a certain strategy or exercising professional judgment. Rather, the importance of settlement to the client and society mandates that an attorney utilize ordinary skill and knowledge. An attorney has a duty to explain the effect of a release to his client and can be liable to the client who relies to his detriment upon incorrect advice of the attorney. McMahon v. Shea, 547 Pa.124, 688 A. 2d 1179 (1997). The Pennsylvania Supreme Court in McMahon limited the application of Muhammad to cases where the amount of the settlement was claimed to be inadequate. When a client claims that the terms and conditions of a settlement were not explained or incorrect advice was given by the attorney, the action is not barred by Muhammad.

Predecessor Counsel Not Protected By Muhammad

The Superior Court in White v. Kreithen, 435 Pa. Super.115, 644 A.2d 1262 (1994) declined to allow the original lawyer to plead the defense under Muhammad when he did not negotiate the settlement of the claim. The client discharged her attorney and later settled the case for what was claimed to be an inadequate amount. The first attorney was not entitled to the protection under Muhammad. Where a second attorney takes over a client's case and actually negotiates a settlement the defense under Muhammad is available and the second attorney cannot be properly joined to the action by the original attorney who was sued by the client. Goodman v. Kotzen, 436 Pa. Super. 71, 647 A. 2d 247 (1994).

STANDARD OF CARE

Basic Standard

The basic standard of care followed in Pennsylvania is found in Enterline v. Miller, 27 Pa Super 463, 467 (1905):

> " An attorney is not liable to his client for a failure to succeed, unless this is due to his mismanagement of the business intrusted to him, through bad faith, inattention or want of professional skill. Without discussing at length the degree of skill and care required of an attorney, it is sufficient for the purpose of the case in hand to say that he must, at least , be familiar with the well settled principles of law and rules of practice which are of frequent application in the ordinary business of the profession; must observe the utmost good faith toward his client; and must give such attention to his duties, and to the interests of his client, as ordinary prudence demands, or members of the profession usually bestow. For loss to his client, resulting from the lack of this measure of professional duty and attainments, he must be held liable; and such loss forms an equitable defense to his demand for compensation."

Schenkel v. Monheit, 266 Pa. Super 396, 405 A.2d 493(1979) used the following standard ".. The failure of the attorney to exercise ordinary skill and knowledge."

Rules of Professional Conduct

The Rules of Professional Conduct specifically indicates in its preamble that its scope is limited. It provides:

> "Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. These are not designed to be a basis for civil liability."

The Rules of Professional Conduct are currently accepted as the ethical guidelines for attorneys. The prior ethical guidelines, the Code of Professional Responsibility, also indicated in its preamble that:

> "The Code makes no attempt to describe either disciplinary procedures or penalties for violation of a disciplinary rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct."

Therefore, the preamble of both the Rules of Professional Conduct and the Code of Professional Responsibility make it clear that these rules are guidelines and are not to be used to define standards or provide a basis for civil liability.

The leading case on this issue is Maritans v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277 (Pa. 1992). The Supreme Court held that the Rules of Professional Conduct and the Code of Professional Responsibility are not the proper basis of a civil claim against an attorney, but they also do not shield the attorney from conduct which would be actionable at common law. Rules of Professional Conduct and the Code of Professional Responsibility provide no independent basis for a civil claim, nor a defense for claims that could be asserted against the attorney at common law.