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A Single-Trust Marital Deduction Will

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5. Reconciliations:
- A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal totals, the trust account check book balance, and the trust account bank statement balance.
 - A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance.
 - Reconciliations shall identify the preparer and be approved by the attorney or one of the attorneys in the firm.
6. Receipts and Disbursements Explained: The purpose of all receipts and disbursements of trust funds reported in the trust journals and subsidiary ledgers shall be fully explained and supported by adequate records.
7. Inspection of Records and Confidentiality: The books and records required by this rule shall be made available without notice at any time during regular office hours to any authorized representative of the Virginia State Bar for inspection and audit. Information derived from such inspection and audit shall not be voluntarily disclosed except insofar as disclosure may be necessary in the enforcement of this rule.

by
J. Rodney Johnson



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A great deal has been written during the past several years about the increasing number of professional liability actions that are being brought against attorneys by their former clients. Indeed, some commentators have taken the position that a legal malpractice "crisis", similar to the medical malpractice crisis that has so adversely affected physicians in recent years, is imminent for the bar. This short note will turn away from the factual question concerning the existence of such a crisis and look instead at the legal issues that form the basis of an attorney's professional liability exposure in Virginia.

A Virginia First

Beginning with the historical background, one discovers that the Commonwealth of Virginia has the rather dubious distinction of being the battleground where the first legal malpractice action in America was fought at the appellate level.¹ The negligence complained of in this case was the attorney's failure to file a necessary pleading which, in turn, caused a judgment previously recovered by the plaintiff to be reversed. The attorney in question defended on the merits and also on the ground that, since he did

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not receive any compensation for his services, he should not be liable for any loss that the plaintiff might have suffered, even though such loss might be attributable to a lack of due care on his part.

In deciding this case of first impression in this country, the Court of Appeals stated that "it is undoubtedly true that an attorney is liable for neglect of duty and that he is bound to make retribution to his client for the injury which he may thereby sustain."² And, in responding to the defense based on lack of consideration, the Court stated that "though a man is not bound to do an act for another without a reward, yet if he will voluntarily engage, and enter upon the performance of it, he is liable for the consequences of his improper management."³

Definition Added

This statement of an attorney's liability to his client has since been codified by the General Assembly and now appears in the Code of Virginia as follows: "Every attorney at law shall be liable to his client for any damage sustained by him by the neglect of his duty as such attorney."⁴ This basic statement of the rule has received added definition over the years as appellate cases involving the attorney malpractice issue have been decided, and the present general rule has been stated by the Virginia Supreme Court as follows:

The law implies a promise on the part of attorneys that they will execute the business intrusted to their professional management, with a reasonable degree of care, skill, and dispatch, and they are liable to an action if guilty of a default in either of these duties whereby their clients are injured, and this liability of the attorney is not affected by the client's diligence or the want of it, unless stipulated for by special contract. While there can be no doubt that for any misfeasance or unreasonable neglect of an attorney whereby his client suffers a loss an action may be supported and damages recovered to the amount of the loss, yet it is equally well established that an attorney in the management of his professional business is not bound to an extraordinary diligence, but only to use a reasonable degree of care and skill, reference being had to the character of the business he undertakes to do, and is not to be answerable for every error or mistake, but, on the contrary, will be protected if he acts in good faith, to the best of his skill and knowledge, and with an ordinary degree of attention.⁵

Tort vs. Contract

While the rule of attorney liability has long been established in Virginia, it has been unknown during most of this time whether the Virginia rule was based on a tort theory or on a contract theory. Under the contract theory it is said that when a lawyer agrees to perform a service for a client, he makes an implied promise to use reasonable skill and diligence. If he fails to do so, then he has breached the contract and is liable in an action thereon. Under

the tort theory it is said that when an attorney and his client enter into the attorney-client relationship, the law imposes a duty on the attorney to use due care in the handling of the client's case. If the attorney fails to exercise due care, then he is guilty of negligence and is liable in a tort action.

On the surface it might appear to not make any difference which theory a jurisdiction might adopt because the end result is the same in both cases. This appearance is illusory, however, because there are three major differences between the two theories: (1) it is possible to recover punitive damages in appropriate tort cases; (2) the statute of limitations is shorter in tort cases; and (3) lack of privity is typically no defense in a tort case.

This issue of tort theory vs. contract theory was finally brought before the Court in *Oleyar v. Kerr, Trustee*,⁶ a case wherein the plaintiff had verbally retained the defendant to make a title examination of certain real property. The defendant attorney conceded that he was negligent in not discovering a particular judgment lien and defended on the ground that the one year statute of limitations applicable to non-surviving torts was applicable and that it had expired. After surveying the cases from other jurisdictions, the Supreme Court decided to "adopt the better reasoned view which is found in those cases which hold that an action for the negligence of an attorney in the performance of professional services, while sounding in tort, is an action for breach of contract and thus governed by the statute of limitations applicable to contracts."⁷

Statute of Limitations

Although the *Oleyar* case settled that the contract theory would obtain in Virginia, it nevertheless left several questions still unresolved. First of all, it is unclear from a reading of this case whether the statute of limitations will be five years if there is a written contract of employment and ten years if the written contract of employment is made a covenant by the placing of a "(SEAL)" thereon, or whether the applicable period will be three years in all cases because the liability is based on an implied term in the contract of employment. Accordingly, in recognition of the possibility that the longer statutes may be held to apply when such a case comes before the Court, prudence would seem to suggest a leaving off of the "(SEAL)" which serves no worthwhile purpose in the average case and which might later be held to keep the attorney liable for double the period of an ordinary written contract of employment.

After one has determined what statute of limitations is applicable to his case, the second question is "When does this period of time start to run?" This question was before the Court in *McCormick v. Romans and Gunn*,⁸ where the client verbally retained an attorney to handle the sale of a portion of her real estate in April of 1963. After repeated attempts to obtain an accounting from the attorney, the client filed suit in November of 1967, which was more than three years after the oral contract was entered into with the attorney. In concluding that a defense based on the running of the statute of limitations was not sufficient, the Supreme Court stated that

"where there is an undertaking which requires a continuation of services, the statute of limitations does not begin to run until the termination of the undertaking. This special rule is applicable to a continuing agreement between attorney and client. Indeed it is particularly appropriate to an attorney-client agreement in view of the trust and confidence inherent in that relationship."⁹ The Court was of the further opinion that the agreement in question was not terminated until "the misappropriations by (the attorney) were discovered and demand was made in October, 1967, for payment of the balance claimed to be due."¹⁰ Consequently, the three year period did not begin to run until that time.

Relationship a Factor

The holding of the *McCormick* case has grave implications for a number of Virginia attorneys whose relationships with one or more clients may be said to be of a continuing nature. Take, for example, the common practice of some attorneys in serving as custodian of their clients' wills or other legal documents after all of the legal work thereon has been finished, the fee paid, and the file placed among the inactive or dead files. Will the retention of the will or other document, which is done merely as a convenience to the client, prevent the statute of limitations from beginning to run on any error in such documents until such time as the documents are delivered to the client or the negligence is discovered, whichever comes first? One can be sure that this argument will be advanced against the attorney/custodian and, thus, prudence might suggest that (1) attorneys no longer serve as a custodian of their clients' wills or other documents, and (2) that when a particular representation for a client comes to an end, a termination letter to that effect be sent to the client even though the attorney is continuing to represent the same client on other matters.

Even though an attorney should take all of the appropriate steps to eliminate the possibility of the continuing relationship argument being raised against him, he must still respond to the question "When does the statutory period begin to run?" At this time there is no clearly defined Virginia rule. The older American cases rather consistently held that the statute of limitations should start running from the time the attorney actually made the negligent mistake.

However, many of the more recent American cases have held that, since it is impossible to expect a client to be able to bring an action at law prior to becoming aware of the existence of the negligent mistake, the statute of limitations cannot begin to run until the wrong is, or, in the exercise of due diligence, should be discovered. While this issue has not yet been before the Virginia Supreme Court in the context of a legal malpractice case, the Court did reject the discovery rule in the case of *Hawks v. DeHart*,¹¹ which involved medical malpractice. It has been suggested, however, that the *Hawks* case is not only out of step with the developing law in Virginia's neighboring states but that it is also capable of being distinguished on its facts.¹²

Retain Coverage

Accordingly, when a case involving legal malpractice comes before the Court it is possible that the discovery rule might then be adopted. Since it is thus possible that the Virginia attorney may truly have what some commentators refer to as "liability for life," prudence might suggest that an attorney give consideration to retaining his professional liability insurance coverage after he retires, goes on the bench, or leaves practice for any other reason.

Now that the length of the attorney's malpractice exposure has been surveyed, it is time to consider the breadth of this exposure and ask, "Who may bring a malpractice action against an attorney?"

Briefly stated, the doctrine of privity of contract limits those persons who can sue for breach of a contract to those persons who are parties (or have privity with parties) to the contract. For instance, if A and C should enter into a contract which A should breach, it is clear that B cannot bring an action at law against A to recover for A's wrongful conduct because B is not in privity with A. And this makes rather obvious sense.

Suppose, however, that the contract in question is one between Attorney and Client to draft a will leaving Client's entire estate to Beneficiary. If Attorney breaches the contract by negligently causing the will to be defectively executed so that Client dies intestate and Beneficiary takes nothing, should B now be able to bring an action at law against A? There is still no privity of contract and, under the historic common law rule, the answer is no — B still cannot sue. However, a new trend began in California, in 1961, in the case of *Lucas v. Hamm*¹³ which several commentators have analogized in importance to the famous case of *McPherson v. Buick Motor Co.*¹⁴ The jurisdictions following this trend take the position that under the above circumstances it is more just to extend the professional liability of the attorney to foreseeable third parties than to impose the loss occasioned by the attorney's negligence on the innocent beneficiary, and, consequently, they have abrogated the attorney's defense which was based on lack of privity of contract.

The Privity Question

Turning to the Virginia law concerning privity of contract, one notes that Section 54-46 *Va. Code Ann.* (Repl. vol. 1974) reads "Every attorney at law be liable to his client . . . (emphasis added). If this emphasized language is taken literally, it could be argued that it amounts to a codification of the common law doctrine requiring privity of contract on the part of those who would seek to hold an attorney liable for his negligence. It is not at all clear that this language was intended to be so interpreted or that the Supreme Court would be inclined to accept such an interpretation today. In fact, there are several policy indicators which suggest that the Court would not accept such a restrictive interpretation of this code section. First of all, Virginia abolished the privity rule in all cases involving products liability,¹⁵ in 1962, in response to public policy arguments similar to those now being

advanced in the legal malpractice cases.

Furthermore, Virginia also recognizes the doctrine of third party beneficiary contracts¹⁶—which permits one who is not a party to a contract to enforce the contract if it was made for his benefit, *in whole or in part* (emphasis added), even though the third party is not mentioned anywhere in the contract. Referring back to the hypothetical case posed above, it would seem rather clear that B was an intended beneficiary of C's contract with A. And, although a will case has been chosen to illustrate the potential scope of an attorney's third party liability, it should be noted that this development is not confined to the estate planning area but is spreading throughout many other areas of the law as well.¹⁷

It would seem, then, that the climate of public policy in Virginia is quite favorable to the reception of this new trend towards the elimination of the privity defense in actions to recover for legal malpractice. Accordingly, it is concluded that the Virginia attorney not only has a potential "liability for life" but that he also may have as broad an exposure to third party liability as do the attorneys in any other jurisdiction.¹⁸

FOOTNOTES

¹ *Stephens v. White*, 2 Va. (2 Wash) 203 (1796).

² *Id.*, p. 211. The requirement of an actual "injury" was emphasized in Virginia's most recent legal malpractice case, *Allied Productions, Inc. v. Duesterdick*, decided March 4, 1977, wherein the Supreme Court held that "when a client has suffered a judgment for money damages as the proximate result of his lawyer's negligence such judgment constitutes actual damages recoverable in a suit for legal malpractice only to the extent such judgment has been paid." Accordingly, a motion for judgment that failed to allege payment of such judgment failed to state a cause of action.

³ *Id.*, pp. 211-212.

⁴ Section 54-46 *Va. Code Ann.* (Repl. Vol. 1974). This section has further language dealing with an attorney's liability for his clients' funds (which is also treated in Section 26-5). This subject is not covered in this note.

⁵ *Glenn v. Haynes*, 192 Va. 574, 581 (1951); See also *Staples Ex'ors v. Staples*, 85 Va. 76 (1888); For a jury instruction that "fairly states the obligation, duty and care that is owed by an attorney to his client," see *Fowler v. Tobacco Growers, Inc.*, 195 Va. 770 (1954).

⁶ 217 Va. 88 (1976).

⁷ *Id.*, p. 90.

⁸ 214 Va. 144 (1973).

⁹ *Id.*, pp. 148-149.

¹⁰ *Id.*, p. 149.

¹¹ 206 Va. 810 (1966).

¹² Lahy, "Perpetuities, Privity and Professional Liability," 2 U. Rich. Law Notes 203 (1966).

¹³ 56 Cal. 2d 583, 364 P. 2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U. S. 987 (1962).

¹⁴ 217 N. Y. 382, 111 N. E. 1050 (1916), the precedent setting case that led to the abolishing of lack of privity of contract as a defense in products liability cases.

¹⁵ Section 8.2-318, *Va. Code Ann.* (Add. vol. 1965).

¹⁶ Section 55-22, *Va. Code Ann.* (Rep. vol. 1974).

¹⁷ See "Attorney's Liability, to One Other Than His Immediate Client, for Consequences of Negligence in Carrying Out Legal Duties," Ann. 45 ALR 3rd 1181 (1972).

¹⁸ For those who wish to pursue these legal issues beyond this survey, The Defense Research Institute, Inc., 1100 West Wells Street, Milwaukee, Wisconsin 53233, has published an *Annotated Bibliography, Liability of Attorneys* (Vol. 1975 No. 2) that collects most of the periodical writing in this area.