

**ETHICAL ISSUES AND THE IMPACT
ON SUITS FOR LEGAL MALPRACTICE**

**Robert P. MacKenzie, III
Starnes Davis Florie LLP**

The Alabama Rules of Professional Conduct (“ARPC”) set forth a lawyer’s ethical duty with respect to the client, court, and other parties. The ARPC derive from the establishment of an attorney-client relationship. Certain duties such as confidentiality under ARPC 1.6 may apply even if an attorney-client relationship is merely considered but not established. The ARPC serve not only to provide guidance as to the scope of an attorney’s ethical responsibility but also a basis for disciplinary action. The ARPC are not intended, however, to be the foundation for a suit for legal malpractice. The Preamble specifically states “violation of the rules should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.” Regardless of the plain language of the Preamble and rulings by the Alabama Supreme Court, a violation of the ARPC often leads to a filing of suit for legal malpractice under the Alabama Legal Services Liability Act (“ALSLA”). As such, compliance with the ARPC not only protects an attorney from disciplinary actions before the Alabama State Bar but also from suits for legal malpractice brought by clients, and other claims filed by third parties. In order to better understand the relationship between the ARPC and ALSLA, this paper addresses both a lawyer’s duty under the ALSLA as well as nine common violations of the ARPC which lead to claims for malpractice.

I. ALABAMA LEGAL SERVICES LIABILITY ACT

All disputes which arise out of the attorney-client relationship are governed by the ALSLA, which became effective on April 12, 1988. The ALSLA was enacted as the result of a crisis that threatened the delivery of legal services to the citizens of Alabama. The Alabama Legislature reasoned the ALSLA was necessary to control the increasing costs of legal services and assure the continuing availability of legal services to all citizens. The ALSLA encompasses “[a]ny action against a legal service provider in which it is alleged that some injury or damage [has been] caused in whole or in part by . . . [a] violation of the [applicable] standard of care.” ALA. CODE § 6-5-572. This is consistent with the legislative intent that the ALSLA serve as “a comprehensive system governing all legal actions against legal service providers.” ALA. CODE § 6-5-570. *See also Jones v. Blanton*, 644 So. 2d 882, 885 (Ala. 1994). (“There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action.” *Id.* (quoting ALA. CODE § 6-5-573)). The ALSLA covers any action brought against an attorney acting in his or her professional capacity. ALA. CODE § 6-5-572 provides:

(1) LEGAL SERVICE LIABILITY ACTION. Any action against a legal service provider in which it is alleged that some injury or damage was caused in whole or in part by the legal service provider’s violation of the standard of care applicable to a legal service provider. A legal services liability action embraces all claims for injuries or damages or wrongful death whether in contract or in tort and whether based on intentional or unintentional act or omission. A legal services liability action embraces any form of action in which a litigant may seek legal redress for a wrong or an injury and every legal theory of recovery, whether common law or statutory, available to the litigant in a court in the state of Alabama now or in the future.

ALA. CODE § 6-5-572. For the ALSLA to apply: (1) there must be an attorney-client relationship, and (2) the subject of the dispute must arise out of the performance of legal services. *Cunningham v. Langston, Frazer, Sweet and Freese, P.A.*, 727 So. 2d 800 (Ala. 1999). The ALSLA encompasses all theories of liability including negligence, wantonness, breach of contract and fraud. *Free v. Lasseter*, 31 So.3d 185 (Ala. 2009); *Voyager Guaranty Ins. Co., Inc. v. Brown*, 631 So. 2d 848 (Ala. 1993); *Leighton Ave. Office Plaza, Ltd. v. Campbell*, 584 So. 2d 1340 (Ala. 1991). The Act has been held to apply to specific claims such as an attorney's alleged failure to properly investigate a claim, negligent addition of an improper defendant, and failure to diligently pursue the express wishes of a client. *See McDuffie v. Brinkley, Ford, Chestnut & Aldridge*, 576 So. 2d 198, 199 (Ala. 1991) (affirming summary judgment on behalf of the defendants because there was no substantial evidence that the firm was guilty of the allegations); *KP & NP v. Reed*, 626 So. 2d 1241, 1242-43 (Ala. 1992) (Act applied to claims that attorney advised a client to enter into an unreasonable settlement agreement and that the attorney failed to follow the express wishes of the client).

II. STANDARD OF CARE

The Act requires an attorney to exercise “the level of such reasonable care, skill, and diligence as other similarly situated legal service providers in the same general line of practice [and] in the same general locality ordinarily have and exercise in a like case.”

ALA. CODE § 6-5-572(3). Consistent with the Alabama Medical Liability Acts (“AMLA”) of 1975 and 1987, the Supreme Court has construed the ALSLA to generally require that attorneys provide reasonable care. There are two caveats to the general

standard of reasonableness. *See* ALA. CODE § 6-6-572(3)(b). If the legal service provider publishes the fact that he or she is a certified specialist, or if the attorney solicits business by publicly advertising as a specialist in a particular area of law, then the standard of care would be such reasonable care, skill and diligence as other legal service providers practicing as a specialist in that same area of the law ordinarily have and exercise in a like case.

The standard of care as prescribed by statute is consistent with the duty imposed under Alabama common law. In 1835, the Alabama Supreme Court held in *Evans v. Watrous*, 2 Port. 205, 210 (Ala. 1835), an attorney “is only bound to use reasonable care and skill, in managing the business of his client. *Id.* The Court in *Watrous* recognized the danger of holding a lawyer to stricter standards and commented that “no one would venture to act in that capacity” if the standard of liability was greater. *Id.* The natural limitations of an attorney’s skill continue to be recognized today. An attorney does not guarantee the success of his or her representation, nor is a lawyer “expected to achieve impossible results for a client.” *Pickard v. Turner*, 592 So. 2d 1016, 1020 (Ala. 1992). “An attorney ‘is not answerable for an error in judgment upon points . . . of doubtful construction.’” *See Herston v. Whitesell*, 348 So. 2d 1054, 1057 (Ala. 1977) (quoting *Goodman & Mitchell v. Walker*, 30 Ala. 482, 496 (1857)). In performing professional services for a client, a lawyer may actually provide “wrong” but “reasonable” advice. *Id.*

III. BURDEN OF PROOF

The plaintiff has the burden of proving three separate aspects of a claim for legal malpractice. First, the traditional elements of an action for negligence apply. *Malloy v.*

Sullivan, 387 So. 2d 169 (Ala. 1980). The plaintiff “must prove a duty, a breach of the duty, and that the breach was the proximate cause of injury and damages.” *Herston v. Whitesell*, 348 So. 2d 1054, 1057 (Ala. 1977). Second, the plaintiff has the unique burden in a legal malpractice action to show that “but for” the defendant attorney’s act or omission, the plaintiff would have recovered in the underlying cause of action or that the outcome of the case would have been different. *Johnson v. Horn*, 500 So. 2d 1024 (Ala. 1986); *Morrison v. Franklin*, 655 So. 2d 964, 966 (Ala. 1995); *Hall v. Thomas*, 456 So. 2d 67 (Ala. 1984). Third, and only after the plaintiff satisfies the trier of fact that he or she has met his burden of proof as to the defendant attorney’s negligent conduct, should the trier of fact then determine the issue of damages. *See Morrison*, 655 So. 2d at 965-67.

The plaintiff must ordinarily present expert testimony to prove a prima facie case in a malpractice suit against an attorney. *Phillips v. Alonzo*, 435 So. 2d 1266 (Ala. 1983). While the ALSLA does not specifically provide such a requirement, the Alabama Supreme Court has held on numerous occasions the plaintiff must have expert testimony given that the jury is unfamiliar with the principles of law governing the lawyer’s professional conduct. The Supreme Court, however, in a case of first impression – *Valentine v. Watters*, 896 So. 2d 385 (Ala. 2004) – adopted what is recognized as a “common knowledge” exception to the requirement that a plaintiff must present expert testimony. In *Valentine*, the plaintiff brought suit against an attorney arising out of an alleged misrepresentation of his experience and for failure to timely file suit on behalf of the plaintiff. The defendant attorney moved for summary judgment based upon his own

affidavit testimony. The plaintiff did not offer a counter-affidavit. The defendant's motion for summary judgment was granted. On appeal, the Alabama Supreme Court reversed, referencing exceptions under the Alabama Medical Liability Act ("AMLA") which allow a plaintiff to maintain certain claims without an expert witness. *Holt v. Godsil*, 447 So. 2d 191 (Ala. 1984); *Ex parte HealthSouth Corp.*, 851 So. 2d 33 (Ala. 2002).

In *Valentine*, the Court ruled that under this "common knowledge" exception, a plaintiff is not required to present expert testimony in those cases where a legal services provider's want of skill or lack of care is so apparent as to be understood by a layperson. The Court concluded in *Valentine* that whether or not the underlying case should have been timely filed and the accuracy of the attorney's experience satisfied the "common knowledge" exception. Following *Valentine*, the "common knowledge" exception has also been extended to include an attorney's failure to follow a client's instruction to close a file, as well as the determination of whether an opposing party is avoiding service. *Wachovia Bank, NA v. Jones, Morrison & Womack, P.C.*, 42 So. 3d 667 (Ala. 2009). Likewise, the Supreme Court of Alabama reaffirmed the applicability of the common knowledge exception when a lawyer fails to timely advise a client of an adverse ruling or fails to timely file an appeal. *Guyton v. Hunt*, 61 So.3d 1085 (Ala. 2010).

The Alabama Supreme Court has, however, continued to hold that a violation of the Alabama Rules of Professional Conduct is not a sufficient basis upon which to maintain a cause of action, nor is it a substitute for expert testimony. *Roberts v. Lanier*, 2011 WL 1449028 (Ala.). Section 6-5-578 of the Alabama Code specifically bars

introduction of any adverse finding against an attorney for violating the rules of professional conduct:

(a) Evidence of action taken by a legal service provider in an effort to comply with any provision or any official opinion or interpretation of the rules of professional conduct shall be admissible only in defense of a legal service liability action and the same shall be available as a defense to any legal services liability action.

(b) Neither evidence of a charge of a violation of the rules of professional conduct against a legal service provider nor evidence of any action taken in response to such a charge shall be admissible in a legal service liability action and the fact that a legal service provider violated any provision of the rules of professional conduct shall not give rise to an independent cause of action or otherwise be used in support of recovery in a legal service liability action.

ALA. CODE § 6-5-578(a);(b). In a case of first impression, *Terry Cove North v. Martin Freeland*, 521 So. 2d 22 (Ala. 1988), the Court held that a breach of a disciplinary rule under the Code of Professional Responsibility does not provide the basis for a private cause of action. In doing so, the Alabama Supreme Court joined the majority of states by finding that the Code of Professional Responsibility was not designed to create a private cause of action for infractions of disciplinary rules but instead establishes a remedy which is solely disciplinary in nature.

This issue was again presented in *Ex parte Toler*, 710 So. 2d 415 (Ala. 1998), wherein the plaintiffs sought to introduce evidence of an attorney's violation of the ARPC to prove a breach of the standard of care. Relying on § 6-5-578 of the Alabama Code, the Court reiterated that "a violation of the Rules of Professional Conduct may not be used as evidence, regardless of whether the attorney has been charged with a violation of those Rules." *Id.* at 416. The Court rejected the attempt of the plaintiff's expert to

base his testimony upon an alleged breach of the Rules of Professional Conduct. Such a limitation, however, is more of a form over substance argument. Ultimately, an attorney's failure to comply with the ARPC is frequently the same misconduct which leads to a suit under the ALSLA.

IV. ETHICAL CONSIDERATIONS

1. Conflict of Interest

There is perhaps no more compelling basis for a legal malpractice suit than when an attorney's actions prejudice the client's position. From the onset of any attorney-client relationship, an attorney should not engage to perform any service which will adversely affect the client. ARPC 1.7 sets forth in broad terms the requirement that an attorney's actions must not "adversely affect" the client. ARPC 1.8 is more precise and lists specific transactions which are prohibited.

Foremost to resolving any conflict of interest is to first acknowledge the attorney's duty under the ALSLA is to the client only.¹ *Robinson v. Benton*, 842 So. 2d 631 (Ala. 2002). Careful attention must be given any time there are multiple clients to whether the representation of one will adversely affect the interest of another. In suits involving more than one client, such as a principal and agent, employer and employee, or partnership and partner, a decision must be made as to whether separate representation is required. *See* ARPC 1.13, Organization as Client. *See also, Leighton Avenue Office*

¹ As described below in Section 3, *Responsibility to Third Parties*, an attorney is not immune from suits filed by non-clients.

Plaza, Ltd. v. Campbell, 584 So. 2d 1340 (Ala. 1991) where certain limited partners brought suit against the partnership, other limited partners, and the partnership's attorney over an ownership dispute of an office building. The plaintiffs claimed negligence, breach of contract, and breach of fiduciary duty against the attorney. Among the issues was the scope of duty owed by the attorney to the various parties interested in the business venture and whether a conflict existed. Portions of the complaint were eventually dismissed based upon the statute of limitations, but other claims survived.

In the event an attorney continues to represent more than one client in a single matter, the clients should sign an acknowledgment consenting to the multiple representation. ARPC 1.7(a)(2). The acknowledgment should reflect the clients' understanding of all existing conflicts and that continued representation of the multiple parties is nevertheless acceptable. The clients should be told to promptly inform the attorney if a problem of continued joint representation arises in the future. ARPC 1.7(b)(2). Even if the clients are later provided separate attorneys, an attorney's conflict may not be sufficiently resolved if information already obtained by the attorney prejudices the former client. In those situations where a conflict cannot be resolved even with separate attorneys, the original attorney should withdraw. *See* ARPC 1.9; *See also Goldthwaite v. Disciplinary Board of Alabama State Bar*, 408 So. 2d 504 (Ala. 1982). Otherwise, a former client wishing to disqualify a lawyer need only show that the matter involved in the pending case is substantially related to the matter of prior representation. *Ex parte State Farm Mutual Auto Ins. Co.*, 469 So.2d 574 (Ala. 1985). The client, however, must file a motion to disqualify within a reasonable time after discovering the

facts constituting the basis for the motion. *Ex parte Intergraph Corporation*, 670 So. 2d 858 (Ala. 1995).

In addition to the representation of multiple parties, a conflict may arise when the attorney and client become involved in a joint business transaction. *See* ARPC 1.8. For example, in *Ex parte Seabol*, 782 So. 2d 212 (Ala. 2000), a client brought suit against his former lawyer for legal malpractice and fraud as a result of the attorney's purchase of client-owned property. The client claimed the attorney failed to give proper advice about the disposition and value of the property. As a result, the client contended he sold the property to the lawyer at an unreasonably low price. The Supreme Court of Alabama refused to dismiss the claim based upon the statute of limitations. *Hason v. Crowson*, 808 So. 2d 17 (Ala. 2001), also involves a client's claim against her former attorney for negotiating the sale of a newspaper owned by the client because the lawyer allegedly failed to disclose his financial involvement with the purchaser. The failure to disclose allegedly caused the client to enter into a less profitable deal. Summary judgment was entered for the attorney upon a showing that once the plaintiff discovered the attorney's interest, the client had the opportunity to stop the sale but failed to do so.

The opportunity for a conflict also arises when a lawyer is alleged to have received an extraordinary benefit from the client or has a relationship with one client to the exclusion of another. In *Peterson v. Anderson*, 719 So. 2d 216 (Ala. Civ. App. 1997), third party beneficiaries to a will brought suit against the attorney who drafted the will and was a prime beneficiary. The plaintiffs contended they did not receive their fair share of the estate due in part to the attorney's receipt of valuable stocks. The case was

ultimately dismissed when the court held the plaintiffs had no standing to bring suit. In that same vein, a conflict may arise where there is a contention the attorney is biased in favor of one client. In *Kuhlman v. Keith*, 409 So. 2d 804 (Ala. 1982), the plaintiff lost custody of her children after signing a consent agreement drafted by her ex-husband's father, who happened to be a lawyer. The plaintiff claimed fraud and negligence by the attorney. The case was ultimately dismissed because plaintiff could not demonstrate she relied upon any act by the attorney or that the outcome would have been different but for the lawyer's actions.

These cases illustrate that the potential for personal and transactional conflicts should be closely examined. In those situations, clients must be well informed of the right to separate counsel. The individual client's permission for continued representation should be documented. To minimize the chance for a conflict claim, transactional documents should be drafted by independent counsel. ARPC 1.8(a)(2). Otherwise, the best intentions of all parties may be questioned, and an attorney may face a conflict of interest claim.

2. Scope of Representation

The attorney and client should have a clear understanding as to who is to be the client and of the scope of the representation. ARPC 1.2. A lawyer may limit the scope of representation if the client consents after consultation. ARPC 1.2(c). In *Sessions v. Espy & Metcalf, P.C.*, 854 So. 2d 515 (Ala. 2002), an attorney was retained in a commercial dispute arising out of the purchase of a business. The plaintiffs brought suit alleging the attorney had agreed to represent them in an individual capacity in addition to representing

the corporation in which they had a vested interest. The lawyer contended he was only retained to represent the corporation and the plaintiffs in their representative capacities as shareholders and officers of the corporation but not in their individual capacities. The trial court granted summary judgment in favor of the attorney. On appeal, the summary judgment was reversed because there were disputed facts concerning the scope of representation. The case of *Sampson v. Cansler*, 726 So. 2d 632 (Ala. 1998), also involves an attorney's agreement to represent a client in a limited fashion. After being sued for personal injury arising out of an automobile accident, the client sought representation from the attorney. The lawyer did not enter an appearance but agreed only to contact the client's insurance carrier and to advise the plaintiff's attorney of the insurance coverage. For reasons not set forth in the opinion, the personal injury action proceeded, and a default judgment was taken against the client. The plaintiff simultaneously appealed the default judgment and brought a separate claim for legal malpractice. Thereafter, the default judgment was set aside which allowed the legal malpractice suit to be resolved.

In keeping with these cases, and in order to avoid a misunderstanding as to the scope of representation, an engagement letter should be sent at the very beginning of any attorney-client relationship. The letter should set forth the identity of every client, the provision of services to be rendered, and the fee arrangement. If representation is declined, a letter should be sent to the potential client outlining the reasons why the matter cannot be accepted and describing in layman's terms any statutory time problems with the filing of the claim. If termination of the attorney-client relationship occurs after

the client's receipt of legal services, any unused retainer should be returned along with an itemization of the work performed. *Roberts v. Lanier*, 2011 WL 1449028 (Ala.); *Kessler v. Gillis*, 911 So. 2d 1072 (Ala. Civ. App. 2004). As described in *Alabama State Bar v. Chandler*, 611 So. 2d 1046 (Ala. 1992), the failure to promptly refund any money due the client may lead to a complaint and Bar investigation. A closing letter should be delivered after any case has been resolved, especially in cases in which there is contingency fee arrangement. ARPC 1.5(c). This letter will confirm that all matters have been completed, including payment of legal fees, and that the client has no expectation for further legal services.

3. Responsibility to Third-Parties

The attorney's duty under the ALSLA is owed only to the client. *Shows v. NCNB National Bank of North Carolina*, 585 So. 2d 880 (Ala. 1991). There is no duty owed by the attorney under the ALSLA to those parties whose interests are in conflict with the client. *Ex parte Ufford*, 642 So. 2d 973 (Ala. 1994). The duty to be a zealous advocate, however, does not bestow the right to ignore standards of civility. Further, the mere fact that the ALSLA does not provide a forum for a third party action does not render attorneys immune to suits by non-clients. *Smith v. Math*, 984 So. 2d 1179 (Ala. Civ. App. 2007); *Kinney v. Williams*, 886 So. 2d 753 (Ala. 2003).

In *Robinson v. Benton*, 842 So. 2d 631 (Ala. 2002), the attorney had been instructed by the client to make certain changes to the client's will including, at one point, instructions to destroy it. The will was not destroyed, and the client died. The proceeds of the estate were divided in a manner disagreeable to the plaintiff, who

contended that but for the existence of the will, the plaintiff would have been entitled to the entire share of the residual estate. The ensuing suit for legal malpractice was ultimately dismissed as the lawyer's duty had been to the maker of the will, not to the beneficiary. The Alabama Supreme Court declined to change the longstanding rule of law that bars an action for legal malpractice against a lawyer by a plaintiff to whom the lawyer does not owe a duty.

Nonetheless, attorneys must be specifically aware of their vulnerability to claims, albeit frivolous ones, brought by third parties whose interests are adverse to those of the client. In *Dickinson v. Echols*, 578 So. 2d 1257 (Ala. 1991), a physician was sued for medical malpractice. After the trial court granted a directed verdict in the underlying medical malpractice suit, the doctor sued the plaintiff's lawyer for malicious prosecution, claiming the attorney did not have probable cause to file suit. The doctor alleged the attorney failed to adequately investigate the claim before bringing suit. The attorney filed a motion for summary judgment which was granted. The Alabama Supreme Court affirmed the trial court's ruling, holding that the plaintiff had not satisfied the elements of malicious prosecution. In *Walker v. Windom*, 612 So. 2d 1167 (Ala. 1992), an attorney and his law firm represented a bank in a collection action involving a credit card dispute. Suit was filed and, in response, a counterclaim was made against the bank's attorney for fraud, attempted extortion, and malicious harassment. Summary judgment was granted and affirmed.

Importantly, recent decisions by the Alabama Supreme Court are expanding an attorney's exposure to a non-client. This trend, beginning with *Averette v. Fields*, 824

So. 2d 85 (Ala. 2001), has led to the current view that an attorney cannot invoke the provisions of the ALSLA in defense of a suit brought by a non-client. In *Averette*, the Supreme Court of Alabama considered an attorney's liability to a non-client arising out of the distribution of settlement proceeds. In the underlying wrongful death action, the attorney represented the administratrix. She was the wife of the decedent who died in a motorcycle accident while the couple was in the process of obtaining a divorce. The divorce was never finalized. Both the wife and the mother-in-law sought to be the administratrix. By agreement, the wife was named with the understanding that all monies collected from the suit for wrongful death would be placed in trust for the decedent's daughter. The wrongful death case was settled for a lump sum and future payments. The administratrix deposited the lump sum in the trust account but never deposited the future proceeds.

Years later, the decedent's wife and daughter became estranged. When the daughter discovered that her mother, acting as the administratrix, had not deposited the settlement proceeds in the trust account, the daughter and her grandmother brought suit against the mother and the attorney. The trial court granted summary judgment for the attorney, due to the plaintiffs' failure to satisfy the statute of limitations and because under the pleadings, there was no duty owed by the attorney to a non-client. The Alabama Supreme Court affirmed without an opinion.

Following the trial court's entry of summary judgment, the defendant attorney sought to recover costs from the prosecuting attorney based on the Alabama Litigation Accountability Act. *See Morrow v. Gibson*, 827 So. 2d 756 (Ala. 2002). The Supreme

Court reaffirmed its long held position that an attorney owed no duty to a non-client. The Supreme Court, however, considered but did not fully address the issue of whether a claim brought by a non-client against an attorney arising out of the performance of legal services is subject to the ALSLA.

The application of the ALSLA in a suit filed by a non-client was examined again in *Fogarty v. Parker, Poe, Adams and Bernstein, LLP*, 961 So.2d 784 (Ala. 2007). The Supreme Court of Alabama determined that the non-clients could maintain an action against an out-of-state law firm where the firm had represented an opposing party in the underlying action. The suit arose out of a failed real estate venture. The plaintiffs contended the law firm compromised the plaintiffs' ability to perform their due diligence by prohibiting them from reviewing certain financial records. The plaintiffs' claims were not based upon a violation of the ALSLA. The firm filed a motion to dismiss based in part upon the fact that the plaintiffs were not clients of the law firm, and therefore, the firm owed no legal duty to them. The law firm contended that the plaintiffs' sole remedy was under the ALSLA for which no claim was set forth in the plaintiffs' complaint. The Supreme Court of Alabama found the ALSLA did not apply given the plaintiffs had not predicated their complaint upon the attorney-client relationship. The court allowed the suit to go forward.

Following the *Fogarty* opinion, the Alabama Court of Civil Appeals further examined the duty owed by an attorney to a non-client and whether that duty fell under the provisions of the ALSLA. *Smith v. Math*, 984 So. 2d 1179, 1183 (Ala. Civ. App. 2007). In reversing summary judgment for an attorney, the Court of Civil Appeals

determined that the plaintiff could maintain a claim against an attorney arising out of a failed collection effort. In reaching its conclusion, the Court of Civil Appeals relied upon the premise that a non-client could sue an attorney as long as the claim was not based upon the ALSLA. The opinion is silent as to why the court reversed summary judgment since the attorney had submitted an affidavit describing his actions as reasonable to which the plaintiffs offered no rebuttal.

More recently, the Supreme Court of Alabama affirmed a \$700,000 award against an attorney including \$500,000 in punitive damages in an action filed by a non-client. *Lyon v. Ventura*, 38 So. 3d 1 (Ala. 2009). In *Lyon*, the attorney was retained to establish a conservatorship on behalf of a minor. The minor's mother hired the attorney, and she was considered the client. The proceeds had been awarded as a result of a wrongful death action arising out of the husband's death. The attorney prepared Petitions for Letters of Conservatorship which were filed in the Probate Court. Appropriate bonds were obtained to guarantee the performance of the conservatorship. As part of the process to approve the conservatorship, the attorney was designated by the surety bond holder as the "joint-control representative" which provided in part for the attorney to approve any expenditures. Evidence was presented that the attorney thereafter signed two to three groups of 25 and 50 blank checks on the conservatorship's account which were made available to the mother. During the course of the conservatorship, the mother used the funds to purchase various items presumably for the minor including polo lessons, a polo pony, and a BMW automobile for the minor's 16th birthday. The funds were also used for outside matters such as mobile home purchases and rentals. When the

child reached majority age, the conservatorship funds were effectively exhausted. The minor, later joined by the bond holder, brought suit against the attorney and others. In seeking a dismissal, the attorney argued the ALSLA provided the only avenue by which the son and bond holder could seek relief and because the attorney did not represent either one, no cause of action could be maintained. In affirming the jury verdict, the Court concluded that the ALSLA did not apply given there was no attorney client relationship between the lawyer and plaintiffs. The court found, however, that a direct action alleging negligence, wantonness, and breach of fiduciary duty could be maintained.

4. Failure to Communicate and Document

Clients are entitled to be adequately and timely informed about their case. ARPC 1.4. Moreover, an attorney has a duty to explain a matter to the client so the client may make an informed decision. ARPC 1.4(b). What is reasonable and the extent of disclosure necessary depends in part upon the client's expectation. As the Committee Comment to Rule 1.4 states, "The guiding principle is contingent upon the client's reasonable expectation but is limited or expanded by the client's willingness, ability and desire to participate in the particular representation, and by the practicality of the lawyers meeting the client's expectations." ARCP 1.4.

Communication with the client does not have to be overbearing as certain cases are slow paced and often there is little to report over a period of months. The client, however, should be apprised of the litigation process and made to understand that the absence of a report does not mean the case does not have the attorney's attention. The

client should be informed well in advance of events which could substantially affect the course of action. Form letters or e-mails sent out in mass should be avoided. Such letters merely reinforce the notion that the client's case is not being given individual attention. Other means such as telephone messages are no substitute for a direct, personalized communication from the attorney to the client. It should be remembered that the goal of communication is to advise and share information with the client. Through communication, clients are able to evaluate and choose from their options. Clients, particularly those knowledgeable about the legal process, should be actively involved in all aspects of making decisions. While attorneys are retained for their advice and skill, the ultimate determination regarding the resolution of a legal matter remains with the client. An informed client makes the best decisions.

Failure to communicate has been the basis for numerous malpractice suits in this state. In *Jones v. Blanton*, 644 So. 2d 882 (Ala. 1994), a client brought suit against her lawyer after settlement of a will contest. The plaintiff alleged the settlement was entered without her permission. Summary judgment was granted when the court determined the plaintiff was not the real party in interest. Importantly, the Supreme Court of Alabama noted that while the plaintiff disputed the settlement, she nevertheless was present during the court proceeding where the settlement was discussed and offered no objection. In *Ex parte Panell*, 756 So. 2d 862 (Ala. 1999), the client was involved in a property dispute. The client contended he had instructed his attorney to file a suit which was delayed for unknown reasons. The client was then sued, and the attorney was instructed to file a counterclaim. Instead, the attorney negotiated a settlement which required the client to

execute warranty deeds conveying his interest in the real property. Despite the affirmative act of executing the deeds, the client asserted the attorney never had permission to affect the settlement. The suit was ultimately dismissed for failure to comply with the statute of limitations.

Given heavy work loads and erratic schedules, all lawyers are susceptible to failing to timely communicate the case status to the client. Uncertainty by the client, however, may lead to dissatisfaction. A bad outcome is made even worse if it is a surprise. Failure to timely advise the client of an unfavorable ruling led to a suit in *Guyton v. Hunt*, 61 So.3d 1085 (Ala. 2010). The Alabama Court of Civil Appeals affirmed the attorney's summary judgment on the plaintiff's failure to prove causation. The opinion, however, recognized the plaintiff did not have to present expert testimony as to the attorney's breach of the standard of care for failure to communicate. Whether the cause for delay is the attorney's work load or simply inattention, the results can threaten the attorney-client relationship. In *Thompson v. D.C. America, Inc.*, 951 F.Supp. 192 (M.D. Ala. 1996), the client moved to set aside a settlement agreement reached by her attorney, whom she later fired. As part of her argument that she should not be bound by the agreement, the client contended she had been unable to communicate with the former attorney. The court ultimately refused to set aside the settlement. Nonetheless, the importance of communication cannot be over-emphasized.

In a case of unusual facts, *Ex parte Burnham, Klinefelter, Halsey, Jones & Cater, P.C.*, 674 So. 2d 1287 (Ala. 1995), the client was involved in a car accident, and later sued by her two nieces. During the underlying case, a demand to settle was made which

the attorney promptly forwarded to the insurance carrier. The carrier declined to extend authority. The client then entered into a consent judgment with her nieces without the knowledge or participation by her attorney. The client later fired her attorney and brought suit against him for failing to settle the case pursuant to the consent judgment and for not informing her of the settlement offers. Although there existed sound, substantive arguments for dismissal, including the attorney's documentation of the settlement negotiation, the case was dismissed due to the plaintiff's procedural failure to satisfy the statute of limitations.

Regardless of the outcome, these cases illustrate the importance of communication and documentation. Even when a client has waived the right to consent, an attorney should document discussions of settlement and the client's position. In *Mitchum v. Hudgens*, 533 So. 2d 194 (Ala. 1988), the physician client brought suit against a lawyer who had represented the physician in a medical malpractice action. The case was settled by the physician's insurance carrier but allegedly without the physician's consent. The legal malpractice case was dismissed because the policy of insurance allowed for settlement even without the physician's permission.

Documentation is absolutely needed when a dispute arises with a client. In those specific situations where the client fails to follow the attorney's advice or does not disclose all relevant information, documentation will be critical to establish the attorney's instructions and the client's knowledge. The Alabama Supreme Court has recognized that an attorney may assert contributory negligence as an affirmative defense. *Ott v. Smith*, 413 So. 2d 1129 (Ala. 1982). The Court has also determined assumption of the

risk is a viable defense. *Simpson v. Coosa Valley Prod. Credit Ass'n.*, 495 So. 2d 1029 (Ala. 1986). Obviously, a documented file is vital to support the attorney's effort to prove the client was well-informed.

Proper communication and documentation place the client on notice of future events. While we all appreciate the client with whom straight talk and a hand shake agreement is sufficient, the growing number and complexity of cases require that all substantive matters be reduced to writing. Otherwise, the passage of time may cause even the most sincere communications to be subject to dispute. With reasonable communication, the client is able to make informed decisions and is not placed in the position of simply responding to an unfortunate result. If the client is knowledgeable about the decisions, the client will be more knowledgeable about the risks. Given this position, the client will recognize that all options were explained, understood, and informed decisions were made.

5. Failure to Act

Clients expect their attorney to perform in a prompt and efficient manner, and with proper attention to each individual case. ARPC 3.2 requires that a lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client. At the beginning of a case, the attorney and client should set forth a plan of action. It should address the scope of discovery, witnesses to meet, and issues to resolve. The plan should include the client's desire to resolve the dispute by settlement or trial and the amount of time and money to be invested. The plan should be reviewed and modified as needed. The failure to have a reasonable and properly executed plan has resulted in disciplinary

action and the filing of suits for various reasons. The Alabama Supreme Court has affirmed sanctions against an attorney for “an unmanageable case load” which prevented the delivery of quality legal services. *Davis v. Alabama State Bar*, 676 So. 2d 306 (Ala. 1996). The Court cited, as an example, associate attorneys having the responsibility for 600 active cases.

In civil actions, claims have been made for lawyers’ alleged failure to properly investigate or diligently pursue the express wishes of a client. *McDuffie v. Brinkley, Ford, Chestnut & Alldridge*, 576 So. 2d 198 (Ala. 1991). Suit was brought in *Cribbs v. Shotts*, 599 So. 2d 17 (Ala. 1992) for the attorney’s failure to attend a condemnation hearing at which the plaintiff’s property was allegedly given a low appraisal by the trial court. In another action, suit was brought for alleging a law firm’s failure to properly file a bankruptcy petition. *Independent Stave Co., Inc. v. Bell, Richardson & Sparkman, P.A.*, 678 So. 2d 770 (Ala. 1996). Both *McDuffie* and *Independent Stave* were dismissed for the plaintiff’s failure to prove causation.

In *Lively v. Kilgore*, 51 So. 3d 1045 (Ala. 2010), an attorney’s failure to submit expert testimony on behalf of his client in an underlying medical malpractice action led to the defendant physicians’ motion for summary judgment being granted. The client thereafter filed the suit for legal malpractice for the attorney’s failure to properly prepare the underlying action. A verdict in favor of the plaintiff was rendered. In *Green v. Nemish*, 652 So. 2d 243 (Ala. 1994), the plaintiff argued that the attorney failed to contact witnesses, timely file a motion to suppress illegally seized evidence, and failed to conduct a pretrial investigation in his criminal case. Likewise, in *Adams v. Erben*, 681

So. 2d 594 (Ala. 1996), the plaintiff contended he was provided ineffective counsel and, as a result, was sentenced to prison. Notably, in both of these underlying criminal cases, the alleged failure was determined not to have caused any damage to the plaintiff, and summary judgment was granted to the attorneys.

The failure to act on behalf of the client should never be the result of improper influence by third parties. The most compelling examples of such improper influence are guidelines sent by insurance carriers to a defense attorney outlining the litigation and discovery process. ARPC 1.7. Similar guidelines have been determined by the Alabama State Bar to conflict with an attorney's duty to the client. *Third-Party Auditing of Lawyer's Billings - Confidentiality Problems and Interference With Representation*, 35A The Alabama Lawyer (January 1995). Such guidelines can interfere with the attorney's representation of a client by imposing measures which are too restrictive. The Bar's opinion reflects the position of the overwhelming majority of Bar Associations which prohibit an attorney from being bound by such third-party guidelines.

A well thought out plan of action is one with joint input by the client and attorney. Both the client and attorney should have realistic expectations about when and how the plan should be implemented. The client shares the responsibility to provide sufficient information so that the plan may be initiated and followed. The attorney has the responsibility to assure that he/she has the capability to enact the plan. If there are occasions where there is a failure to act either by the client or the attorney, prompt attention needs to be given to the omission. There needs to be a sound relationship upon

which both the client and attorney can base open and honest discussions of such failures and the best means for remedy.

6. Compliance With Statutory Time Limitations and Court Orders

The ARPC 1.3 requires that a lawyer act with diligence. The committee comments to that Rule observe that perhaps no more professional shortcoming is as widely resented than procrastination. ARPC 1.3. The best lawsuit or most crucial appeal may never be heard if statutory time limitations are not met. Every attorney should have a diary system with a suitable backup. Pertinent dates should be documented for the attorney and staff. Often, the failure to comply is simply the result of a miscalculation. In order to avoid missing a statutory deadline, one should not wait until the last day to file a pleading. *Ziade v. Koch*, 952 So. 2d 1072 (Ala. 2006). Too often uncertainties or unexpected consequences prevent the timely filing of a document with the court.

The failure to timely file an appeal was the subject of the case of *Childers v. Jewell*, 677 So. 2d 232 (Ala. Civ. App. 1995). The client was convicted of third degree burglary and first degree theft. Due to his criminal record, the client was sentenced to life in prison. His attorney filed a notice of appeal which was dismissed as being untimely but which was subsequently reinstated. The attorney was fired and another lawyer retained to continue the criminal appeal. The sentence was affirmed. In the subsequent suit for legal malpractice, the plaintiff claimed to have been prejudiced when the original appeal was dismissed. Summary judgment was granted to the attorney on the basis that even though the initial appeal had been dismissed, it was later reinstated. To avoid a similar problem, one should calculate and double check the statutory time-table and then

file the pleading or response at least two to three days before the deadline. A stamped copy of the document should always be sent to the client and placed in the file.

In addition to statutory time limitations, attention must be given to statutory procedures and court orders. While there is a never ending spectrum of rules and orders, almost every case includes a pretrial order. The pretrial order is sometimes understood by the parties to set forth a discovery schedule which may be subject to change by agreement among the attorneys or a sympathetic judge. Among the terms, the pretrial order may govern the time to designate expert witnesses, identify exhibits, or stipulate to the reasonableness and necessity of medical expenses. Pretrial orders may require the plaintiff to set forth each theory of liability and the defendant to describe each defense. In the Circuit Court of Jefferson County, for example, certain judges require theories of liability and defenses to be set forth with particularity. A general claim of negligence or denial of liability will not suffice. These pretrial orders do not allow the parties to rest upon the allegations of the complaint or the defenses set forth in the answer. Failure to comply may cause a party to waive an argument. In the Circuit Court of Mobile County, the general pretrial order requires the parties to timely object to such critical issues as the reasonableness of medical expenses and agency, or the issue is waived.

On occasion, the pretrial order becomes buried in a mound of pleadings and motions and surfaces only weeks before a trial, long after the time for compliance has passed. The failure to comply may be devastating. When the pretrial order is not followed, a party may be precluded from obtaining necessary discovery. (*Gonzalez v. Blue Cross/Blue Shield of Alabama*, 689 So. 2d 812 (Ala. 1997)) (party not allowed to

call an expert witness), *Ford Motor Co. v. Burdeshaw*, 661 So. 2d 236 (Ala. 1995) (party not allowed to introduce certain exhibits at trial), *USA Petroleum Corporation v. Hines*, 770 So. 2d 589 (Ala. 1999)). Whether to amend a pretrial order is within the discretion of the trial judge, and a ruling will not be reversed unless there is a clear abuse of discretion. *Electrolux Motor AB v. Chancellor*, 486 So. 2d 414 (Ala. 1986). In short, the requirements of a pretrial order should be fully understood, the time limitations documented, and a system put in place to ensure compliance.

In defending legal malpractice actions, there is perhaps no more difficult an argument to overcome than a failure to comply with statutory time limitations and court orders. Lay persons have the expectation that lawyers -- skilled and versed in complex matters -- certainly should be held accountable for following schedules and orders of the court. The failure to comply with a statutory time limitation or court order is rarely the result of a tactical decision, and the failure will not likely be understood by the client. To avoid such an omission, the attorney should make sure all statutory time limitations and court orders are docketed with backup, and that there are checks and balances in place to ensure compliance.

7. Office Staff

ARPC 5.3 prescribes an attorney's responsibilities for the actions of the office staff. These requirements include but are not limited to assuring the office staff's conduct is compatible with the professional obligations of the lawyer. ARPC 5.3 recognizes that non-lawyers have no legal training and are not subject to professional discipline. However, an attorney may be held responsible for the conduct of an employee

if it is determined the lawyer had knowledge or ratified improper conduct. ARPC 5.3(c)(1).

Attorneys frequently delegate to their office staff critical responsibilities such as conducting investigations, drafting pertinent documents, and filing information with the court and with opposing parties. Employees are also often asked to perform mundane tasks such as faxing a letter. Experience teaches that even such a simple task can result in sending a letter to the wrong party with consequent prejudice to the client and embarrassment to the law firm. The supervision of employees is the attorney's responsibility. ARPC 5.3. With this responsibility comes liability for an employee's act or omission.

The omissions of a secretary were responsible for a claim against a law firm in *Sanders v. Weaver*, 583 So. 2d 1326 (Ala. 1991). In the suit for legal malpractice, the plaintiff alleged the law firm had negligently permitted the dismissal of the plaintiff's action against her former employer. The dismissal was the result of conduct by the firm's legal secretary, who apparently acted beyond the line and scope of her employment.

Similarly, the actions of a law clerk were at issue in two related cases of unusual facts described in *Richards v. Lennox Industries, Inc.*, 574 So. 2d 736 (Ala. 1990), and *Richards v. Robertson*, 578 So. 2d 673 (Ala. 1991). In those cases, a former law clerk employed by the plaintiff's attorney was sued by the client for violating the attorney-client privilege. The underlying lawsuit was filed after the plaintiff was injured by a defective gas furnace. The law clerk assisted in the preparation of the case including the dismantling and handling of parts of the furnace. During the trial, the law clerk was

called by the defense to testify about the inspection and removal of the valve assembly. The law clerk's testimony was allowed over the plaintiff's objection. A jury verdict was rendered for the product manufacturer. Following their products liability action, the plaintiffs, in a second suit, sued the law clerk for violating the attorney-client privilege and giving his testimony at trial. Ironically, both suits were brought by the same attorney. The suits against the law clerk were dismissed based upon the failure to state an actionable claim.

In a more recent and unreported case, an attorney was retained to file suit for personal injury arising out of an automobile accident. The pre-suit investigation revealed a case of liability and substantial plaintiff's damages. The complaint was properly drafted and signed by the attorney. A copy was sent to the client advising that suit had been filed and that discovery would be undertaken. The complaint was to be filed on the day before the statute of limitations lapsed. The complaint, unfortunately, was misplaced by the secretary and never filed with the court. Approximately one month after the statute had lapsed, the file was reviewed to determine the status of service of process. The unfiled complaint was discovered. The attorney properly brought the omission to his client's attention though, unfortunately, a suit for legal negligence followed. The case was settled.

To avoid a claim arising out of an employee's misconduct, all employees should be well-trained and instructed in their areas of responsibility, with a system in place to catch errors. An employee's scope of responsibility should be limited to his/her areas of expertise. Office procedures, though not necessarily reduced to writing, must be

understood by all. Clearly, there must be sufficient supervision and an organized chain of command.

8. Determination and Distribution of Settlement or Case Proceeds

ARPC 1.5 governs the manner and method upon which an attorney may enter into a fee agreement and distribute the proceeds. The failure to “close” a settled case or a jury award to the client’s satisfaction may be grounds for a suit. There is an increasing trend of legal malpractice suits based upon a theory that the underlying case was settled for an unreasonable amount or that the proceeds were improperly distributed. *Dubose v. Weaver*, 2011 WL 751247 (Ala.). These suits stem from all manner of underlying cases from individual personal injury claims to settlements of mass tort litigation. Attorneys, including both those who refer and those who litigate the cases, must be aware that a settlement, once accepted by the plaintiff, may later be challenged and made the basis of a claim of legal malpractice. In *Edmondson v. Dressman*, 469 So. 2d 571 (Ala. 1985), the plaintiff entered into a settlement agreement for \$150,000.00 for the wrongful death of her husband. The plaintiff later sought to be released from the agreement based upon the alleged negligence of her attorney. The plaintiff claimed to have suffered damage when she accepted an offer substantially less than the value of the case. The case was dismissed by summary judgment. In *Green v. Ingram*, 794 So. 2d 1070 (Ala. 2001), the plaintiff filed suit for legal malpractice following the settlement of a workmen’s compensation claim. The plaintiff argued that the settlement did not reflect the plaintiff’s degree of injury and, as a result, was unreasonably low. Summary judgment was granted based upon the attorney’s affidavit that his legal services were reasonable.

Even if the settlement amount is reasonable, there are still pitfalls related to the correct distribution of the proceeds. At the very beginning of any case, it is necessary to confirm the identities of those individuals who are proper parties to the action and who may be entitled to the settlement distribution. Court approval should be obtained not just for a minor or one who lacks capacity but also if there is a question about the standing of any party who may have an interest in the settlement proceeds. An improper distribution may leave an attorney responsible for later paying a share to an individual who was unknown until after the settlement proceeds were spent.

In a recent wrongful death action, suit was brought by a mother, as the administratrix of her son's estate, following his death in a construction accident. Based upon the investigation by the plaintiff's attorney and information received from the mother, the mother was the only known relative. Suit was filed and thereafter, a reasonable settlement was reached. The settlement proceeds were paid, and the case dismissed. Later, an adult daughter, born out of wedlock gave notice of her intent to seek a share of the settlement proceeds. The settlement proceeds had already been distributed, and a substantial sum spent by the decedent's mother. A suit for legal malpractice was brought against the plaintiff's attorney for failure to disburse the appropriate sum to the daughter. The case was dismissed based upon the statute of limitations.

In a similar suit, a previously unknown beneficiary appeared after a civil action had been settled. Given the passage of time, there could be no recovery against the original plaintiff, who had spent her share. The plaintiff's lawyer was without malpractice insurance and apparently, not in a position to respond to the beneficiary's

demand. The beneficiary then unsuccessfully sought to have the settlement set aside. Rather than risk the filing of a second suit by the beneficiary which would have adversely affected his client, the defense attorney satisfied the claim.

In disbursing settlement proceeds, careful attention should be given to third parties who have a contractual right to the client's share. In *Birmingham News Co., Inc. v. Chamblee & Harris*, 617 So. 2d 689 (Ala. Civ. App. 1993), the attorneys were sued for allegedly failing to pay a debt owed by their client out of settlement proceeds. The law firm had settled an underlying suit where a portion of the settlement proceeds was to be directed to a third party. The settlement proceeds, however, were not distributed to a third-party as had been agreed upon by the client. When the client was unable to satisfy the debt, the firm was sued. In reversing summary judgment in favor of the attorneys, the Supreme Court of Alabama refused to create a rule of law which would extend a client's breach of contract to the attorneys. The Court determined, however, that there was a question of fact as to whether or not the law firm had entered into an assignment which would require the firm to have distributed the settlement proceeds to a third party.

Once a settlement is agreed upon and proper beneficiaries are confirmed, the distribution should be made without delay or impropriety. The failure to timely send clients their share of settlement proceeds has resulted in a judgment against an attorney. In *Oliver v. Towns*, 770 So. 2d 1059 (Ala. 2000), the defendant attorney had been hired to represent the plaintiff in a personal injury suit. The claim settled for \$12,000. Instead of properly distributing the settlement proceeds as had been agreed upon, the attorney forged the clients' endorsement and kept the entire settlement for herself. Following the

filing of the malpractice complaint, a default judgment was taken against the defendant attorney. Ultimately, a judgment against the attorney in the amount of \$75,000 in compensatory and \$249,000 in punitive damages was affirmed by the Supreme Court of Alabama.

Settlements ought to provide satisfaction to all parties. Particularly in tragic cases, a settlement provides closure to all parties. It should be the final step in the litigation process for financial and emotional reasons. To achieve a proper settlement, an attorney must evaluate the case for a reasonable value, confirm the authority to settle, and distribute the proceeds in a timely manner to the appropriate parties. If a settlement is not properly handled, this intended resolution may unfortunately only be the beginning of a new problem.

9. Representing Your Level of Skill and Experience

A client has the right to expect that an attorney will provide competent representation. ARPC 1.1 provides that this representation requires the “legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” The Committee Comments to Rule 1.1 provide that a lawyer does not necessarily have to have special training or prior experience to handle a particular legal problem. The lawyer, however, must have a recognized level of competence through necessary study and preparation. Problems arise where a lawyer holds himself out to be a “expert” when in fact the lawyer’s experience is lacking. ARPC 7.1 warns lawyers not to engage in conduct involving representations which create an “unjustified expectation” about the results:

A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(c) compares the quality of the lawyer's services with the quality of other lawyers' services, except as provided in Rule 7.4; or

(d) communicated the certification of the lawyer by a certifying organization, except as provided in Rule 7.4.

Law firm web sites often read like a John Grisham novel. The label of "complex litigator" may be adopted without reservation. All the while, the law becomes more and more complicated. These factors converge to create exaggerated claims by attorneys and unrealistic expectations by clients. Attorneys should refrain from handling matters beyond their expertise unless they can reasonably educate himself themselves on the issues so as to protect a client's interest. A client dissatisfied with the outcome may likely question the attorney's experience.

Historically, Alabama courts have been reluctant to hold attorneys liable for inflating their experience. In *Lawson v. Cagle*, 504 So.2d 226 (Ala. 1997), a Mississippi attorney found himself the subject of a suit when the client failed to receive a \$1,000,000 recovery which the attorney had allegedly guaranteed. The plaintiff had been injured in an accident in Mississippi and hired an Alabama attorney to file suit in Mississippi. The

Mississippi attorney was subsequently retained as co-counsel. There later became a disagreement among the attorneys as to the direction of the case. In an effort to keep control, the Mississippi attorney purportedly stated he could guarantee the plaintiff a \$1,000,000 recovery if the client would allow the Mississippi attorney to maintain the case. The client selected the Mississippi attorney based upon this representation. The client, however, failed to recover any settlement or verdict, much less the \$1,000,000 allegedly guaranteed.

The client then brought a fraud claim against the Mississippi attorney based upon the \$1,000,000 representation. The case proceeded to trial, where the jury awarded the plaintiff \$2,500,000. On appeal, the verdict was reversed. The Alabama Supreme Court found that even accepting the plaintiff's version of the attorney's statement as having been made, the attorney did nothing more than make a prediction of a future event. The Court observed that the million dollar figure was mere "puffery" which did not constitute actionable fraud. The plaintiff had no right to rely upon the attorney's alleged statements since on one can guarantee the results of a trial.

In *Valentine v. Watters*, 896 So. 2d 385 (Ala. 2004), the Supreme Court of Alabama recognized a cause of action existed for an alleged misrepresentation of the lawyer's experience in handling a particular matter. The client had retained the attorney to represent her in litigation regarding breast implants. According to the plaintiff, the attorney represented that he was well-versed in this area of litigation. Ultimately, the underlying case was dismissed for failure to prosecute. The plaintiff filed suit against the attorney. Among the plaintiff's claims was that the attorney had mislead her by touting

his experience in breast implant litigation. During the course of discovery, it was determined that the lawyer did not have this experience. The defendant attorney denied making such statements. The Supreme Court of Alabama reversed summary judgment in favor of the defendant attorney. In issuing this ruling, the Court recognized that a cause of action could be maintained by a client based upon alleged misrepresentations by the attorney regarding the attorney's experience. The recognition by the Alabama Supreme Court of a cause of action for an attorney's alleged failure to accurately describe his experience will be a fertile ground for future suits.²

In this day of advertisements and statements of almost guaranteed success, an attorney is unwise to promise more than can be delivered. A sound practice is to review the applicable law before accepting any assignment. If you do not and cannot reasonably educate yourself on the law at issue and adequately represent the client for whatever reason, the case should be referred or turned down. A client who expects nothing less than perfection is one whom you will never satisfy.

SUMMARY

Suits for legal malpractice continue to rise in Alabama. There is, unfortunately, no magic formula or set of rules to follow so as to avoid being subject to a claim. The

² Further, attorneys should be mindful of a more recent and potentially analogous medical malpractice decision – *Ex parte Mendel*, 942 So.2d 829 (Ala. 2006) – a case which arose out of a dentist's failure to advise the patient of the dentist's history of being sanctioned by the Alabama Dental Board. A cause of action was recognized for the dentist remaining silent about having his dental license suspended. The Court concluded that as part of the patient's expectation to have all the material facts and information to make an informed decision about treatment, the dentist's background was material. Likewise, attorneys should be mindful of a client's expectation to know the attorney's track record in handling a particular type of matter.

above-listed categories, however, continue to be primary causes underlying these suits. It is hopeful that the recognition of these potential problems will limit one's exposure.