Chapter 1

Legal Elements of a Claim

1-1 INTRODUCTION

The risks for District of Columbia (D.C.) lawyers from bar grievances and legal malpractice suits are significant. Indeed, during the period between August 1, 2023, and July 31, 2024, in the District of Columbia, 1,252 complaints were filed with the Office of Disciplinary Counsel.[1] Of the 1,252 complaints filed in the 2023-2024 Board term, the Office of Disciplinary Counsel opened 210 docketed complaints for formal investigation. Meanwhile, the amount that law firms or insurers are paying in indemnity or settlement payments in litigation continues to increase, making malpractice claims more expensive to litigate or settle than ever before. Thus, it is critical that practitioners continue to develop an understanding of the basic elements of a legal malpractice cause of action and the steps to take to prevent or minimize liability for such claims.

Under D.C. law, a claim for legal malpractice requires the plaintiff to allege facts that establish:

(1) that the attorney had a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise;

(2) a breach of that duty;

[1.] District of Columbia, Board on Professional Responsibility Annual Report 2023-2024, *available at* https://www.dcbar.org/getmedia/dc0445f1-ce5a-4b55-9f63-b8041f3d6564/2025-03-07-FINAL-Annual-Report-of-the-Board-on-Professional-Responsibility-(2023-2024) (last visited Feb. 3, 2026).

(3) a proximate causal connection between the negligent conduct and the resulting injury; and

(4) actual loss or damage resulting from the attorney's negligence.[2]

The first element corresponds with the existence of a duty of care to the plaintiff, while the second element requires a breach of that duty. The third element comprises the elements of proximate cause and damages. Notably, the remedy in a civil case for an attorney's negligent performance during the representation is to bring a legal malpractice suit against the attorney.

1-2 DUTY

1-2:1 Generally

An attorney is not necessarily liable for every harm his or her professional negligence causes to a potential plaintiff. Instead, an attorney's liability is limited to the class of people to whom the attorney owes a duty to exercise ordinary care, skill, and diligence in the performance of professional services. Typically, an attorney owes a duty to only his or her clients. Indeed, "[a] threshold requirement for a legal malpractice action is the existence of an attorney-client relationship."[3] This proof is essential because "[a]bsent such relationship, there is no duty to breach."[4] Whether

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[2] *Harris v. U.S. Dep't of Justice*, 600 F. Supp. 2d 129 (D.D.C. 2009); *see also Seed Co. v. Westerman, Hattori, Daniels & Adrian, LLP*, 961 F.3d 1190, 1196 (D.C. Cir. 2020); *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 38 (D.D.C. 2020); *Beach TV Props., Inc. v. Solomon*, 306 F. Supp. 3d 70, 93 (D.D.C. 2018); *Venable LLP v. Overseas Lease Grp.*, No. 14-02010 (RJL), 2015 U.S. Dist. LEXIS 98650, at *5, 2015 WL 4555372, at *2 (D.D.C. July 28, 2015); *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 902 (D.C. 2013); *Antiballistic Sec. & Prot., Inc. v. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC*, 789 F. Supp. 2d 90, 95 n.3 (D.D.C. 2011); *Johnson v. Sullivan*, 748 F. Supp. 2d 1, 9 (D.D.C. 2010); *Martin v. Ross*, 6 A.3d 860, 862 (D.C. 2010); *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 664 (D.C. 2009); *Niosi v. Aiello*, 69 A.2d 57, 60 (D.C. 1949). Federal question jurisdiction is satisfied in a malpractice action if the federal issue is: (1) necessarily raised; (2) actually disputed; (3) substantial; and (4) capable of resolution in federal court without disrupting federal-state balance. *Gunn v. Minton*, 568 U.S. 251 (2013); *Apton v. Volkswagen Grp. of Am., Inc.*, 233 F. Supp. 3d 4 (D.D.C. 2017) (same); *Capitol Hill Grp. v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 489 (D.C. Cir. 2009) (referring legal malpractice case to bankruptcy court because action arose in a case under 11 U.S.C. §§ 1501 et seq.).

[3] *Hiligh v. Sands*, 389 F. Supp. 3d 69, 73 (D.D.C. 2019).

[4] *Hiligh v. Sands*, 389 F. Supp. 3d 69, 73 (D.D.C. 2019); *Taylor v. Akin, Gump, Strauss, Hauer & Feld*, 859 A.2d 142, 147 (D.C. 2004) (finding law firm no longer owed plaintiff any duty with respect to the first lawsuit because the only source of such a duty (her tenancy) had come to an end).

an attorney-client relationship exists or existed between an alleged client and an attorney is typically a question for a jury.[5] However, as discussed herein, there are additional circumstances that give rise to an implied attorney-client relationship or that support a duty to a non-client third party.

1-2:2 Duty to Client

1-2:2.1 Who is the Client?

It seems axiomatic that an attorney owes to a client the duty to competently perform the services that the attorney bargained to perform on the client's behalf. However, as case law in the District of Columbia demonstrates, to say that an attorney owes a duty to a client raises the question of who qualifies as a client.

In the District of Columbia, there are essentially three ways a plaintiff can demonstrate the existence of an attorney-client relationship that would sustain a legal malpractice claim. First, if an attorney acknowledges he or she was retained by the plaintiff or served as counsel to the plaintiff, then it is indisputable that an attorney-client relationship exists. This is an express attorney-client relationship. Such an acknowledgment can be evidenced by the existence of an engagement letter, a fee contract, or other correspondence in which the attorney acknowledges that he or she represents or is counsel to the client.

Second, if the attorney acts in a way that causes a plaintiff to reasonably believe that the attorney is representing the interests of the plaintiff, then the plaintiff can prove an implied attorney-client relationship sufficient to sustain a legal malpractice action.

Third, D.C. courts have found that, in limited circumstances, professionals owe a duty to exercise reasonable care to certain non-client third parties who are the direct and intended beneficiaries of the contracted-for services.[6]

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5. *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 45 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

6. *Hopkins v. Akins*, 637 A.2d 424, 429 (D.C. 1993); *Williams v. Mordkofsky*, 901 F.2d 158, 163 (D.C. Cir. 1990).

1-2:2.2 Express Attorney-Client Relationship

The existence of an attorney-client relationship is the threshold question in a legal malpractice case.[7] An express relationship, however, is the easiest to identify and is infrequently contested or litigated.[8] In such a representation, the attorney-client relationship generally is expressed by a written contract.[9] Doubt about whether an attorney-client relationship exists can be eliminated by the lawyer, preferably in writing, so that the client will not mistakenly believe the lawyer is looking after the client's affairs when the lawyer has ceased to do so.[10]

An express attorney-client relationship is personal and not vicarious.[11] Additionally, courts in other jurisdictions have held that an attorney in an express privileged relationship with a client may not be contractually relieved from the duty to exercise reasonable care; any attempt to do so is void as against public policy.[12]

1-2:2.3 Implied Attorney-Client Relationship

The D.C. Court of Appeals has confirmed that "neither a formal agreement nor the payment of fees is necessary to create an attorney-client relationship."[13] It is not necessary for an attorney

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7. *Hiligh v. Sands*, 389 F. Supp. 3d 69, 73 (D.D.C. 2019).

8. Indeed, the existence of an attorney-client relationship is litigated infrequently because the parties typically recognize it when they have agreed to an express relationship. One of the only contexts in which the express relationship is litigated, therefore, is in determining who the real party in interest is after a bankruptcy. *See Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 795 (D.C. Cir. 2010) (a trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed).

9. *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998); *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982); *Udall v. Littell*, 366 F.2d 668, 676 (D.C. Cir. 1966).

10. *See In re Dickens*, 174 A.3d 283, 297 (D.C. 2017); D.C. Rules of Pro. Conduct R. 1.3 cmt. 9.

11. This is a well-accepted premise nationwide. *See, e.g.*, *Attorney Grievance Comm'n of Md. v. Potter*, 844 A.2d 367 (Md. 2004); *Stephen W. Holaday, P.C. v. Tieman, Spencer & Hicks, L.L.C.*, 609 S.W. 3d 771, 778 (Mo. Ct. App. 2020), *transfer denied* (Aug. 27, 2020); *Crane v. Albertelli*, 592 S.E.2d 684, 685 (Ga. Ct. App. 2003); *American Cont'l Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12, 13 (Ky. Ct. App. 1998); *In re Cupples*, 952 S.W.2d 226, 234 (Mo. 1997); *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 328 (Ariz. Ct. App. 1996), *as corrected on denial of reconsideration* (Jan. 13, 1997); *Bump v. Stewart, Wimer & Bump, P.C.*, 336 N.W.2d 731, 736 (Iowa 1983); *In re Petition for Rule of Ct. Governing Lawyer Advert.*, 564 S.W.2d 638, 641 (Tenn. 1978); *Young v. Scarazzo*, 30 Pa. D. & C.2d 324, 334 (Pa. Com. Pl. 1963).

12. *Little v. Middleton*, 401 S.E.2d 751, 754 (Ga. Ct. App. 1991).

13. *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 209 (D.D.C. 2013) (citing *Derrickson v. Derrickson*, 541 A.2d 149, 153 (D.C. 1988)); *see also* Restatement (Third) of the Law Governing Lawyers § 14 cmt. c; *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

to take substantive action and give legal advice in order to establish such a relationship.[14]

Following the general rule that contracts are formed according to the objective manifestation of mutual intent, an attorney-client relationship generally cannot be created unilaterally by the client.[15] All that is required to create an attorney-client relationship is that the parties, explicitly or by their conduct, manifest an intention to create the attorney-client relationship.[16] A client's perception that an attorney is his or her counsel is a consideration in determining whether a relationship exists.[17] However, the client's perception of the relationship is not dispositive to whether an attorney-client relationship exists; rather, D.C. courts consider the totality of the circumstances.[18] An attorney-client relationship hinges upon the client's intention to seek legal advice and the client's belief that they are consulting an attorney.[19] The intent of the person seeking advice is assessed from that person's viewpoint, not that of the attorney.[20] The ultimate issue is whether the plaintiff reasonably believed he or she was seeking legal advice.[21]

An attorney-client relationship can exist even if the parties do not have a written agreement, the client does not pay the attorney any

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14. *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

15. *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 209 (D.D.C. 2013).

16. *In re Dickens*, 174 A.3d 283 (D.C. 2017); *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 209 (D.D.C. 2013).

17. *In re Dickens*, 174 A.3d 283, 296 (D.C. 2017); *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

18. *In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015); *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998); *In re Robbins*, 192 A.3d 558, 563 (D.C. 2018).

19. *Geier v. Conway, Homer & Chin-Caplan, P.C.*, 983 F. Supp. 2d 22, 36 (D.D.C. 2013); *N.L.R.B. v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 312 (D.D.C. 2009) (finding meager piece of evidence is not enough to carry that burden of establishing that the Union intended to seek legal advice or services from the NLRB, considered its communications confidential, and that its belief was reasonable).

20. *Jones v. United States*, 828 A.2d 169, 176 (D.C. 2003).

21. *Jones v. United States*, 828 A.2d 169, 176 (D.C. 2003); *see also Breen v. Chao*, 304 F. Supp. 3d 9, 26 (D.D.C. 2018) (once an attorney has entered an appearance in a pending lawsuit, the attorney may not unilaterally decide to consider a client unrepresented simply because the client has not paid fees or because a motion to withdraw from the case is pending before the court); *Pressley v. Mgmt. Support Tech., Inc.*, No. 22-cv-2262, 2024 U.S. Dist. LEXIS 244801, 2024 WL 5708170, at *4-5 (D.D.C. Oct. 21, 2024) (finding a plaintiff did not have a reasonable expectation that a law firm was willing to engage in a discussion about forming an attorney-client relationship after the plaintiff unilaterally—and without solicitation—submitted a series of documents to a law firm and where no consultation, advice, or discussion between the parties subsequently occurred).

fees, and the attorney does not give the client any legal advice.[22] In determining whether an attorney-client relationship exists, courts have considered factors such as:

(1) the character or nature of the information allegedly shared with the attorney;

(2) the passage of time between the alleged former representation and the current litigation;

(3) the payment of fees; and

(4) the existence of a formal agreement.[23]

Additional factors considered include whether the client perceived that an attorney-client relationship existed (although as noted above, this is rarely dispositive on its own); whether the client sought professional advice or assistance from the attorney; whether the attorney took action on behalf of the client; and whether the attorney represented the client in proceedings or otherwise held himself or herself out to others as the client's attorney.[24]

D.C. courts have upheld claims against attorneys even in the absence of a retainer agreement or engagement letter. In *In re Bernstein*,[25] the attorney argued that he was not acting as an attorney for the clients based on the absence of a written retainer agreement for the particular matter, and the fact that he was never paid for his representation.[26] The court explained that the argument was "baseless" following the general rule that neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship.[27] The court found "substantial evidence" of an attorney-client relationship where the record showed that the attorney had contacted a third party on behalf of the alleged clients; threatened to sue the company; and filed a lawsuit on their behalf.[28] Further, one of the clients repeatedly

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22. *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 45 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

23. *United States v. Crowder*, 313 F. Supp. 3d 135, 144-45 (D.D.C. 2018); *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 209 (D.D.C. 2013).

24. *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 45 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014); *see also Hiligh v. Sands*, 389 F. Supp. 3d 69, 73 (D.D.C. 2019).

25. *In re Bernstein*, 707 A.2d 371 (D.C. 1998).

26. *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998).

27. *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998).

28. *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998).

contacted the attorney about the case and issued a letter discharging him.[29]

The U.S. District Court for the District of Columbia has suggested that an attorney may not be shielded from malpractice liability for injuries stemming from a matter merely because that matter was expressly excluded from the lawyer's purview in a client retainer agreement.[30] In that case, the attorney defendants represented a radio broadcast client in the sale of one of its two radio stations. The retainer agreement expressly excluded any responsibility for the lawyer to provide representation related to the client's lease for operations of a third station.[31] The attorney was co-owner of the third station leased by the plaintiff.[32] The client alleged the attorney knew the leased station was under construction, knew the client was considering purchasing the leased station, and knew that the client would not proceed with the sale if there were potential operational delays with the leased station that could have a negative financial impact on the company.[33]

As such, the client alleged the attorney failed to use reasonable care when he voluntarily and "affirmatively assured" claimant that the leased station "was under control and proceeding as expected," notwithstanding the limitations drawn in the retainer agreement.[34] The claimant allegedly relied on this assurance in agreeing to sell the other radio station. In denying defendants' motion to dismiss the subsequent malpractice action, the court found that if an attorney gives a client assurances regarding a matter otherwise excluded from the representation and the client relies on those assurances to its detriment, the claimant may be able to allege a plausible

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29. *Rothschild Broad., LLC v. Law Offs. of Evan D. Carb, PLLC*, No. 20-2794 (RC), 2021 U.S. Dist. LEXIS 178029, 2021 WL 4243411 (D.D.C. Sept. 17, 2021).

30. *Rothschild Broad., LLC v. Law Offs. of Evan D. Carb, PLLC*, No. 20-2794 (RC), 2021 U.S. Dist. LEXIS 178029, 2021 WL 4243411, at *4 (D.D.C. Sept. 17, 2021).

31. *Rothschild Broad., LLC v. Law Offs. of Evan D. Carb, PLLC*, No. 20-2794 (RC), 2021 U.S. Dist. LEXIS 178029, 2021 WL 4243411, at *2 (D.D.C. Sept. 17, 2021).

32. *Rothschild Broad., LLC v. Law Offs. of Evan D. Carb, PLLC*, No. 20-2794 (RC), 2021 U.S. Dist. LEXIS 178029, 2021 WL 4243411, at *3-4 (D.D.C. Sept. 17, 2021).

33. *Rothschild Broad., LLC v. Law Offs. of Evan D. Carb, PLLC*, No. 20-2794 (RC), 2021 U.S. Dist. LEXIS 178029, 2021 WL 4243411, at *13 (D.D.C. Sept. 17, 2021).

34. *Rothschild Broad., LLC v. Law Offs. of Evan D. Carb, PLLC*, No. 20-2794 (RC), 2021 U.S. Dist. LEXIS 178029, 2021 WL 4243411, at *13 (D.D.C. Sept. 17, 2021).

cause of action of legal malpractice.[35] The *Rothschild* court warned, however, that alleging a plausible cause of action to overcome a motion to dismiss does not mean the claimant will succeed ultimately in that claim "due to a lack of duty under the circumstances."[36]

Courts also take care to look at the parties' intent in assessing whether a privileged relationship exists. In *United States v. Crowder*,[37] the court found no attorney-client relationship between the attorney and a co-defendant where the attorney and the alleged client never explicitly expressed a desire to form an attorney-client relationship, and the purported client had never paid the attorney nor signed any agreement.[38] The sum total of the evidence suggesting an attorney-client relationship consisted of the attorney's statements in emails that he "reached out to" or "instructed" the alleged client to provide documents, and the attorney's implied threat to take court action to prevent the government from enforcing subpoenas against the co-defendant.[39]

The attorney clarified to the court that he never represented the alleged client, nor even had a one-on-one conversation with her. The attorney explained that he found out about the government's subpoenas from his defendant-client and that he was interacting with the government in his role as defendant-client's attorney because of his concern that the government viewed the client as the alter ego of other entities.[40] The court assessed that the alleged client, for her part, did not indicate that she ever intended for the attorney to provide her with legal services.[41] The court therefore found no attorney-client relationship between the attorney and the alleged client.[42]

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35. *Rothschild Broad., LLC v. Law Offs. of Evan D. Carb, PLLC*, No. 20-2794 (RC), 2021 U.S. Dist. LEXIS 178029, 2021 WL 4243411, at *13 (D.D.C. Sept. 17, 2021). The *Rothschild* court pointed out that the attorney defendants failed to cite to any case law in defense of their argument that no duty existed, and so the court could not reach such a conclusion at the motion to dismiss stage of litigation.

36. *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998).

37. *United States v. Crowder*, 313 F. Supp. 3d 135 (D.D.C. 2018).

38. *United States v. Crowder*, 313 F. Supp. 3d 135, 145 (D.D.C. 2018).

39. *United States v. Crowder*, 313 F. Supp. 3d 135, 145 (D.D.C. 2018).

40. *United States v. Crowder*, 313 F. Supp. 3d 135, 145 (D.D.C. 2018).

41. *United States v. Crowder*, 313 F. Supp. 3d 135, 145 (D.D.C. 2018).

42. *United States v. Crowder*, 313 F. Supp. 3d 135, 145 (D.D.C. 2018).

In *Headfirst Baseball LLC v. Elwood*,[43] the court likewise determined that there was insufficient evidence to determine that an attorney-client relationship existed. Neither party had presented emails nor other documentation affirmatively establishing an attorney-client relationship. Moreover, there were no allegations of a formal agreement, payment of attorney's fees, or conversations in which either party made express statements about the nature of the alleged relationship. Notably, there was a letter by which the attorney and a former law partner told the alleged client that the law firm did not represent him. Indeed, the evidence before the court almost exclusively consisted of declarations made by the alleged client, the former law partner, and the law firm attorneys. The court held that the declarations provided far less than what other courts have accepted as evidence establishing an attorney-client relationship.[44]

In *Teltschik v. Williams & Jensen, PLLC*,[45] however, the court held that a genuine issue of material fact existed as to whether the attorney and the alleged client formed an attorney-client relationship.[46] The attorney prepared a declaration claiming that she never formed an attorney-client relationship with the alleged client or had any fiduciary relationship with him.[47] Contrary to the declaration, the court held that a reasonable jury could conclude that an attorney-client relationship existed where the plaintiff provided the court with evidence of "letters of attorney designation," third parties addressed legal correspondence intended for the plaintiff to the attorney, and the attorney "received, read, and responded to [such] correspondence."[48]

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43. *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199 (D.D.C. 2013).

44. *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 210 (D.D.C. 2013).

45. *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

46. *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 46 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

47. *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 45 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

48. *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 46 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

1-2:2.4 Providing Legal Opinions to Clients for Use by Others

Imagine that the board of directors of a large corporation hires an attorney to conduct an "independent" investigation into conduct potentially implicating the officers or directors of the corporation. If the board contemplates that the results of the investigation will be shared outside the company, does privilege attach? Are the results truly "independent?" These are some of the issues that can arise when attorneys provide legal opinions to clients for use by others.

A routine part of nearly every attorney-client relationship is the provision of legal opinions by the attorney to the client. This can occur in a wide variety of contexts including, for example, a legal opinion relating to a real estate transaction or regarding the client's likelihood of success in potential litigation. While providing a legal opinion may seem like a straightforward task, there are a number of ethical considerations that can arise, including most notably where the opinion is intended to be shared with third parties.

Rule 2.3 of the D.C. Rules of Professional Conduct provides that:

> A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.[49]

When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.[50] Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6 of the D.C. Rules of Professional Conduct.[51]

The comments to Rule 2.3 of the D.C. Rules of Professional Conduct provide a list of situations where this may become an issue, including an "opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective

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49. D.C. Rules of Pro. Conduct R. 2.3(a).
50. D.C. Rules of Pro. Conduct R. 2.3(b).
51. D.C. Rules of Pro. Conduct R. 2.3(c).

purchaser, or at the behest of a borrower for the information of a prospective lender," an opinion regarding the legality of securities, or an opinion provided for a third person, such as the purchaser of a business.[52] This rule might also be implicated in other contexts. For example, corporations often retain attorneys to perform internal investigations that may serve the primary purpose of advising the corporation, but may also involve reporting the investigation results to shareholders or to regulatory agencies. In such circumstances, who exactly the client is (e.g., the corporation or only its board of directors) impacts whether Rule 2.3 may be implicated.

When an attorney provides an evaluation or legal opinion that is to be solely relied upon by the client and kept confidential, there usually is no issue with the attorney being candid and forthright regarding the issues being evaluated, including with respect to any weaknesses in the client's position or potential liability. Indeed, in such circumstances, clients would expect that their attorneys provide an objective evaluation of the matter, consistent with the attorney's duty of diligence and zeal and the duty to avoid intentionally prejudicing a client's interests during a professional relationship, in accordance with Rule 1.3 of the D.C. Rules of Professional Conduct. However, the same may not hold true where the evaluation is expected to be provided to others outside the attorney-client relationship. Thus, at the beginning of the representation, attorneys can find out whether the client intends for the attorney to share the opinion with others to determine whether the provisions of Rule 2.3 of the D.C. Rules of Professional Conduct may be implicated.

The United States Supreme Court has recognized that "the private attorney's role [is to serve] as the client's confidential adviser and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light."[53] However, when an attorney is retained to provide an evaluation of a matter that will be shared with third parties, it represents a minor deviation from the normal attorney-client relationship. It may be that the attorney is caught between two potentially competing interests in

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52. D.C. Rules of Pro. Conduct R. 2.3 cmt. 1.

53. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984).

the evaluation: to render an impartial opinion so that the client can benefit from candid advice but also to ensure that the evaluation does not contain any information that will harm the client if it is being shared with third parties.

Attorneys' obligations generally run directly—and exclusively—to their client, and not to the public at large. This is different from an accountant, for example, who often prepares reports for public consumption and "owes ultimate allegiance to the corporation's creditors and stockholders, as well as the investing public."[54] Thus, attorneys who are preparing materials for public consumption may face a tension of sorts.

Because of the tensions between the duties owed to the client and the purpose of the evaluation, the comments to Rule 2.3 of the D.C. Rules of Professional Conduct caution that "careful analysis of the situation is required."[55] In addition, the requisite "informed consent" under Rule 2.3 may require that the attorney advise the client regarding the potential adverse effects of sharing an evaluation with a third party.[56] Having this discussion before commencing the representation can help ensure that both the attorney and client understand the purpose of the representation (i.e., whether the attorney is to act as an advocate or as an impartial evaluator) and avoid client relations problems later. It can also be helpful to confirm the scope of the representation because, even if the parties do not expressly envision a public report, it is common to consider internal investigations as subject to Rule 2.3 just by the nature of the investigation involved. Indeed, Section 95 of the Restatement (Third) of the Law Governing Lawyers closely tracks Rule 2.3 and comments that the rule regarding evaluations for use by third parties applies to internal investigations because they "review[ ] management conduct for the protection of shareholders, the investment community, and sometimes regulators."[57] The Rule may also require attorneys to ensure that they are not creating a conflict by advocating for the client's interests, on one hand, and

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54. *United States v. Deloitte LLP*, 610 F.3d 129, 135 (D.C. Cir. 2010) (citing *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984)).

55. D.C. Rules of Pro. Conduct R. 2.3 cmt. 3.

56. D.C. Rules of Pro. Conduct R. 2.3(b).

57. Restatement (Third) of the Law Governing Lawyers § 95 (2000).

seeking to provide an objective evaluation for consumption by others, on the other hand. Comment 3 to Rule 2.3 states:

> For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction.[58]

Rule 2.3 of the D.C. Rules of Professional Conduct also addresses confidentiality concerns raised by evaluations or legal opinions as it provides that "[e]xcept as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6."[59] Rule 1.6 of the D.C. Rules of Professional Conduct concerns an attorney's duty of confidentiality. Except when permitted under limited circumstances, a lawyer shall not knowingly reveal a confidence or secret of the lawyer's client.[60] Thus, even though the attorney may not be acting strictly as the client's advocate when rendering a legal opinion, the same rules of confidentiality likely apply.

In other words, while the attorney may be acting impartially in some respects, the client is still the client when it comes to protecting confidential information. Accordingly, when retained to provide an evaluation, attorneys can take the same precautions with respect to the client's confidential information and not disclose any such information unless it is necessary for the evaluation (or the client consents).

While there is nothing inherently improper in providing a legal opinion with the knowledge that the opinion will be shared with third parties, a review of Rule 2.3 of the D.C. Rules of Professional Conduct will help attorneys meet the goals of the representation as well as their ethical obligations.

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58. D.C. Rules of Pro. Conduct R. 2.3 cmt. 3.
59. D.C. Rules of Pro. Conduct R. 2.3(c).
60. D.C. Rules of Pro. Conduct R. 1.6.

1-2:3 Duty to Non-Clients

1-2:3.1 Generally

Generally, a third party to an attorney-client relationship cannot bring a legal malpractice claim against the attorney, even where the third party has purportedly suffered as a result of the attorney's malpractice.[61] Even in the absence of an express or implied contract, however, certain non-clients may have standing to sue professionals for negligence.

The District of Columbia recognizes an exception for cases in which the third party can establish that it was the direct and intended beneficiary of a contract.[62] The mere fact that a third party is a foreseeable plaintiff is typically not sufficient to give rise to a duty under the intended beneficiary exception to the requirement that an attorney-client relationship exist in a legal malpractice action.[63]

1-2:3.2 Intended Beneficiaries

In general, a plaintiff cannot recover in a legal malpractice action unless there is an attorney-client relationship with the attorney-defendant. However, in certain circumstances, an attorney may owe a duty to a party who is not a client but who is a direct and intended beneficiary to an agreement between the attorney and his or her client. For that exception to apply, it must clearly appear

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61. *Scott v. Burgin*, 97 A.3d 564 (D.C. 2014) (As a general rule, the obligation of the attorney is to his client and not to a third party. In this jurisdiction, whether a plaintiff falls into the class of persons who may sue an attorney for malpractice has been resolved as "a matter of law."); *see also Hopkins v. Akins*, 637 A.2d 424, 428 (D.C. 1993) (beneficiaries of an estate may not sue attorney for estate's personal representative); *Needham v. Hamilton*, 459 A.2d 1060, 1060-61 (D.C. 1983) (intended beneficiaries of estate may sue attorney who drafted the decedent's will) (quoting *National Sav. Bank v. Ward*, 100 U.S. 195, 200 (1880)).

62. *Hopkins v. Akins*, 637 A.2d 424, 429 (D.C. 1993) (recognizing attorney only has obligation to client, not to a third party, and that the exception applies "where it is alleged that the plaintiffs were the direct and intended beneficiaries of the contracted for services); *Williams v. Mordkofsky*, 901 F.2d 158, 163 (D.C. Cir. 1990) (evidence indicated that suing corporation was intended beneficiary of work done by attorney); *see also Scott v. Burgin*, 97 A.3d 564, 567 (D.C. 2014) (holding that "[e]xtending permission to sue an attorney for malpractice to those who would indirectly benefit from the dissolution of a client's marriage introduces precisely this risk of unforeseen and unmanageable liability."); *Footbridge Ltd. Tr. v. Zhang*, 584 F. Supp. 2d 150 (D.D.C. 2008), *aff'd*, 358 F. App'x 189 (D.C. Cir. 2009) (finding a dearth of evidence in the record supporting this third-party beneficiary relationship and that there was no evidence demonstrating intended beneficiary of work on loan transaction).

63. *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99 (D.D.C. 2009).

from the agreement between the attorney and client that the agreement was intended for the benefit of that third party.[64]

In *Needham v. Hamilton*,[65] the D.C. Court of Appeals recognized the well-established rule that:

> [T]he obligation of the attorney is to his client, and not to a third party.[66] This denial of liability to anyone not in privity of contract is premised primarily upon two concerns: (1) that to allow such liability would deprive the parties to the contract of control of their own agreement; and (2) that a duty to the general public would impose a huge potential burden of liability on the contracting parties.[67]

The court acknowledged the landmark decision in *Ultramares Corp. v. Touche*,[68] in which Justice Cardozo reasoned that to extend the duty to exercise reasonable care to persons beyond the party in privity might expose individuals "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[69] The court recognized that the privity rule is not without exception, and that the exception may apply to third-party claims where it is alleged that the plaintiffs were the direct and intended beneficiaries of the contracted-for services.[70] Thus, in *Needham*, the application of the privity rule to legal malpractice cases involving the drafting or execution of wills was a matter of first impression.[71]

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64. *Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983); *see also Scott v. Burgin*, 97 A.3d 564 (D.C. 2014) ("Third party claims for legal malpractice against attorneys may be sustained where the plaintiffs were the direct and intended beneficiaries of the contracted for services."); *Williams v. Mordkofsky*, 901 F.2d 158 (D.C. Cir. 1990) (Corporation was entitled to maintain malpractice action against attorney, even though attorney had not represented it directly. Attorney had represented shareholders of corporation and an affiliated corporation, and evidence indicated that suing corporation was intended beneficiary of work done by attorney.).

65. *Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983).

66. *Needham v. Hamilton*, 459 A.2d 1060, 1061 (D.C. 1983) (citing *National Sav. Bank v. Ward*, 100 U.S. 195, 200 (1880)).

67. *Needham v. Hamilton*, 459 A.2d 1060, 1061 (D.C. 1983) (internal citations omitted).

68. *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931).

69. *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983).

70. *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983) (citing *Security Nat'l Bank v. Lish*, 311 A.2d 833 (D.C. 1973).

71. *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983).

Following the guidance of Justice Cardozo and courts in other jurisdictions, the Court of Appeals held that the intended beneficiary of a will could bring a malpractice cause of action against drafting attorneys despite a lack of privity between those attorneys and the beneficiary.[72] First, the court concluded that neither of the rationales supporting the requirement of privity applies to the situation presented involving a legal malpractice claim.[73] Second, "it is obvious that 'the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will . . .'"[74]

Later, in *Teasdale v. Allen*,[75] the Court of Appeals took the ruling in *Needham v. Hamilton* one step further, holding that the alleged intended beneficiaries of a testator had standing to bring an action for legal malpractice against the attorney who drafted the will, regardless of whether their precise standing as intended beneficiaries could be discerned from the four corners of the will itself.[76] The court refused to adopt any per se rule that standing may be granted only to those whose precise status as intended beneficiaries can be discerned from the four corners of the will.[77]

In *Clark v. Feder Semo & Bard, P.C.*,[78] the court held that a retirement plan participant was not the direct and intended beneficiary of a law firm's legal services related to the participant's employer's retirement plan, as required to state a claim for legal malpractice. The court reiterated the principle that the primary exception to the requirement of an attorney-client relationship occurs in a narrow class of cases where the "intended beneficiary" of a will sues the attorney who drafted that will.[79]

Further, the court also discussed that the few cases that apply the intended beneficiary exception in other contexts require that third parties allege more than "mere harm" from the conduct in question. The court held that the fact that a third party is a

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72. *Needham v. Hamilton*, 459 A.2d 1060, 1063 (D.C. 1983).
73. *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983).
74. *Needham v. Hamilton*, 459 A.2d 1060, 1063 (D.C. 1983).
75. *Teasdale v. Allen*, 520 A.2d 295 (D.C. 1987).
76. *Teasdale v. Allen*, 520 A.2d 295 (D.C. 1987).
77. *Teasdale v. Allen*, 520 A.2d 295 (D.C. 1987).
78. *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99 (D.D.C. 2009).
79. *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99, 107 (D.D.C. 2009).

foreseeable plaintiff is not sufficient to give rise to a duty under the intended beneficiary exception to the requirement that an attorney-client relationship exist in a legal malpractice action.[80]

1-2:3.3 Voluntary Agency

It is well-accepted that an attorney does not owe the same duty to members of the general public as the attorney owes to his or her client.[81] However, in appropriate circumstances, an attorney is not exempt from the general principle that one who assumes to act, even gratuitously, may thereby become subject to the duty of acting carefully.[82]

In *Security National Bank v. Lish*,[83] on appeal from the trial court's granting of summary judgment to the attorney, the Court of Appeals explained that in appropriate circumstances, an attorney is not exempt from the general tort and agency principle described above:

> One engaged in supplying information has a duty to exercise reasonable care. Generally, this duty does not extend beyond one's employer. However, there is a recognized exception to this general rule. Where information is supplied directly to a third party (or indirectly for the benefit of a specific third party), then the same duty of reasonable care exists, notwithstanding a lack of privity. The validity of the principles enunciated by Justice Cardozo in the *Ultramares* and *Glanzer* cases was recognized by this court.[84]

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80. *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99, 107 (D.D.C. 2009) (citing *Morowitz v. Marvel*, 423 A.2d 196, 199 (D.C. 1980)).

81. *Security Nat'l Bank v. Lish*, 311 A.2d 833, 834 (D.C. 1973).

82. *Security Nat'l Bank v. Lish*, 311 A.2d 833, 834 (D.C. 1973); *see also Gilbert v. Miodovnik*, 990 A.2d 983, 1011 (D.C. 2010) (courts have found that a physician may still incur a legal duty towards a patient "although his services are performed gratuitously").

83. *Security Nat'l Bank v. Lish*, 311 A.2d 833 (D.C. 1973).

84. *Security Nat'l Bank v. Lish*, 311 A.2d 833, 834-35 (D.C. 1973) (citing *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922)).

Specifically, D.C. courts have adopted the expression of this proposition in Section 378 of the Restatement of Agency.[85] The Restatement provides:

> One who, by a gratuitous promise or other conduct which he should realize will cause another reasonably to rely upon the performance of definite acts of service by him as the other's agent, causes the other to refrain from having such acts done by other available means is subject to a duty to use care to perform such service, or, while other means are available, to give notice that he will not perform.[86]

Once a voluntary agency relationship exists, even where there is no express attorney-client relationship, that voluntary agent may nonetheless owe the non-client a duty to perform the undertaking with the skill and care required by the profession.

1-3 BREACH

1-3:1 Breach of Duty Required

Once it becomes clear that the attorney owes a duty to a client or non-client, the plaintiff then must establish a deviation from or breach of the applicable standard of care to recover for professional malpractice.

Whether an attorney violated the standard of care is an issue for the trier of fact hearing the legal malpractice action.[87] Emphasizing upon the establishment of the violation of standard of care, the court held that:

> To establish a prima facie case of attorney malpractice under D.C. law, the plaintiff must establish the applicable standard of care, that

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85. *Franklin Inv. Co. v. Huffman*, 393 A.2d 119, 122 (D.C. 1978); *Dawson v. Nat'l Bank & Tr. Co*., 335 A.2d 259, 261 (D.C. 1975) (Under some circumstances, a purely gratuitous undertaking to perform certain services may subject a person to a legal obligation.).

86. Restatement (Second) of Agency § 378 (1958).

87. *Burke v. Scaggs*, 867 A.2d 213, 221 (D.C. 2005); *Seed Co. v. Westerman*, 832 F.3d 325, 337 (D.C. Cir. 2016); *Smith v. Haden*, 872 F. Supp. 1040, 1046 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir. 1995); *Mills v. Cooter*, 647 A.2d 1118, 1124 (D.C. 1994); *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Secs. Co*., 751 F.2d 1262, 1266 (D.C. Cir. 1985).

> the attorney violated the standard, and that the violation caused a legally cognizable injury.[88]

1-3:2 Standard of Care

Practitioners have a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise.[89] The court has highlighted this standard of care in a lawyer malpractice case:

> Inherent in such reasonable care [ ] is the requirement that those with special training and experience adhere to a standard of conduct commensurate with such attributes. Thus, a lawyer must exercise that degree of reasonable care and skill expected of lawyers acting under similar circumstances.[90]

The District of Columbia does not follow the locality rule, which, in some jurisdictions, measures the standard of care only in the context of attorneys practicing in that area. In the District of Columbia, a lawyer must exercise the degree of reasonable care and skill expected of lawyers acting under similar circumstances.[91] The conduct of lawyers is not measured solely by the conduct of other lawyers in the District of Columbia or a similar community.[92]

The more complex and complicated the legal matters of the underlying retention, the more training and experience that may be required to assure the lawyer "exercise[s] that degree of reasonable care and skill expected of lawyers acting under similar circumstances."[93] In *Battle v. Thornton*,[94] the court defined the standard of care to which attorneys practicing in the District of Columbia are held in matters involving special skills. There, a lawyer must exercise that degree of reasonable care and skill expected of someone who has "special training" (i.e., training as a lawyer), coupled with enough "experience," to handle the

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88. *Kaempe v. Myers*, 367 F.3d 958, 966 (D.C. Cir. 2004) (citing *O'Neil v. Bergan*, 452 A.2d 337, 341 (D.C. 1982)); *Hickey v. Scott*, 738 F. Supp. 2d 55, 61 (D.D.C. 2010).

89. *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 75 (D.D.C. 1998).

90. *Battle v. Thornton*, 646 A.2d 315, 319 (D.C. 1994) (internal quotations omitted).

91. *See Morrison v. MacNamara*, 407 A.2d 555, 564 (D.C. 1979).

92. *Morrison v. MacNamara*, 407 A.2d 555, 564 (D.C. 1979).

93. *Battle v. Thornton*, 646 A.2d 315, 323 (D.C. 1994).

94. *Battle v. Thornton*, 646 A.2d 315 (D.C. 1994).

case under the circumstances.[95] The question, however, remains: how "specialized" must an attorney's training and experience be to satisfy the duty of care required for legal representation in a particular case? The trial court ruled on the pretrial motion in limine that "unless there is proof, prima facie proof that these attorneys, the defendants, held themselves out as specialists, the standard is not going to be the standard for specialists. It's going to be a standard of general practice." That is to say, only if the lawyers had held themselves out to appellants as Medicaid fraud specialists would the court have based the applicable standard of care on the standard governing such specialists.[96]

1-3:3 Factors Establishing Breach

1-3:3.1 Generally

As detailed above, the standard of care for lawyers practicing in the District of Columbia is rather broadly written. Thus, there are several factors that a court will consider in determining whether that standard of care has been breached by an attorney's negligence.

1-3:3.2 Failing to Properly Advise Clients

A court may find that an attorney breached the standard of care by failing to properly advise his or her clients. In *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Securities Co.*,[97] the court held that the law firm knew, or should have known, that under the relevant federal securities act, a promoter may be sued and prosecuted "in the district where the offer or sale took place."[98] The court held that a failure to advise the defendant-companies that some targeted jurisdictions might deem their marketing plan an "investment contract" could constitute malpractice notwithstanding the more lenient inclinations of the U.S. District Court for the District of Columbia.[99]

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95. *Battle v. Thornton*, 646 A.2d 315, 319 (D.C. 1994).

96. *Battle v. Thornton*, 646 A.2d 315, 319 (D.C. 1994).

97. *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Secs. Co.*, 751 F.2d 1262 (D.C. Cir. 1985).

98. *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Secs. Co.*, 751 F.2d 1262, 1265 (D.C. Cir. 1985).

99. *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Secs. Co.*, 751 F.2d 1262, 1265 (D.C. Cir. 1985).

While the law firm argued that other federal circuits would not classify the plan as an investment contract, the court dismissed that argument and determined that those federal circuits would treat the plan as an investment contract if the investors could be expected in practice to rely on the promoter's advice.[100] The court concluded that the evidence raised substantial fact issues as to reasonableness of the firm's time spent on those issues and the resulting fees, and whether the firm's advice on investment offering constituted malpractice, thereby precluding summary judgment.[101]

Clients who bring a legal malpractice action alleging that their lawyer failed to properly advise them may be able to support such allegations solely through testimony describing oral communications with the lawyer. In *Hughes v. Rism LLC*,[102] the D.C. Superior Court denied the motion for new trial and stay of enforcement of judgment filed by defendant-lawyers following a jury verdict. The defendants argued that the jury's verdict finding legal malpractice was against the weight of the evidence, in part because the plaintiffs did not present any written evidence of the advice they alleged to have received from their lawyer. The court denied defendants' motions, noting that "the plaintiffs testified about the oral advice they received from Mr. Taylor, and the jury was free to credit the plaintiffs' testimony even though it was not supported by written documentation."[103]

As discussed in Section 1-3:3.7, below, and in Chapter 3, below, plaintiffs may not be required to provide expert testimony in support of claims alleging an attorney error that are so obvious or well-known as to be "common knowledge," such as when an attorney misses filing by the statute of limitations deadline. However, expert testimony may be necessary for the plaintiff to establish how an attorney's failure to advise could support a legal malpractice claim. In *Flax v. Schertler*,[104] the court held that the

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100. *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Secs. Co.*, 751 F.2d 1262, 1266 (D.C. Cir. 1985).

101. *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Secs. Co.*, 751 F.2d 1262, 1266 (D.C. Cir. 1985).

102. *Hughes v. RISM LLC*, No. 2021-CA-2554-M, 2023 WL 7107673 (D.C. Super. Ct. July 31, 2023).

103. *Hughes v. RISM LLC*, No. 2021-CA-2554-M, 2023 WL 7107673, at *1 (D.C. Super. Ct. July 31, 2023).

104. *Flax v. Schertler*, 935 A.2d 1091 (D.C. 2007).

plaintiff failed to present expert testimony that explained why the attorneys were negligent in failing to advise her about the potential impact of the defendant's bankruptcy petition. The court held:

> We agree with the trial judge that the allegations of attorney negligence in the Amended Complaint do not relate to matters that fall within the "common knowledge" exception to the requirement for expert testimony. To understand whether the [lawyers and law firm] were negligent in failing to bring one or more additional intentional tort claims or in failing to advise Flax about the potential impact of a bankruptcy petition, and whether a loss to [plaintiff] was occasioned by their failure to do so, a jury would need to understand the elements of each tort, the measure of available damages, the availability and strength of the proof in support of the claim(s), the validity of the [lawyers' and law firm's] reasoning that lay behind any choices they made about claims to pursue, what types of debts were dischargeable under bankruptcy law at the time the [lawyers and law firm] prepared their counterclaims, and many other factors that an expert who is an expert trial lawyer would understand, but that would not likely have been within the common knowledge of a jury.[105]

Similarly, in *Kruise v. Jorgensen*,[106] the court held that the plaintiff's claims of malpractice, breach of contract, breach of the covenant of good faith, breach of fiduciary duty, and negligent misrepresentation all failed because the plaintiff failed to produce any expert evidence that the attorney's performance fell below the standard of care. The court deemed the case too complex for a jury to analyze without expert help, distinguishing the case (which involved allegations of venue selection, failure to accept a settlement, and analysis of likelihood of success) from more

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105. *Flax v. Schertler*, 935 A.2d 1091, 1107 (D.C. 2007).

106. *Kruise v. Jorgensen*, No. 19-CV-49 (DLF), 2022 U.S. Dist. LEXIS 171863, 2022 WL 4379036, at *3 (D.D.C. Sept. 22, 2022).

straightforward matters like those alleging an entry of default or expired statute of limitation.[107]

Notably, the failure to advise clients does not always result in a finding of malpractice. In *In re Greater Southeast Community Hospital Corp.*,[108] the court held that the law firms did not breach the standard of care by failing to advise Chapter 11 debtor-clients of the consequences of acquiring excess debt.[109] The court determined that deepening insolvency is not a tort. Therefore, a law firm's knowledge that a corporate transaction would deepen the corporation's insolvency would not mean that the law firm knew that the corporation's fiduciaries were breaching their duties of care or loyalty in approving such transactions.[110] Thus, the failure to advise the debtors of the consequences of acquiring excess debt did not constitute a breach in the standard of care.[111]

1-3:3.3 Adverse Results

Obviously, a result adverse to the client's goals or interests does not automatically mean that the attorney breached the applicable standard of care. In other areas of professional malpractice law (for example, with regard to health professionals), an inference of negligence under D.C. law cannot be based solely on the fact that an adverse result follows the professional's advice.[112]

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[107] *Kruise v. Jorgensen*, No. 19-CV-49 (DLF), 2022 U.S. Dist. LEXIS 171863, 2022 WL 4379036, at *3 (D.D.C. Sept. 22, 2022) ("Here, none of [plaintiff]'s theories of malpractice—poor choice of venue, misguided advice to reject a settlement, excessive billing, and misjudgment as to likelihood of a suit's success in federal court—are simple enough for a jury to summarily comprehend.").

[108] *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324 (Bankr. D.D.C. 2006), *as amended* (Sept. 26, 2006).

[109] *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324 (Bankr. D.D.C. 2006), *as amended* (Sept. 26, 2006).

[110] *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324, 358 (Bankr. D.D.C. 2006), *as amended* (Sept. 26, 2006) ("[D]eepening insolvency" is properly treated as theory of harm, not as separate cause of action).

[111] *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324, 358 (Bankr. D.D.C. 2006), *as amended* (Sept. 26, 2006).

[112] *Flores-Hernandez v. United States*, 910 F. Supp. 2d 64 (D.D.C. 2012); *Bunn v. Urban Shelters & Health Care Sys., Inc.*, 672 A.2d 1056, 1060 (D.C. 1996) ("[W]e cannot imply negligence . . . based solely on the fact that an adverse result[] occurred.").

1-3:3.4 Undertaking to Accomplish a Specific Result

Attorneys are not insurers of the results of their efforts on behalf of clients. However, a client may assert that an attorney breached his or her duty to the client when, after undertaking to accomplish a specific result, the attorney then fails to effectuate the intent of the parties. Although the District of Columbia has not specifically addressed this issue, courts in other jurisdictions have recognized that when an attorney guarantees a specific result, the failure to achieve the result may render the attorney liable.[113] In *Abramson v. Wildman*,[114] the Maryland Court of Special Appeals held that when a lawyer promised the guarantee of a specific result, the promisor-attorney may be found liable for such unsuccessful performance.

Further, in *Graivier v. Dreger & McClelland*,[115] two doctors hired an attorney to prepare an operating agreement for the formation of their new company.[116] The plaintiff claimed that he requested that the attorney draw up the agreement so that the profits were divided in a specific manner. When the agreement failed to incorporate this request, the plaintiff sued the attorney for legal malpractice. Although the court stated that the plaintiff read the agreement prior to signing it and the plaintiff could have instructed the attorney to change any of the provisions, this did not relieve the attorney of liability in light of the plaintiff's specific instructions:

> [I]t is the lawyer's responsibility to his client to select and employ words in the construction of a contract that will accurately convey the meaning intended. And although he is not an insurer of the documents he drafts, the attorney may breach his duty towards his client when, after undertaking to accomplish a specific result, he then fails to effectuate the intent of the parties.[117]

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[113] *See, e.g.*, *Abramson v. Wildman*, 964 A.2d 703 (Md. Ct. App. 2009); *Harrison v. Deming, Parker, Hoffman, Green & Campbell, P.C.*, 541 S.E.2d 407, 409 (Ga. Ct. App. 2000); *Littleton v. Stone*, 497 S.E.2d 684, 686 (Ga. Ct. App. 1998).

[114] *Abramson v. Wildman*, 184 Md. App. 189, 964 A.2d 703 (2009).

[115] *Graivier v. Dreger & McClelland*, 633 S.E.2d 406 (Ga. Ct. App. 2006).

[116] *Graivier v. Dreger & McClelland*, 633 S.E.2d 406, 410 (Ga. Ct. App. 2006).

[117] *Graivier v. Dreger & McClelland*, 633 S.E.2d 406, 410 (Ga. Ct. App. 2006) (internal citations omitted). Indeed, as discussed in Chapter 4, below, clients may be responsible

As a result, the court concluded that the attorney was negligent in drafting the operating agreement and failed to exercise ordinary care.

1-3:3.5 Failing to Obtain Client Authority

An attorney may be found to have breached the applicable standard of care where the attorney fails to obtain client authority before taking certain actions.[118] For example, in *Bronson v. Borst*,[119] the D.C. Court of Appeals held that regardless of the good faith of the attorney, absent specific authority, an attorney cannot accept a settlement offer on behalf of a client.[120] Instead, the court recommended that the attorney should have terminated the relationship before the statute of limitations ran, or could have filed the suit and requested leave of the court to withdraw earlier in the litigation.[121] The court concluded that by deciding to accept the settlement offer, the attorney chose the one option that should have been foreclosed to him.[122] Accordingly, the court found no reason to deny the client an opportunity to amend its pleading to include a counterclaim for legal malpractice.

1-3:3.6 Ethical Rules

As discussed in Chapter 7, Identifying and Resolving Conflicts of Interest, below, a violation of the D.C. Rules of Professional Conduct, standing alone, cannot serve as a basis for a legal malpractice claim, but rule violations are not wholly irrelevant.[123] While ethical rules are not substantive law, violations of the ethical rules may be used in legal malpractice actions to assist

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for understanding factual aspects of documents they read and approve, but they may not always be expected to understand the legal significance of a document.

118. *In re Wilson*, No. 19-BG-34, 2020 D.C. App. LEXIS 134, 2020 WL 1950495 (D.C. Apr. 23, 2020) (attorney disciplined for failing to obtain client consent); *Macktal v. Garde*, 111 F. Supp. 2d 18 (D.D.C. 2000), *aff'd*, No. 00-7207, 2001 U.S. App. LEXIS 4010, 2001 WL 238170 (D.C. Cir. Feb. 23, 2001) (finding attorney did not commit malpractice by allegedly coercing client to accept settlement offer).

119. *Bronson v. Borst*, 404 A.2d 960 (D.C. 1979).

120. *Bronson v. Borst*, 404 A.2d 960, 963 (D.C. 1979).

121. *Bronson v. Borst*, 404 A.2d 960, 963 (D.C. 1979).

122. *Bronson v. Borst*, 404 A.2d 960, 963 (D.C. 1979).

123. *Atlanta Channel, Inc. v. Solomon*, No. 15-1823 (RC), 2020 U.S. Dist. LEXIS 73371, 2020 WL 1984296 (D.D.C. Apr. 27, 2020); *Griva v. Davison*, 637 A.2d 830 (D.C. 1994); *Waldman v. Levine*, 544 A.2d 683, 690 (D.C. 1988).

in establishing the standard of care required of attorneys.[124] Accordingly, to avoid establishing the element of breach, D.C. practitioners should be aware of the restrictions contained in the Rules of Professional Conduct.

1-3:3.7 Use of Expert Testimony

As discussed in Chapter 3, Additional Requirements for a Malpractice Claim, below, in a legal malpractice action, the plaintiff typically must present expert testimony establishing the standard of care.[125] Although, as discussed above, the issue of whether an attorney has breached the standard of care is for a jury to decide, expert testimony is admissible to assist the jury in determining whether an attorney breached the standard of care.[126] Expert testimony is not required, however, where "the attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge."[127]

Conduct falling within this "common knowledge" exception may include: allowing the statute of limitations to run on a client's claim; permitting entry of default judgment against the client; failing to instruct the client to answer interrogatories; failing to allege affirmative defenses; failing to file tax returns; failing to follow the client's explicit instructions; billing a client for time not spent providing services; decisions regarding choice of venue; advising a client to reject a settlement offer; excessive billing; and misjudgment as to likelihood of suit's success in federal court.[128]

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124. *Atlanta Channel, Inc. v. Solomon*, No. 15-1823 (RC), 2020 U.S. Dist. LEXIS 73371, at *17, 2020 WL 1984296, at *6 (D.D.C. Apr. 27, 2020).

125. *Television Cap. Corp. of Mobile v. Paxson Commc'ns Corp.*, 894 A.2d 461, 469 (D.C. 2006), *as amended on reh'g in part* (July 5, 2006); *Hamilton v. Needham*, 519 A.2d 172, 174 (D.C. 1986).

126. *Smith v. Haden*, 872 F. Supp. 1040, 1045 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir. 1995); *Waldman v. Levine*, 544 A.2d 683 (D.C. 1988) (admitting expert witness testimony based on various provisions of the Code of Professional Responsibility for Lawyers).

127. *Flax v. Schertler*, 935 A.2d 1091, 1106 (D.C. 2007); *Forti v. Ashcraft & Gerel*, 864 A.2d 133, 138 (D.C. 2004); *Kruise v. Jorgensen*, No. 19-cv-49, 2022 U.S. Dist. LEXIS 171863, 2022 WL 4379036, at *3 (D.D.C. Sept. 22, 2022); *see also* Chapter 3: Additional Requirements for a Malpractice Claim, below.

128. *Carranza v. Fraas*, 763 F. Supp. 2d 113, 122 (D.D.C. 2011); *see also Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 51 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014); *Kaempe v. Myers*, 367 F.3d 958, 966 (D.C. Cir. 2004); *Kruise v. Jorgensen*, No. 19-CV-49 (DLF), 2022 U.S. Dist. LEXIS 171863, 2022 WL 4379036, at *3 (D.D.C. Sept. 22, 2022).

1-4 PROXIMATE CAUSE

1-4:1 Generally

A cognizable claim of legal malpractice requires that the alleged breach of duty by the attorney was the cause of damages suffered by the client.[129] Proximate cause has been defined as "that cause which, in natural and continual sequence, [and] unbroken by an efficient intervening cause, produces the injury and without which [cause] the result would not have occurred."[130]

To demonstrate causation, the client plaintiff must show that absent the defendant attorney's alleged negligence, the client plaintiff would have succeeded on an otherwise valuable claim; thus, assessment of proximate cause typically requires an evaluation of the "case within a case."[131] In cases where no loss was the result of the lawyer's action, a legal malpractice defendant will not be held liable.[132]

Proximate cause is generally a factual issue to be resolved by the jury, but may be taken from the jury where no reasonable

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129. *Chase v. Gilbert*, 499 A.2d 1203, 1211 (D.C. 1985); *see also Herbin v. Hoeffel*, 806 A.2d 186, 194-96 (D.C. 2002).

130. *Butts v. United States*, 822 A.2d 407, 417 (D.C. 2003) (quoting *Wagshal v. District of Columbia*, 216 A.2d 172, 175 (D.C. 1966)).

131. *Flax v. Schertler*, 935 A.2d 1091, 1102 n.7 (D.C. 2007) (quoting *Chase v. Gilbert*, 499 A.2d 1203, 1211 (D.C. 1985)).

132. *See Niosi v. Aiello*, 69 A.2d 57, 60 (D.C. 1949) ("An attorney is not liable for negligence if, notwithstanding the negligence, the client had no cause of action or meritorious defense as the case may be; or that if the conduct of an attorney with respect to litigation results in no damage to his client the attorney is not liable."); *McCord v. Bailey*, 636 F.2d 606, 611-12 (D.C. Cir. 1980) (attorney's failure to assert defense on behalf of criminal defendant did not cause client cognizable harm because assertion of the defense would not have altered the trial's outcome); *Herbin v. Hoeffel*, 806 A.2d 186, 196 (D.C. 2002) (affirming 12(b)(6) dismissal where appellant's "conclusory allegations" do not include facts sufficient to show that but for the defendant's actions the events leading to the alleged harm would not have occurred); *Hobley v. L. Off. of S. Howard Woodson, III*, 983 A.2d 1000, 1003-04 (D.C. 2009) (summary judgment was properly granted where plaintiff did not present evidence establishing that the defendant's alleged malpractice caused plaintiff's loss in the underlying case); *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 710 (D.C. 2013) (court declined to find proximate cause where plaintiff's "allegation that the federal court, the United States Court of Appeals for the First Circuit, or the United States Supreme Court would have struck down DADT if attorneys had advanced the overbreadth and systematic abuse claims is purely speculative"); *Cash v. Elan*, No. 24-cv-2057, 2025 U.S. Dist. LEXIS 35619, at *4-6 (D.D.C. Feb. 27, 2025) (court declined to dismiss legal malpractice action, for although a plaintiff "does not plausibly allege causation if there is no way she could have prevailed on the underlying claim," this plaintiff had alleged "specific evidence in support of her claim" and the complaint included "particular details supporting the merits of her claims").

person could find causation on the facts adduced.[133] Triers of fact determine not only whether a defendant's negligence proximately caused damage to the plaintiff, but also the extent of the plaintiff's damage that the defendant proximately caused.[134] In the District of Columbia, expert testimony regarding the ultimate issue of causation is not admissible in a legal malpractice action.[135]

1-4:2 Client Would Have Prevailed, Absent the Alleged Malpractice

Although the standard for proximate cause is rather straightforward, in application, the issue of proximate cause can be quite complicated. Indeed, the issue of proximate cause is one of the most frequently litigated issues in D.C. legal malpractice cases. When evaluating the merits of a malpractice claim, D.C. courts focus on whether the client would have been able to obtain a favorable resolution had the attorney not been negligent.[136] Thus, if there is

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133. *Grant v. District of Columbia*, 597 A.2d 366, 370 (D.C. 1991); *Chase v. Gilbert*, 499 A.2d 1203, 1211 (D.C. 1985) (holding the question of whether the defendant proximately caused the plaintiff's injury as a question of fact which must be resolved by the fact finder); *Majeska v. District of Columbia*, 812 A.2d 948, 950 (D.C. 2002) (same).

134. *Jefferson v. Ourisman Chevrolet Co.*, 615 A.2d 582, 584-85 (D.C. 1992).

135. *Hickey v. Scott*, 796 F. Supp. 2d 1, 5-6 (D.D.C. 2011) (court held that expert testimony would not be permitted on causation because "in attorney malpractice cases where causation requires proof of what would have happened in the underlying 'case within the case,' courts simply instruct the jury on the legal aspects of the case, and then leave it to the jury to decide, based on the law, what a reasonable fact-finder would have concluded if the attorney had not been negligent," and "[e]xpert testimony will not assist the jury in performing this independent fact-finding function" because such testimony would "invade the jury's function"); *Colella v. Androus*, No. 20-813, 2025 U.S. Dist. LEXIS 101072, 2025 WL 1492792, at *11 (D.D.C. Mar. 31, 2025) (expert testimony on "case within the case" causation was more prejudicial than probative, for such testimony would either require a prediction of what some other fact finder would have concluded or an evaluation of the legal merits of the underlying claims, both of which improperly invade the jury's function of reaching the ultimate question at issue).

136. *McCord v. Bailey*, 636 F.2d 606, 611-12 (D.C. Cir. 1980) (attorney's failure to assert defense on behalf of criminal defendant did not cause client cognizable harm because assertion of the defense would not have altered the trial's outcome); *Mount v. Baron*, 154 F. Supp. 2d 3 (D.D.C. 2001) (granted 12(b)(6) motion to dismiss legal malpractice claim because "the plaintiffs [ ] failed to allege any facts showing that but for the defendant's negligence, there would have been a different verdict"); *Herbin v. Hoeffel*, 806 A.2d 186, 196 (D.C. 2002) (found the complaint did not allege that, but for attorney's disclosure, a search warrant would not have been issued or been served; nor does it claim that without evidence seized during the search appellant would not have been charged, or would have fared better in his criminal trial, or that there would have been a different outcome in that trial); *Cash v. Elan*, No. 24-cv-2057, 2025 U.S. Dist. LEXIS 35619, at *1-6 (D.D.C. Feb. 27, 2025) (dismissal of a legal malpractice action, alleging that attorneys had missed deadlines and failed to file action for three years— rendering some claims untimely—was not proper where the client alleged "specific evidence in support of her claim" and the complaint

no evidence that there would have been a different outcome absent the attorney's error, the court likely will find that there is no basis for a legal malpractice claim.

In *Steele v. Salb*,[137] the client retained an attorney to handle her appeal of an adverse summary judgment decision on her claim of race and gender discrimination, a hostile work environment, and constructive discharge. The attorney pursued the claims of retaliation and hostile work environment on appeal, but did not argue the client's constructive termination claim.[138] The U.S. Court of Appeals reversed the District Court with respect to all issues that were argued and remanded the case for further proceedings.[139] The client, with the assistance of the attorney, then participated in mediation with her former employer and her case ultimately settled for $150,000.

The client then filed a legal malpractice claim against the attorney and the law firm alleging that the attorney breached the standard of care by not including the constructive termination claim in the appeal.[140] The client maintained that, because the constructive termination claim was not argued on appeal, she was precluded from pursuing $750,000 in front pay and back pay, even though there was evidence on the record that she failed to make an effort to mitigate her damages. The client asserted that if her attorney had challenged the District Court's entry of summary judgment on the constructive discharge claim, the U.S. Court of Appeals would have concluded that a genuine issue of material fact remained as to whether "her working conditions were so intolerable and

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included "particular details supporting the merits of her claim"); *In re Belmar*, 319 B.R. 748, 755 (Bankr. D.D.C. 2004) (granting summary judgment on malpractice claim where plaintiff did not contend that the underlying claim would have been resolved more fairly in the absence of the attorney's alleged malpractice); *Hobley v. L. Off. of S. Howard Woodson, III*, 983 A.2d 1000 (D.C. 2009) (affirming the granting of summary judgment in favor of the lawyer in a legal malpractice case after reviewing the record and determining that the U.S. District Court would have granted the motion for summary judgment on the merits even if the lawyer had made an argument in opposition); *Steele v. Salb*, 93 A.3d 1277, 1284 (D.C. 2014) (summary judgment was appropriate where plaintiff "failed to meet her burden of showing that she would, more likely than not, have prevailed in the United States Court of Appeals in the absence of [attorney's] negligent failure to challenge the District Court's entry of summary judgment on her constructive discharge claim" and "was unable to allege facts showing that a genuine issue of material fact remained as to causation").

137. *Steele v. Salb*, 93 A.3d 1277 (D.C. 2014).

138. *Steele v. Salb*, 93 A.3d 1277, 1280 (D.C. 2014).

139. *Steele v. Salb*, 93 A.3d 1277, 1280 (D.C. 2014).

140. *Steele v. Salb*, 93 A.3d 1277, 1280 (D.C. 2014).

aggravating that a reasonable person would have felt compelled to quit."[141] The Court of Appeals hearing the malpractice claim, however, held that the client failed to meet her burden of showing that "she would, more likely than not, have prevailed in the United States Courts of Appeals in the absence of [the attorney's] negligent failure to challenge the District Court's entry of summary judgment on her constructive discharge claim"; thus, the Court of Appeals upheld the Superior Court's entry of summary judgment on the malpractice claim in favor of the attorney, in part because the client was unable to allege facts showing that a genuine issue of material fact remained as to causation.[142]

To recover in a malpractice case, the plaintiff must show that the link between the breach of the standard of care and the plaintiff's damages is more than merely speculative.[143] In *Chase v. Gilbert*,[144] the client hired an attorney to represent it in its Federal Communications Commission (FCC) application to operate a radio station. While waiting for the FCC to decide on the application, an issue arose concerning the illegal use of the radio station to broadcast lottery numbers. The attorney recommended that the client not act until the FCC issued its initial decision on the application. The client agreed. The FCC subsequently disqualified the client.

In its counterclaim, the client contended that the attorney committed legal malpractice because "he failed to exercise reasonable care in recommending that [the client] raise the ministers' issue" and in "failing to eliminate or minimize or apprise [the client] of the risk involved in raising the issue."[145] The client alleged that if its attorney had adequately investigated the involvement of a client's principal in the illegal broadcasts, the information uncovered would have caused the client either to document that the principal had reported the illegal broadcasts to

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141. *Steele v. Salb*, 93 A.3d 1277, 1283 (D.C. 2014).

142. *Steele v. Salb*, 93 A.3d 1277, 1284 (D.C. 2014).

143. *In re Estate of Curseen*, 890 A.2d 191, 194 n.3 (D.C. 2006) ("Actual, not speculative damage is required to succeed on a legal malpractice claim"); *Jimenez v. Hawk*, 683 A.2d 457, 461-62 (D.C. 1996) (in other negligence claims, "a jury should never be permitted to guess as to a material element of the case such as damages").

144. *Chase v. Gilbert*, 499 A.2d 1203 (D.C. 1985).

145. *Chase v. Gilbert*, 499 A.2d 1203, 1211 (D.C. 1985).

his superiors or to change its decision to enlarge the issues rather than to appeal the FCC's initial decision, or both.

The trial court and the Court of Appeals agreed that the client had failed to show the proximate cause between the investigation the client believed the attorney should have done and any damages that the client had sustained in the FCC license proceedings. The Court of Appeals concluded that, "even assuming negligence by [the attorney], [the client] has failed to establish that his negligence caused it to be disqualified for the radio station license" and "[w]hat [the client] might have done, and what the result would have been had [the client] either put in writing [the principal's] report to his superiors or appealed the FCC's initial decision, involves the kind of speculation which courts have rejected as grounds for holding that an attorney has been negligent in performing his duty to his client."[146] The Court of Appeals concluded that the client's alleged additional expenses and speculative damages were "insufficient to show proximate cause in relation to producing a different result in the ultimate outcome."[147]

Similarly, in *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*,[148] the Court of Appeals affirmed the dismissal of legal malpractice claims where allegations of the "but for" outcome of the underlying case were predicated upon "mere speculation." There, allegations in the pleadings regarding the law firm's alleged misconduct in filing a brief, even if true, did not proximately cause injury since the alleged outcome was predicated upon compound speculation, namely, that the Supreme Court would have granted certiorari, found in the plaintiff's favor on the merits, remanded the case to the District Court, and resulted in an order that granted the plaintiff's reinstatement and/or struck down federal legislation regulating the treatment of gay persons in the military.

Even where a plaintiff in a legal malpractice action identifies several alleged errors committed by counsel, the plaintiff must also be able to show how the underlying representation would have resolved differently if not for those errors. In matters where the client's liability in the underlying action was clear or

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146. *Chase v. Gilbert*, 499 A.2d 1203, 1212 (D.C. 1985).

147. *Chase v. Gilbert*, 499 A.2d 1203, 1212 (D.C. 1985).

148. *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697 (D.C. 2013).

well-supported by evidence, the client may not be able to prove the causation element of a subsequent malpractice action. In *Kenny v. Simon*,[149] the plaintiff alleged a host of errors allegedly committed by his counsel during the course of his underlying divorce matter, including that the lawyer failed to act as a zealous advocate, failed to secure certain witnesses and present certain evidence, failed to provide guidance to the plaintiff on his financial disclosures, made "unorthodox" filings, and ultimately withdrew from the representation. The plaintiff alleged that as a result of these errors, he lost his divorce case and became estranged from his children. Although the court noted that a *pro se* plaintiff was entitled to some deference in the review of his pleading, the court ultimately dismissed the complaint, finding that the plaintiff "has not established that any such breach was the proximate cause of his injury or damages."[150] The court found that the plaintiff "merely lists, in vague and general terms, perceived failures by [his attorney] and provides no information as to how these alleged failures affected the outcome of his case."[151] The court took judicial notice of the orders from the underlying divorce case, which showed that the client's children testified they were afraid of him and did not want a relationship with him, that plaintiff had admitted to his own abusive conduct toward his family, and cited other evidence that "any estrangement from his children existed long before plaintiff was represented by Simon and suggest that Simon could have done little in terms of trial strategy to change the result of the divorce proceedings."[152]

Although the link must be more than speculative, a court does not require so much specificity that each step in the chain must be foreseeable. In *Estate of Botvin v. Heideman, Nudelman & Kalik, P.C.*,[153] the estate and family members of a suicide bombing victim filed a legal malpractice claim against their attorneys. Although the

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149. *Kenny v. Simon*, No. CV 23-772 (BAH), 2023 U.S. Dist. LEXIS 188698, 2023 WL 6960385, at *2 (D.D.C. Oct. 20, 2023).

150. *Kenny v. Simon*, No. CV 23-772 (BAH), 2023 U.S. Dist. LEXIS 188698, 2023 WL 6960385, at *4 (D.D.C. Oct. 20, 2023).

151. *Kenny v. Simon*, No. CV 23-772 (BAH), 2023 U.S. Dist. LEXIS 188698, 2023 WL 6960385, at *4 (D.D.C. Oct. 20, 2023).

152. *Kenny v. Simon*, No. CV 23-772 (BAH), 2023 U.S. Dist. LEXIS 188698, 2023 WL 6960385, at *4 (D.D.C. Oct. 20, 2023).

153. *Estate of Botvin v. Heideman, Nudelman & Kalik, P.C.*, 115 F.4th 594 (D.C. Cir. 2024).

plaintiffs recovered approximately $2.8 million in the underlying case, it took eight years to obtain the default judgment.[154] Due to the delay, plaintiffs could not participate in a 2012 agreement that would have resulted in a much larger recovery.[155] The district court granted the attorneys' motion to dismiss finding "the harm it alleged was not sufficiently foreseeable."[156] The D.C. Circuit Court of Appeals held the district court required "too much specificity," in appearing to require that each step in a string of events must be foreseeable.[157] While the "type of harm must be foreseeable," proximate cause does not require "the particular method by which the plaintiff will be harmed" to be foreseeable.[158] The Court found a jury could rationally conclude the attorneys "should have foreseen that a years-long delay in obtaining default judgments against Iran would cause [the client] to miss out on satisfaction opportunities in the relevant, hyper-competitive enforcement environment."[159]

1-4:3 Collectability of Underlying Judgment

Collectability of the underlying judgment is not a specific element that plaintiffs are required to prove in order to succeed on a legal malpractice claim in the District of Columbia.[160] The District of Columbia is among a minority of jurisdictions that shift the burden of proving that the underlying judgment was never collectable (and thus not recoverable as malpractice damages) to attorney-defendants.[161] The majority view, followed by states

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154. *Estate of Botvin v. Heideman, Nudelman & Kalik, P.C.*, 115 F.4th 594, 595 (D.C. Cir. 2024).

155. *Estate of Botvin v. Heideman, Nudelman & Kalik, P.C.*, 115 F.4th 594, 595 (D.C. Cir. 2024).

156. *Estate of Botvin v. Heideman, Nudelman & Kalik, P.C.*, 115 F.4th 594, 599 (D.C. Cir. 2024).

157. *Estate of Botvin v. Heideman, Nudelman & Kalik, P.C.*, 115 F.4th 594, 601 (D.C. Cir. 2024).

158. *Estate of Botvin v. Heideman, Nudelman & Kalik, P.C.*, 115 F.4th 594, 601 (D.C. Cir. 2024) (citations omitted).

159. *Estate of Botvin v. Heideman, Nudelman & Kalik, P.C.*, 115 F.4th 594, 602 (D.C. Cir. 2024).

160. *Smith v. Haden*, 872 F. Supp. 1040, 1054 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir. 1995).

161. *Smith v. Haden*, 868 F. Supp. 1 (D.D.C. 1994); *see, e.g.*, *Bain v. Gary, Williams, Parenti, Watson, & Gary*, 636 F. Supp. 3d 124, 137 (D.D.C. 2022) (defendants were granted summary judgment on the causation prong of plaintiff's malpractice claim arising out of her underlying breach of contract claim, because the court held that no factfinder could conclude she ever had a valid contract claim in the original underlying suit).

outside of the District of Columbia, is that the plaintiff has the burden of proving not only that it would have obtained a judgment in the underlying action but for the attorney's malpractice, but that it would have collected that judgment.

In *Smith v. Haden*,[162] the U.S. District Court of the District of Columbia first addressed the issue of collectability. The *Smith* court held that collectability is an affirmative defense and that the burden is on the attorney-defendant to prove uncollectability in a legal malpractice action.[163] Recognizing that a split of authority exists on the issue of collectability, the *Smith* court stated that those courts that place the burden of proving collectability on the plaintiff analyze the issue of collectability as part of the proximate cause analysis.[164] Although the court acknowledged that a plaintiff in a legal malpractice claim must prove a "case within a case," it noted that it did not necessarily follow that the plaintiff must prove the collectability of the judgment, as "[n]ormally, enforcement of the judgment remains for another day."[165]

1-4:4 Intervening Cause

In examining whether the client would have prevailed on an underlying claim absent the attorney's alleged negligence, a dispositive issue can arise when the client acts in a way to break the chain of causation put in motion by the attorney's alleged misconduct. In *Dalo v. Kivitz*,[166] the Court of Appeals explained that "an intervening act not reasonably foreseeable (sometimes referred to as a 'superseding cause') breaks the chain of causation and relieves the wrongdoer of liability."[167]

In *Seed Co. v. Westerman, Hattori, Daniels & Adrian, LLP*,[168] the plaintiffs alleged that their former attorneys committed malpractice by omitting an English language translation of an international

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162. *Smith v. Haden*, 872 F. Supp. 1040 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir. 1995).

163. *Smith v. Haden*, 872 F. Supp. 1040, 1054 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir. 1995).

164. *Smith v. Haden*, 868 F. Supp. 1, 2 (D.D.C. 1994).

165. *Smith v. Haden*, 868 F. Supp. 1 (D.D.C. 1994).

166. *Dalo v. Kivitz*, 596 A.2d 35, 41-42 (D.C. 1991).

167. *Dalo v. Kivitz*, 596 A.2d 35, 41-42 (D.C. 1991).

168. *Seed Co. v. Westerman, Hattori, Daniels & Adrian, LLP*, 961 F.3d 1190 (D.C. Cir. 2020).

patent application in a motion filed with the U.S. Patent Office. Their claim for legal malpractice was based on advice they received from a second law firm regarding the applicable statute of limitations and accrual date to bring such a suit. After both law firms raised a statute of limitations defense to the claim of malpractice, the client alleged that the second law firm also committed malpractice in advising the client on the viability of a legal malpractice claim. The attorneys moved for summary judgment on the grounds that they were not the proximate cause of plaintiffs' claimed harm. The District Court granted the defendants' motion for summary judgment. In affirming the judgment of the District Court, the Court of Appeals relied on the fact that the client had worked with yet another law firm that actually pursued the legal malpractice claims and had been retained prior to the expiration of the statute of limitations, thereby breaking the causal chain:

> A reasonable jury could not find that [the attorneys] should have foreseen that [the clients] would retain new counsel who would fail to independently (and correctly) review the statute of limitations applicable to [the clients'] claims, negotiate tolling agreements that did not adequately protect [the clients'] claims and file the complaint after the statute of limitations had run.[169]

De May v. Moore & Bruce, LLP[170] presented a situation involving a law firm that had played multiple roles in creating and amending certain trusts, administering those trusts, and defending them in litigation against the Internal Revenue Service (IRS). The client eventually entered into a settlement agreement with the IRS in which it agreed to pay $6 million in past due taxes.[171] The law firm was not involved in advising the client with respect to the settlements with the IRS.[172] The client subsequently sued the law firm for legal malpractice alleging that the defendants were negligent in advising plaintiffs to create the trusts as a means of

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169. *Seed Co. v. Westerman, Hattori, Daniels & Adrian, LLP*, 961 F.3d 1190, 1197 (D.C. Cir. 2020).

170. *De May v. Moore & Bruce, LLP*, 584 F. Supp. 2d 170 (D.D.C. 2008).

171. *De May v. Moore & Bruce, LLP*, 584 F. Supp. 2d 170, 173 (D.D.C. 2008).

172. *De May v. Moore & Bruce, LLP*, 584 F. Supp. 2d 170, 178 (D.D.C. 2008).

avoiding tax liability and in the services performed in responding to IRS inquiries.[173]

Defendants moved for summary judgment, arguing that the plaintiffs could not recover damages for taxes that were unavoidable (or interest on such taxes) because the plaintiffs would have owed those taxes regardless of whether the defendants had ever represented them.[174] Plaintiffs agreed that they could not recover damages for unavoidable taxes, but contended that the unavoidable portion is the amount the plaintiffs would have paid had they received sound advice, not the settlement amount.[175] The District Court denied the defendants' motion for summary judgment finding that there was a genuine factual dispute over what portion of plaintiffs' taxes were unavoidable and what portion could be attributed to the defendants' alleged malpractice.[176]

Similarly, in *Beach TV Properties, Inc. v. Solomon*,[177] the plaintiff brought a suit alleging legal malpractice against an attorney and law firm arising out of the filing of a Statement of Eligibility with the Federal Communications Commission (FCC). The one-page Statement of Eligibility, prepared by the plaintiff, was dismissed by the FCC, which resulted in the plaintiff being denied a Class A license.[178] The attorney (who retired prior to the filing of the legal malpractice case) filed an Application for Review in 2000 that remained pending for almost 12 years. After Congress passed the Spectrum Act of 2012,[179] which was expected to be harmful to the client's interests, the client contacted the law firm to ask them to inquire as to the status of the Application for Review. The Application was ultimately rejected by the FCC for a "material deficiency." The attorney moved for summary judgment, claiming that the passage of the Spectrum Act of 2012 was unforeseeable and therefore an intervening/superseding act post-dating his

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173. *De May v. Moore & Bruce, LLP*, 584 F. Supp. 2d 170, 178-79 (D.D.C. 2008).

174. *De May v. Moore & Bruce, LLP*, 584 F. Supp. 2d 170, 186 (D.D.C. 2008).

175. *De May v. Moore & Bruce, LLP*, 584 F. Supp. 2d 170, 186 (D.D.C. 2008).

176. *De May v. Moore & Bruce, LLP*, 584 F. Supp. 2d 170, 186 (D.D.C. 2008).

177. *Beach TV Props., Inc. v. Solomon*, 306 F. Supp. 3d 70 (D.D.C. 2018).

178. *Beach TV Props., Inc. v. Solomon*, 306 F. Supp. 3d 70, 78 (D.D.C. 2018).

179. Linda K. Moore, Spectrum Policy: Provisions in the 2012 Spectrum Act, Cong. Rsch. Serv. (Mar. 12, 2014), *available at* https://sgp.fas.org/crs/misc/R43256.pdf (last visited Feb. 4, 2026).

failure to file a proper Application for Review.[180] The District Court declined to grant summary judgment in the attorney's favor, stating that it could not find as a matter of law that the damages the client alleged it suffered were not foreseeable when the attorney submitted the incomplete filing.[181]

1-4:5 Loss of Settlement Position

Courts applying D.C. law have entertained legal malpractice claims based upon negligent settlement recommendations.[182] However, hindsight challenges to recommended settlements typically fail if they are based only on speculation about what alternative results could have been achieved.[183]

In *In re Belmar*,[184] the clients advanced a novel argument to circumvent the causation requirement. The client did not contend that the bankruptcy court would have denied a mortgagee's motion for relief from the automatic stay if their attorney had filed a timely opposition thereto; instead, the client argued that the attorney's failure to file a timely opposition caused the motion to be granted by default, depriving the client of leverage that could have been used to negotiate a settlement with the mortgagee.[185] The D.C. Bankruptcy Court held that this alleged loss of leverage and the failure to negotiate a settlement was too speculative of an injury to support an award of damages to the clients on the malpractice claim.[186]

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180. *Beach TV Props., Inc. v. Solomon*, 306 F. Supp. 3d 70, 95 (D.D.C. 2018).

181. *Beach TV Props., Inc. v. Solomon*, 306 F. Supp. 3d 70, 96-97 (D.D.C. 2018).

182. *Jones v. Lattimer*, 29 F. Supp. 3d 5, 11 (D.D.C. 2014); *see also Crawford v. Katz*, 32 A.3d 418, 434 (D.C. 2011) (remanding legal malpractice case to trial court to address in the first instance "bad legal advice" argument based on defendants' settlement advice); *Macktal v. Garde*, 111 F. Supp. 2d 18, 22 (D.D.C. 2000), *aff'd*, No. 00-7207, 2001 U.S. App. LEXIS 4010, 2001 WL 238170 (D.C. Cir. Feb. 23, 2001) (plaintiff has given the court no authority that would allow an attorney to be sued for lost settlement value in a case that could not have been won on the merits); *Estate of Darby v. Medhin*, No. 90-887-LFO, 1991 U.S. Dist. LEXIS 752, at *4 (D.D.C. Jan. 22, 1991) ("Under District of Columbia law, a settlement attorney is responsible for negligent advice given to a party to the settlement even though that party is not his client.").

183. *Venable LLP v. Overseas Lease Grp.*, No. 14-02010 (RJL), 2015 U.S. Dist. LEXIS 98650, at *8, 2015 WL 4555372, at *3 (D.D.C. July 28, 2015); *Macktal v. Garde*, 111 F. Supp. 2d 18, 22 (D.D.C. 2000), *aff'd*, No. 00-7207, 2001 U.S. App. LEXIS 4010, 2001 WL 238170 (D.C. Cir. Feb. 23, 2001) (same).

184. *In re Belmar*, 319 B.R. 748 (Bankr. D.D.C. 2004).

185. *In re Belmar*, 319 B.R. 748 (Bankr. D.D.C. 2004).

186. *In re Belmar*, 319 B.R. 748 (Bankr. D.D.C. 2004).

In *Venable LLP v. Overseas Lease Group*,[187] the client claimed that it was forced to accept a $4 million settlement instead of the $10 million it believed it was owed because of the attorney's negligence.[188] The court stated that "hindsight challenges to recommended settlements as being inadequate must fail if they are based only on speculation about what alternative results could have been achieved."[189] In granting a motion to dismiss, the court concluded that none of the alleged damages logically flowed from any acts of the law firm, but instead from the client's voluntary decision to settle its claims.[190] In fact, the client accepted the settlement offer after it had already fired the firm and initiated a suit in New York against the firm alleging the same claims as the counterclaims in the present action.[191]

In *Colella v. Androus*,[192] a client filed a counterclaim against two attorneys for legal malpractice, alleging the attorneys incorrectly advised on the strength of his claim and failed to engage in settlement negotiations. The client argued that, had the attorneys not improperly advised him that his case was strong, he would have engaged in settlement negotiations rather than proceeding to trial.[193] The Court rejected the argument as too speculative, finding the client failed to demonstrate any evidence "showing what settlement [the client and opposing party] would have reached absent the alleged breaches" or that the client would have accepted any proposed terms.[194]

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187. *Venable LLP v. Overseas Lease Grp.*, No. 14-02010 (RJL), 2015 U.S. Dist. LEXIS 98650, 2015 WL 4555372 (D.D.C. July 28, 2015).

188. *Venable LLP v. Overseas Lease Grp.*, No. CV 14-02010 (RJL), 2015 U.S. Dist. LEXIS 98650, 2015 WL 4555372, at *3 (D.D.C. July 28, 2015).

189. *Venable LLP v. Overseas Lease Grp.*, No. CV 14-02010 (RJL), 2015 U.S. Dist. LEXIS 98650, 2015 WL 4555372, at *3 (D.D.C. July 28, 2015).

190. *Venable LLP v. Overseas Lease Grp.*, No. CV 14-02010 (RJL), 2015 U.S. Dist. LEXIS 98650, 2015 WL 4555372, at *3 (D.D.C. July 28, 2015).

191. *Venable LLP v. Overseas Lease Grp.*, No. CV 14-02010 (RJL), 2015 U.S. Dist. LEXIS 98650, 2015 WL 4555372, at *3 (D.D.C. July 28, 2015).

192. *Colella v. Androus*, No. 20-813, 2025 U.S. Dist. LEXIS 101072, 2025 WL 1492792 (D.D.C. Mar. 31, 2025).

193. *Colella v. Androus*, No. 20-813, 2025 U.S. Dist. LEXIS 101072, at *36-37, 2025 WL 1492792, at *12 (D.D.C. Mar. 31, 2025).

194. *Colella v. Androus*, No. 20-813, 2025 U.S. Dist. LEXIS 101072, at *39-40, 2025 WL 1492792, at *12 (D.D.C. Mar. 31, 2025).

1-4:6 Negligence in Appeals

To establish proximate cause in the context of a legal malpractice claim for a negligently represented appeal, a plaintiff must show that "it is more likely than not [it] would have prevailed in [its] appeal . . . in the absence of" the defendant's negligence.[195] In *North American Catholic Educational Programming Foundation, Inc. v. Womble Carlyle Sandridge & Rice, PLLC*,[196] the plaintiff initiated a legal malpractice suit alleging that after the Federal Communications Commission (FCC) issued its final decision affirming the grant of a regulatory rule waiver to a competitor of the plaintiff and affirming the denial of the plaintiff's competing license application, the defendants failed to file the notice of appeal in a timely manner. The plaintiff further contended that but for the defendants' errors, the Court of Appeals would have considered the substance of the plaintiff's appeal and would have vacated the FCC's decision to award the license to the plaintiff's competitor. The Court of Appeals stated that in considering a legal malpractice action for failure to note an appeal, "[t]he Court must first determine how the appeal would have been decided—which is a question of law for the judge in a legal malpractice suit."[197] The Court of Appeals ultimately determined that the D.C. Circuit would not have granted plaintiff relief even had the notice been timely filed, and therefore, determined that the plaintiff had not demonstrated a causal relationship between the defendants' filing the notice of appeal two days late and the harm that the plaintiff suffered.[198]

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195. *Beach TV Props., Inc. v. Solomon*, No. 15-1823 (RC), 2016 U.S. Dist. LEXIS 142489, at *37-38, 2016 WL 6068806, at *11 (D.D.C. Oct. 14, 2016) (quoting *Steele v. Salb*, 93 A.3d 1277, 1282 (D.C. 2014)).

196. *North Am. Catholic Educ. Programming Found., Inc. v. Womble Carlyle Sandridge & Rice, PLLC*, 800 F. Supp. 2d 239 (D.D.C. 2011).

197. *North Am. Catholic Educ. Programming Found., Inc. v. Womble Carlyle Sandridge & Rice, PLLC*, 800 F. Supp. 2d 239, 244 (D.D.C. 2011); *see also O'Donnell v. Jones*, 108 Daily Wash. L. Rptr. 253, 256 (D.C. Super. Ct. Feb. 11, 1980) (determination of how an appellate court would have ruled on the appeal is "necessarily one of law and rests with the trial judge"); *Hoover v. Fried, Frank, Harris, Shriver & Jacobson*, 121 Daily Wash. L. Rptr. 1373, 1376 (D.C. Super. Ct. July 7, 1993) ("it is uniformly held in other jurisdictions that the determination of how an appellate court would have ruled is a matter of law for the trial court to decide").

198. *North Am. Catholic Educ. Programming Found., Inc. v. Womble Carlyle Sandridge & Rice, PLLC*, 800 F. Supp. 2d 239, 251 (D.D.C. 2011).

In *Biomet Inc. v. Finnegan Henderson LLP*,[199] the client sued its appellate counsel (but not its trial counsel) for legal malpractice as a result of appellate counsel's failure to preserve and raise a constitutional challenge to a punitive damages award in a post-trial motion. Appellate counsel made a post-trial challenge to the compensatory damages award, but made the tactical decision to forgo a constitutional challenge to the punitive damages award.[200] Ultimately, the client's appeal was successful on the compensatory damages issue, but the appellate court ruled that the client had waived the right to challenge the punitive damages award because it failed to raise it in its post-trial motion.[201]

In the subsequent malpractice case, the trial court granted summary judgment in favor of the appellate counsel and the Court of Appeals affirmed. The Court of Appeals held that, as a matter of law, the appellate counsel's reasoned judgment that a constitutional challenge alleging excessive punitive damages was not viable was a legally supportable position in an unsettled area of law.[202] The Court of Appeals recognized that:

> To conclude otherwise, would mean that every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight.[203]

1-4:7 Criminal Representations

Malpractice cases arising out of criminal representations bring a unique host of issues to the causation analysis. In *Herbin v. Hoeffel*,[204] the plaintiff brought a legal malpractice lawsuit against his public defender for breaching the duty of confidence by providing information to another state's prosecutor and maliciously withholding or destroying documents needed to present a defense in a criminal prosecution in another state. Even

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199. *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662 (D.C. 2009).

200. *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 664 (D.C. 2009).

201. *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 664 (D.C. 2009).

202. *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 666 (D.C. 2009).

203. *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 666 (D.C. 2009). For additional discussion of the judgmental immunity doctrine, see Chapter 2-3:2, below.

204. *Herbin v. Hoeffel*, 806 A.2d 186 (D.C. 2002).

though the plaintiff was adjudged guilty, the Court of Appeals still allowed him to pursue his claims of damages resulting from breaches of duties his prior counsel owed to keep confidences and maintain files. The Court of Appeals explained:

> In the more usual case against the lawyer representing the client in the criminal prosecution, and a claim that the lawyer's negligence resulted in conviction . . . it is logical to require a successful challenge to the conviction before monetary damages are assessed against the lawyer, because otherwise there is no causal connection between the lawyer's performance and the claimed injury.[205]

The Court of Appeals further explained that where the malpractice pled is not a deficient performance resulting in a criminal conviction, the plaintiff need only "link up the breach of duty to the loss he claims to have sustained."[206] Accordingly, the setting aside of a criminal conviction is typically required in a subsequent legal malpractice action if the plaintiff is alleging that legal malpractice caused his or her conviction and that the improper conviction (or sentence) is the damage.

In *Brown v. Jonz*,[207] the *pro se* plaintiff filed a civil action following his criminal conviction and sentencing that alleged that his counsel in the prior criminal proceeding "had prejudiced [his] defense by failing to investigate fully his alibi defense, interview alibi witnesses, conduct proper discovery, and have a bullet analyzed in a crime laboratory and introduced at trial to corroborate his alibi."[208] Further, the Court of Appeals rejected the lawyer's argument that the separate decision rejecting the plaintiff's direct appeal (and finding that the plaintiff was not deprived of his Sixth Amendment constitutional right to the effective assistance of counsel), "effectively decided [the plaintiff's] civil action for legal malpractice on the merits."[209]

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205. *Herbin v. Hoeffel*, 806 A.2d 186, 195 (D.C. 2002).
206. *Herbin v. Hoeffel*, 806 A.2d 186, 196 (D.C. 2002).
207. *Brown v. Jonz*, 572 A.2d 455 (D.C. 1990).
208. *Brown v. Jonz*, 572 A.2d 455, 456 (D.C. 1990).
209. *Brown v. Jonz*, 572 A.2d 455, 457 n.7 (D.C. 1990).

In reviewing this decision in a subsequent case,[210] the Court of Appeals stated:

> *Brown*'s holding is limited to the proposition that legal malpractice claims are not automatically barred whenever a plaintiff has pursued unsuccessfully a claim for ineffective assistance of counsel. Different legal standards of care apply to each of these.[211]

In *Smith v. Public Defender Service for the District of Columbia*,[212] following his conviction for sexually assaulting a young girl, the malpractice plaintiff-criminal defendant filed a motion under Section 23-110 of the D.C. Code alleging ineffective assistance of trial counsel due to her alleged failure to investigate his medical condition that would have rendered him impotent and therefore unable to commit the crime charged.[213] The trial court conducted an evidentiary hearing at which Smith and trial counsel testified. Smith did not call any doctor or other expert witness to testify, and trial counsel represented that, based on her conversation with Smith's doctor, the medication he was taking would not have rendered him impotent.

The trial judge found that counsel's representation satisfied the requirements of the Constitution and denied Smith's motion; both Smith's conviction and the trial judge's ruling on the Section 23-110 of the D.C. Code motion were affirmed on appeal. Subsequently, Smith sued trial counsel under theories of breach of contract, negligence, negligent infliction of emotional distress and deprivation of his civil rights under Section 1983 of Title 42 of the United States Code.

The trial court subsequently granted the attorney-defendant's motions to dismiss and Smith appealed. Applying the doctrine of collateral estoppel, the Court of Appeals held that Smith was "barred from relitigating his claims because all of the issues of fact were litigated and determined before [the sentencing judge] in the § 23-110 hearing," such that the judge's "findings from the ineffective counsel hearing preclude Smith's legal malpractice

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210. *Smith v. Pub. Def. Serv. for D.C.*, 686 A.2d 210 (D.C. 1996).
211. *Smith v. Pub. Def. Serv. for D.C.*, 686 A.2d 210, 212 (D.C. 1996).
212. *Smith v. Pub. Def. Serv. for D.C.*, 686 A.2d 210 (D.C.1996).
213. *Smith v. Pub. Def. Serv. for D.C.*, 686 A.2d 210, 211 (D.C. 1996).

claims that [trial counsel] failed to investigate" matters allegedly bearing on Smith's ability to commit the crime charged.[214]

1-5 DAMAGES

1-5:1 Damages Required for Cause of Action

Just as no cause of action for legal malpractice is available where the plaintiff cannot prove causation, no cause of action will lie where no damages resulted from the alleged breach of duty.[215] The measure of damages recoverable in a legal malpractice action is generally the value of the plaintiff's lost claim: the amount the client would have recovered but for the attorney's negligence.[216]

1-5:2 Damages Cannot be Speculative

The burden of proving damages prohibits a plaintiff from recovering damages that are merely speculative.[217] However, if the existence of damages is known but the amount of damages is unknown (or, arguably, speculative), the cause of action will typically survive. Indeed, in *Knight v. Furlow*,[218] the court held that it is not necessary that all or even the greater part of the damages have occurred before the cause of action arises.[219] The court explained that:

> Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue. We conclude that attorney's fees and costs expended as a result of an attorney's alleged malpractice constitute

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214. *Smith v. Pub. Def. Serv. for D.C.*, 686 A.2d 210, 211-12 (D.C. 1996).

215. *McCord v. Bailey*, 636 F.2d 606, 611 (1980) (attorney not liable for malpractice if his client suffered no damages).

216. *Lockhart v. Cade*, 728 A.2d 65, 69 (D.C. 1999).

217. *Seed Co. v. Westerman*, 840 F. Supp. 2d 116, 125 (D.D.C. 2012) (actual, not speculative, damages are required to succeed on a legal malpractice claim); *see also In re Estate of Curseen*, 890 A.2d 191 (D.C. 2006).

218. *Knight v. Furlow*, 553 A.2d 1232 (D.C. 1989).

219. *Knight v. Furlow*, 553 A.2d 1232, 1235 (D.C. 1989); *see also Morgan v. Psychiatric Inst. of Wash.*, 692 A.2d 417, 426 (D.C. 1997) (medical malpractice case finding that damages may not be based on "mere speculation or guesswork," however, at the same time a party is not required to prove damages to a degree of mathematical certainty, but must instead offer some evidence that allows the trier of fact to make a reasoned judgment).

> legally cognizable damages for purposes of stating a claim for such malpractice. The fact that not all of a client's damages are finally ascertainable pending the outcome of an appeal may suggest in some circumstances that trial of the malpractice action should be stayed pending the appeal; it does not indicate that the client has not been injured earlier.[220]

Notably, the mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm not yet realized, does not support a cause of action for professional negligence.[221] District of Columbia courts find that where the claimed harm can still be avoided, it is too speculative to provide a basis for legal malpractice. In *Arrington v. Federal Public Defenders for the District of Columbia*,[222] the court concluded that the plaintiff-prisoner's injury—being required to serve consecutive terms of supervised release—was too speculative to support recovery for a legal malpractice claim under D.C. law.[223] The prisoner asserted a claim for legal malpractice based on his attorney's failure to challenge both the twenty-year sentence and the consecutive terms of supervised release.[224] The prisoner, after serving one-year of supervised release, could petition for termination of supervised release in the interest of justice and thereby avoid serving consecutive terms.[225] The court held that the prisoner must show an actual injury and the only way to demonstrate that is by serving consecutive terms, which was extremely improbable.[226]

In certain circumstances, an attorney's withdrawal may not constitute sufficient harm to support a legal malpractice claim. In *Guo Wengui v. Clark Hill, PLC*,[227] the plaintiff argued that the defendants' withdrawal from the plaintiff's asylum process

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220. *Knight v. Furlow*, 553 A.2d 1232, 1235 (D.C. 1989) (citations omitted).
221. *Knight v. Furlow*, 553 A.2d 1232, 1235 (D.C. 1989).
222. *Arrington v. Fed. Pub. Def. for D.C.*, 75 F. Supp. 3d 340 (D.D.C. 2014).
223. *Arrington v. Fed. Pub. Def. for D.C.*, 75 F. Supp. 3d 340, 347 (D.D.C. 2014).
224. *Arrington v. Fed. Pub. Def. for D.C.*, 75 F. Supp. 3d 340, 347 (D.D.C. 2014).
225. *Arrington v. Fed. Pub. Def. for D.C.*, 75 F. Supp. 3d 340, 347 (D.D.C. 2014).
226. *Arrington v. Fed. Pub. Def. for D.C.*, 75 F. Supp. 3d 340, 347 (D.D.C. 2014).
227. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30 (D.D.C. 2020).

(or as the plaintiff described the incident, the attorneys' "firing" of him) provided grounds for a viable legal malpractice claim. The defendants terminated their representation of the plaintiff following a cyber-attack.[228] The defendants explained in a letter to the client that the cyber-attack had created "several ethical complications" related to their representation.[229] The plaintiff did not claim to have experienced any difficulties in finding successor counsel with immigration law expertise, and was generally unable to identify how this withdrawal prejudiced the outcome of his case.[230] At the time of the withdrawal, the asylum application had already been filed and the plaintiff was awaiting an initial interview, which could potentially take years to be scheduled.[231] Thus, the court held that the plaintiff's claims predicated on the withdrawal did not plead damages that rose above the "speculative" or "nominal" level.[232] The court dismissed his fiduciary-duty and malpractice claims asserted in the complaint to the extent they relied on the defendants' withdrawal as the purported harm.[233]

Legal malpractice cases alleging that clients were harmed by an attorney's recommendation in support of settlement can be too speculative to survive. That is because recommending a settlement is generally considered a protected judgment call in which the attorney has broad discretion and for which the attorney is not liable for a mere error of judgment.[234] Settlements necessarily involve compromise, as well as considerations evaluated in the thick of litigation; therefore, hindsight challenges to recommended settlements typically fail if they are based only on speculation about what alternative results could have been achieved.[235] In *In re Belmar*,[236] the court held that central to the plaintiffs' theory of harm was their alleged loss of leverage and failure to negotiate a settlement. The court held that

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228. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 40 (D.D.C. 2020).

229. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 40 (D.D.C. 2020).

230. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 41 (D.D.C. 2020).

231. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 41 (D.D.C. 2020).

232. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 41 (D.D.C. 2020).

233. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 41 (D.D.C. 2020).

234. *Macktal v. Garde*, 111 F. Supp. 2d 18, 22 (D.D.C. 2000), *aff'd*, No. 00-7207, 2001 U.S. App. LEXIS 4010, 2001 WL 238170 (D.C. Cir. Feb. 23, 2001).

235. *Macktal v. Garde*, 111 F. Supp. 2d 18, 22 (D.D.C. 2000), *aff'd*, No. 00-7207, 2001 U.S. App. LEXIS 4010, 2001 WL 238170 (D.C. Cir. Feb. 23, 2001).

236. *In re Belmar*, 319 B.R. 748 (Bankr. D.D.C. 2004).

the allegation of injury was too speculative to support an award of damages to the debtors on their legal malpractice claim.[237]

1-5:3 Expenses of Litigation

The cost of defending a lawsuit may be a factor in calculating damages for a legal malpractice claim. In *Winter v. Brown*,[238] the court concluded that the trial court did not err when it refused to reduce the client's recovery—which reflected the amount that the client would have recovered in their underlying claim but for the attorneys' negligence—by the amount of the contingent attorney fees that the client would have paid to the attorneys in the underlying case, had it been successful.[239] Because the damages sustained by the client included the cost of additional litigation against their attorney in order to recover on their original claim, those fees incurred by the client "canceled out" any attorney's fees that the attorneys could have expected to recover in a successful underlying case. [240]

A client who has advanced sums to an attorney to cover litigation costs and expenses may be allowed to recover those sums as compensatory damages in a subsequent malpractice action against the attorney.[241] In *Lockhart v. Cade*,[242] the attorney accepted a retainer with the understanding that she would provide certain services to the client, but then failed to do so.[243] The client paid a $100,000 retainer for services that he did not receive. The court discussed the fact that the attorney should not benefit financially from her own negligence, although the court recognized that the attorney may have rendered services and incurred litigation expenses (e.g., filing fees, copying costs, depositions) regarding which the court was not aware of at the time.[244] The court stated

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237. *In re Belmar*, 319 B.R. 748 (Bankr. D.D.C. 2004). As discussed below, however, a loss of a settlement opportunity can constitute recoverable damages in a legal malpractice case where causation is proven.

238. *Winter v. Brown*, 365 A.2d 381 (D.C. 1976).

239. *Winter v. Brown*, 365 A.2d 381, 386 (D.C. 1976) (holding that cost of legal malpractice action was an element of consequential damages caused by lawyer's negligence).

240. *Winter v. Brown*, 365 A.2d 381, 386 (D.C. 1976).

241. *Lockhart v. Cade*, 728 A.2d 65 (D.C. 1999).

242. *Lockhart v. Cade*, 728 A.2d 65 (D.C. 1999).

243. *Lockhart v. Cade*, 728 A.2d 65, 69-70 (D.C. 1999).

244. *Lockhart v. Cade*, 728 A.2d 65, 70 (D.C. 1999).

that on remand, the trial court should determine how much of the retainer that attorney paid should be returned, after considering any evidence that the attorney may offer in mitigation to show that she should be allowed to keep some of that money.[245]

1-5:4 Punitive Damages

1-5:4.1 Grounds for Punitive Damages in Malpractice Actions

Punitive damages may be available in a suit against a lawyer if the lawyer commits an act accompanied by "fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury."[246] Punitive damages are a form of relief, not a stand-alone cause of action.[247] To recover punitive damages, a plaintiff must establish that the tortious act was committed with an evil motive, actual malice, deliberate violence or oppression, or in support of outrageous conduct in willful disregard of another's rights. [248]

Under D.C. law, to be entitled to a jury instruction on punitive damages for legal malpractice or breach of fiduciary duty, a plaintiff must set forth sufficient evidence of blatant wrongdoing to allow a jury to infer that the attorney acted with either deliberate malice or conscious disregard of his client's rights.

In *Hickey v. Scott*,[249] a former client filed a counterclaim for malpractice and breach of fiduciary duty and sought $500,000 in punitive damages in connection with the two counterclaims. The

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245. *Lockhart v. Cade*, 728 A.2d 65, 70 (D.C. 1999).

246. *Dalo v. Kivitz*, 596 A.2d 35, 40 (D.C. 1991); *Boynton v. Lopez*, 473 A.2d 375, 378 (D.C. 1984).

247. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 42 (D.D.C. 2020).

248. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 42 (D.D.C. 2020); *see also Caston v. Butler*, 718 F. Supp. 2d 87 (D.D.C. 2010) (plaintiff may have shown negligence or even gross negligence, but he has not established the requisite "malice or its equivalent" based on an evil motive or reckless indifference that would warrant an award of punitive damages); *Thomas v. Nat'l Legal Pro. Assocs*., 594 F. Supp. 2d 31 (D.D.C. 2009) (finding that punitive damages may be recoverable in a case seeking compensatory and punitive damages arising from defendants' post-conviction representation of a *pro se* plaintiff); *Hendry v. Pelland*, 73 F.3d 397, 400 (D.C. Cir. 1996) (district court found that a that a reasonable jury could not have awarded punitive damages on the basis of the evidence presented at trial); *Dalo v. Kivitz*, 596 A.2d 35, 40-41 (D.C. 1991) (evidence supported trial court's determination that no reckless or willful conduct, sufficient to support client's claim for punitive damages, was involved in attorney's commission of legal malpractice).

249. *Hickey v. Scott*, 162 F. Supp. 3d 1 (D.D.C. 2011).

former client alleged that the attorney committed legal malpractice and breached his fiduciary duties by:

(1) failing to petition for attorneys' fees using *Laffey* rates;[250]

(2) submitting bills for services that were not actually rendered;

(3) spending an inordinate amount of time completing unnecessary tasks;

(4) failing to provide descriptions of services rendered in his monthly bills; and

(5) violating Rule 1.5 of the D.C. Rules of Professional Conduct, which governs the reasonableness of attorneys' fees.[251]

The court explained that the test for punitive damages is a "rigorous one."[252] The party seeking punitive damages bears the burden of proving "egregious conduct and the requisite mental state by clear and convincing evidence." [253]

In order to submit the issue of punitive damages to the jury, the court concluded that the former client needed to do more than simply aver that her attorney acted with "malice" or "reckless indifference." Such a showing would require her to set forth evidence that a jury could reasonably find that the attorney committed "a tortious act accompanied with fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the [her] rights, or other circumstances tending to aggravate the injury." [254] The court held that the former client's allegations with respect to the attorney's billing practices had fallen "far short of showing the blatant wrongdoing necessary for a jury to infer that

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250. The fee schedule used by courts in determining the reasonable hourly rates in the District of Columbia for attorneys' fee awards, based upon *Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.D.C. 1983).

251. *Hickey v. Scott*, 162 F. Supp. 3d 1, 2 (D.D.C. 2011).

252. *Hickey v. Scott*, 162 F. Supp. 3d 1, 2 (D.D.C. 2011); *Rosenthal v. Sonnenschein Nath & Rosenthal, LLP*, 985 A.2d 443, 455 (D.C. 2009).

253. *Hickey v. Scott*, 162 F. Supp. 3d 1, 2 (D.D.C. 2011).

254. *Hickey v. Scott*, 162 F. Supp. 3d 1, 3 (D.D.C. 2011).

he acted either with deliberate malice or conscious disregard of his clients' rights."[255]

The court explained that a trial court should only allow the issue of punitive damages to be submitted to the jury if there is a "sufficient legal foundation" for such damages (i.e., if a jury could reasonably find the requisite malicious intent or willful disregard of another's rights needed to sustain such an award).[256] Nevertheless, the court held that a decision on the issue of punitive damages should be deferred at least until after the presentation of the attorney's case-in-chief.[257]

Similarly, in *Guo Wengui v. Clark Hill, PLC*,[258] discussed above, the court held that the plaintiff failed to plead sufficiently outrageous conduct to support an award of punitive damages. The former client filed a malpractice suit against a law firm and attorney arising out of a hacking incident at the firm, which resulted in the release of the client's personal information during his asylum petition.[259] The complaint alleged that the defendants violated the plaintiff's "rights" in an "intentional deliberate, [and] outrageous" manner. [260] The court held that this was not enough:

> Instead, if true, [plaintiff]'s allegations suggest that Defendants' failure to protect his information against hacking may mean that the firm acted imprudently or incompetently, but they fall far short of showing the blatant wrongdoing necessary for a jury to infer that Defendants acted either with deliberate malice or conscious disregard of their client's rights. Plaintiff does not allege, for example, that Defendants intentionally left their server vulnerable to third-party hackings or stood to profit from such an event in any way.[261]

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255. *Hickey v. Scott*, 162 F. Supp. 3d 1, 3 (D.D.C. 2011).

256. *Hickey v. Scott*, 162 F. Supp. 3d 1, 2 (D.D.C. 2011).

257. *Hickey v. Scott*, 162 F. Supp. 3d 1, 3 (D.D.C. 2011).

258. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30 (D.D.C. 2020).

259. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30 (D.D.C. 2020).

260. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 42 (D.D.C. 2020).

261. *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 42 (D.D.C. 2020) (internal citations omitted).

1-5:4.2 Punitive Damages from the Underlying Action

It is not settled in the District of Columbia whether a plaintiff prevailing on a claim of attorney negligence may recover lost punitive damages as an element of the damages awarded to compensate for his or her attorney's failure to pursue a claim.[262] The Court of Appeals acknowledged that while it has not addressed this particular issue, other jurisdictions have held that lost punitive damages are not recoverable.[263]

In *Jacobsen v. Oliver*,[264] the U.S. District Court for the District of Columbia predicted that under D.C. law, a client suing a former attorney for malpractice could recover as compensatory damages the loss of what would have been available as punitive damages in the underlying case. This issue of "lost punitives" was a matter of first impression and the District Court acknowledged that it was an issue that was not universally agreed upon by other courts.[265] But because the court had no authority to certify this issue to the D.C. Court of Appeals, it attempted to predict how the issue would be resolved by the Court of Appeals.[266]

The court acknowledged that the plaintiff and defendants argued for positions based on legitimate but competing policy considerations. The former client argued that he can only be made "whole" if he can recover the entire value of the claim lost, which must include an amount for punitive damages, while defendants argued that collection of such "lost punitives" from attorneys runs counter to the deterrent and punitive purposes of punitive damages. The court stated:

> While it is true that the purpose of punitive damages is not to compensate victims, but rather is to punish bad actors and deter future

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262. *Flax v. Schertler*, 935 A.2d 1091, 1097 (D.C. 2007); *but see Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 101 (D.D.C. 2002) (predicting that this court would resolve the issue in favor of the rule that attorneys can be liable for exemplary or punitive damages lost because of their negligence) (quoting Ronald E. Mallen & Jeffrey M. Smith, 3 Legal Malpractice § 20.7, at 136-37 (5th ed. 2000)).

263. *Flax v. Schertler*, 935 A.2d 1091, 1097 n.1 (D.C. 2007) (citing *Tri-G., Inc. v. Burke, Bosselman & Weaver*, 856 N.E.2d 389 (Ill. 2006); *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP*, 69 P.3d 965 (Cal. 2003); *McMurtry v. Wiseman*, No. 1:04CV-81-R, 2006 U.S. Dist. LEXIS 58140, 2006 WL 2375579, *3 (W.D. Ky. Aug. 16, 2006)).

264. *Jacobsen v. Oliver*, 201 F. Supp. 2d 93 (D.D.C. 2002).

265. *Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 100 (D.D.C. 2002).

266. *Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 100 (D.D.C. 2002).

> wrongdoing, as Professor Freedman points out, "[t]he issue is not the purpose of punitive damages, but the purpose of compensatory damages, which is to give the client what she lost because of the lawyer's negligence . . . . Essentially, as a result of the lawyer's negligence, the punitive damages recoverable from the original tortfeasor become compensatory damages recoverable from the lawyer."[267]

Based on a consideration of the case law and commentary, the court concluded that the approach advocated by the former client was preferable, and therefore, the plaintiff may sue to recover as compensatory damages those damages that would have been available as punitive damages in his underlying action.[268]

1-5:5 Damages for Intentional Infliction of Emotional Distress

Under D.C. law, to sustain a claim of intentional infliction of emotional distress, a plaintiff must prove that the defendant engaged in (1) extreme and outrageous conduct that (2) intentionally or recklessly caused (3) severe emotional distress.[269]

In *Herbin v. Hoeffel*,[270] the court considered whether an attorney or the attorney's firm could be held liable for intentional infliction of emotional distress based on the attorney's breach of the duty of confidentiality.[271] The D.C. Court of Appeals recognized that such a claim could be viable under certain circumstances. The plaintiff claimed that his former attorney collaborated with prosecutors to ensure his prosecution and disclosed client confidences in the process, which caused him personal distress distinct from

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267. *Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 101 (D.D.C. 2002).

268. *Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 100-01 (D.D.C. 2002) (In their treatise on legal malpractice, Richard E. Mallen and Jeffrey M. Smith support such a view: "Attorneys can be liable for exemplary or punitive damages lost or imposed because of their negligence. If the client should have recovered exemplary damages in the underlying action but for the attorney's wrongful conduct, then such a loss should be recoverable in the malpractice action as direct damages.").

269. *Herbin v. Hoeffel*, 806 A.2d 186 (D.C. 2002); *Williams v. Callaghan*, 938 F. Supp. 46, 51 (D.D.C. 1996).

270. *Herbin v. Hoeffel*, 806 A.2d 186 (D.C. 2002).

271. *Herbin v. Hoeffel*, 806 A.2d 186, 197 (D.C. 2002).

any injury resulting from a legal interest.[272] The court explained that, "the allegation in the complaint that [the former attorney] breached her client confidences and that she did so to assist in his prosecution, if true, is extremely serious misconduct on the part of an attorney."[273] The court reasoned that:

> In light of the high value we place on a lawyer's duty of loyalty and to preserve client confidences, we are unwilling to state that the conduct alleged here, if true, is not extreme and outrageous as a matter of law, as actions which violate public policy may constitute outrageous conduct sufficient to state a cause of action for infliction of emotional distress.[274]

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[272] *Herbin v. Hoeffel*, 806 A.2d 186, 196 (D.C. 2002).

[273] *Herbin v. Hoeffel*, 806 A.2d 186, 197 (D.C. 2002).

[274] *Herbin v. Hoeffel*, 806 A.2d 186, 197 (D.C. 2002). *Cf. Williams v. Callaghan*, 938 F. Supp. 46, 51-52 (D.D.C. 1996) (lawyer's failure to adequately investigate, interview, cross-examine and otherwise zealously advocate does not constitute outrageous and egregious conduct).