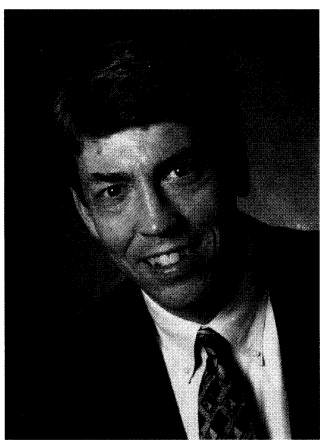
Legal Malpractice in Kansas: Principles and Examples

By Monte Vines

I. Introduction

Among the reasons lawyers choose to engage in the practice of law as a profession, surely the desire to help people and their organizations is found at or near the top of our lists. We also practice law because it can be personally satisfying and can provide well for ourselves and our families. These reasons explain why becoming the subject of a malpractice claim can be a very difficult experience for a lawyer. Rather than having helped a client, a malpractice claim alleges that the lawyer has injured someone. Rather than the feeling of satisfaction that comes with the completion of a difficult job done well, the lawyer may feel inadequate, upset, frustrated, or angry. And concern over the potential costs of the claim, both in money and time, even if the lawyer is insured, can be a heavy burden.



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Any opinions expressed in this article are those of the author alone.

The practice of law is difficult, both substantively and practically. It is inevitable that mistakes will be made, even by dedicated and accomplished lawyers. It is also inevitable that meritless claims of malpractice will be asserted against lawyers. In other words, malpractice claims are a fact of life in our legal profession. It has been estimated on a national basis that new lawyers face an average of three malpractice claims during the course of their legal careers.[1] That figure is probably less for Kansas lawyers, but the real potential for malpractice claims is inherent in the practice of law even in Kansas.

The more we know about what malpractice is, how claims have arisen in the past, and the legal principles governing the resolution of these claims, the better we can serve our clients and avoid malpractice claims. Kansas lawyers have a long history of collegiality and professionalism that has allowed us to learn from one another — both from our successes and our mistakes. Sometimes our mistakes teach us more than our successes.

This article will summarize some of the ways malpractice claims can arise and the legal principles governing a lawyer's duties to both clients and to third parties. It will also present several examples of situations in which malpractice claims arose. Some of these examples are taken from published cases, mostly in Kansas. Several are claims which were resolved without a trial or appellate opinion. Except for the examples from published opinions, the situations are presented without naming the lawyers involved. But, each of these "anonymous" examples is presented with the approval of the lawyer. These lawyers are continuing the Kansas tradition of sharing experiences for the benefit of our clients as well as our profession.

Different legal principles govern lawyers' duties to clients than our duties to third parties, so they will be discussed separately. Related matters, such as damages considerations, vicarious liability, and statute of limitations matters will also be discussed. Finally, this article uses the term "legal malpractice" in its broadest sense to include any mistake, wrongdoing, or violation of a duty or a statute by a lawyer, in that capacity, to either clients or third parties.

FOOTNOTES

1. 1 R. Mallen and J. Smith, LEGAL MALPRACTICE § 1.1 (5th ed. 2000).

II. Liability to Clients

The essence of what lawyers are hired to do is to protect the rights of clients. It is therefore appropriate that lawyers are governed by high standards in representing clients.

A. Contract

Lawyers can be liable to clients for breach of contract. The lawyer–client relationship itself is usually based upon contract, whether written or oral, express or implied. Many contracts to provide legal services to clients are not specific enough to be the basis for a breach of contract claim when a mistake is made by the lawyer. If the lawyer agrees with the client to do a specific thing, such as file an appeal, but fails to do it, the lawyer has breached the contract and is liable for the breach.[2] In contrast, if the claim looks beyond the contractual obligations to legal duties imposed by law upon the relationship created by the contract, such as the duty to act with care, then the claim is one only in tort.[3]

B. Negligence

1. The standard of care

Negligence in the performance of legal services to a client is the classic malpractice situation. The law imposes upon lawyers a duty of care toward their clients. Lawyers are obligated to their clients to use reasonable and ordinary care and diligence in the handling of matters undertaken for clients; to use their best judgment; and to exercise that degree of learning, skill, and experience that is ordinarily possessed by other lawyers in the community.[4] Furthermore, lawyers are judged by the professional standards of the particular area of the law in which they practice.[5] These are challenging standards.

Almost by definition, a lawyer is considered to be involved in the area of practice that includes the matter undertaken, even if that is not the lawyer's usual area of practice. This should be a strong incentive for lawyers to stay within their areas of practice, unless they are willing to get themselves up to speed on issues outside their areas of expertise or they are willing to associate with a lawyer in that area.

Restricting a law practice to areas of existing expertise can be difficult to accomplish, for the law is "a seamless web" and issues outside a lawyer's usual areas of practice often arise unexpectedly in the middle of a representation. An example is a lawyer with many years of expertise in estate planning and probate and trust administration who was asked to advise trustees about their rights and obligations under a complicated trust agreement. The trust agreement included options to split the trust and give powers of appointment to minimize the possibility of a generation skipping tax in the future. This can be a technical and arcane matter, so although the lawyer thought he knew how the law would apply to this particular situation, he consulted with an estate tax specialist to ensure the clients were properly advised on that issue. But what if he had advised them to the best of his ability, on the basis of his own experience and legal research, and had advised them incorrectly? The issue is whether the relevant area of practice is the general field of estate planning and probate and trust administration or if it is the narrow field of estate tax.

In general, lawyers can be held to know the limit of their expertise.[6] When lawyers find themselves in uncertain territory they should either research the issue until comfortable with it, consult a specialist, or decline the representation. There are rare examples where a court found the lawyer's incorrect advice did not fall below the standard of care — as with the Rule Against Perpetuities.[7] That rule was found to be so difficult that even careful and competent lawyers occasionally fall prey to its traps. But we have become a more specialized and connected profession, and the expertise is available to get it right, even if it can be found only outside a lawyer's own city.

2. Matters of legal judgment

While there is much certainty in the practice of law, there is also much that is less than certain. It is both a science and an art. Where there is certainty, as with settled principles of law, lawyers are generally held to know or discover the correct answer and advise or act accordingly. Unsettled or debatable legal principles, however, are matters for the lawyer's reasonable informed judgment.[8] Where there is uncertainty, the law gives lawyers discretion in exercising their judgment and provides immunity for exercising that judgment incorrectly but reasonably.

a. A lawyer's "reasonable judgment"

An interesting example of this principle is found in *Bergstrom v. Noah*. The lawyer filed an antitrust case under the Kansas antitrust statutes rather than the federal statutes, which were not identical. No published opinion had construed the Kansas antitrust statutes at issue. The costly case was unsuccessful, and on appeal the Kansas Court of Appeals stated that the law was clear that this claim was not available under the Kansas statutes.

With that declaration by the Court of Appeals, the lawyer was sued by his client for malpractice. The case against the lawyer was dismissed on summary judgment, and on appeal the Kansas Supreme Court affirmed the dismissal on the basis of immunity for an exercise of judgment. The Supreme Court ruled that the law on this point had not been clear, despite the language used by the Court of Appeals, and that the lawyer had exercised reasonable judgment in pursuing the case based on these statutes.[9]

2. *Pittman v. McDowell, Rice & Smith Chtd.*, 12 Kan. App. 2d 603, 752 P.2d 711 (1988); *Jubnke v. Hess*, 211 Kan. 438, 506 P.2d 1142 (1973).

3. *Mo-Kan Teamsters Pension Fund v. Creason*, 669 F. Supp. 1532 (D. Kan. 1987); *Pancake House v. Redmond*, 239 Kan. 83, Syl. ¶ 1, 716 P.2d 575 (1986); *Bowman v. Doherty*, 235 Kan. 870, Syl. ¶ 10, 686 P.2d 112 (1984); *Chavez, Executrix v. Saums*, 1 Kan. App. 2d 564, 571 P.2d 62 (1977).

4. *Bowman*, 235 Kan. at 870, Syl. ¶ 5.

5. *Bowman*, 235 Kan. at 870, Syl. ¶ 6.

6. *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979).

7. *Smith v. Lewis*, 118 Cal. Rptr. 621, 530 P.2d 589 (1975); *Lucas v. Hamm*, 15 Cal. Rptr. 821, 364 P.2d 685 (1961).

8. *Bergstrom v. Noah*, 266 Kan. 829, 874-85, 974 P.2d 520 (1999).

9. *Bergstrom*, 266 Kan. at 884.

b. Immunity for "errors in judgment"

A lawyer's role as an advocate for a client is filled with uncertainty. As advocates for clients in litigation, before administrative agencies, or in private negotiations, lawyers must exercise their judgment on what is most likely to achieve their clients' goals. In these fluid situations involving matters of strategy, competent lawyers would often disagree on how best to handle many steps in the process. The law generally provides immunity for the lawyer's exercise of judgment in these matters.

An excellent example of how immunity for errors of judgment is applied is found in *Hunt v. Dresie*.[10] After earlier litigation was concluded, the unsuccessful plaintiff was sued for malicious prosecution. He used the same lawyers in the defense of this case. In defending against the malicious prosecution action, the lawyers considered and rejected the idea of asserting the defense of advice of counsel. A judgment was entered against the client for $20,000 actual damages and $600,000 punitive damages.

The client then sued his lawyers for legal malpractice for failure to assert the advice of counsel defense. The district court granted summary judgment for the lawyers, ruling that at most it would be an error of judgment. The Court of Appeals reversed on that point, ruling that the failure to assert the defense was malpractice as a matter of law, apparently on the belief that all reasonable lawyers would have asserted the defense. The Supreme Court reversed again, ruling that it was a question of fact for the jury to decide whether the exercise of judgment in not asserting the defense was reasonable under the circumstances.[11]

This case shows that the discretion given to lawyers for matters of judgment, even for strategy decisions, is not unfettered. Immunity for matters of judgment requires that they be *informed* judgments, and matters upon which reasonable lawyers could disagree. While this issue can sometimes be determined as a matter of law, it was not in *Hunt* because of the possibility that the lawyers' self-interest in not asserting that defense may have interfered with their judgment.[12] This is similar to the principle that the business judgment rule is not available to a person with a conflict of interest. Despite these restrictions on the principle, immunity for matters of judgment provides crucial protection for lawyers in the often uncertain and difficult practice of law.

C. Fiduciary obligations

An attorney–client relationship is a fiduciary relationship. The two primary fiduciary obligations a lawyer owes to a client are the duty of confidentiality and the duty of undivided loyalty. While these fiduciary obligations are a matter of legal ethics and can be the basis for disciplinary action, they are also common law obligations to clients,[13] and they can be the basis for a damages claim against a lawyer if a violation causes a loss.

A claim involving both the duties of confidentiality and undivided loyalty was made in *Alexander v. Russo*.[14] A former client asked a lawyer to assist her in regard to a large quantity of platinum, but no arrangements were made at that time. The lawyer called the police to see if any platinum had been stolen and, upon learning of an unresolved platinum theft, gave the police the person's name and told them of her request.

The lawyer later visited this person while she was at the police station for questioning and advised her to tell the police the truth. Although she decided not to retain the services of the lawyer on this matter, she gave a complete statement to the police on the basis of his advice to do so. Her statement led to the recovery of the stolen platinum. An insurance company had advertised a reward for information leading to the recovery of the platinum, and the lawyer claimed the reward. The client also claimed the reward, leading to this lawsuit between them. The lawyer contended there was no attorney–client relationship during these events, and the district court agreed, awarding the reward to him.

The Court of Appeals determined an attorney–client relationship did exist; therefore, the lawyer's disclosure to the police was a breach of the duty of confidentiality. The court also determined that the lawyer's exercise of judgment in advising the client to make a statement was tainted by the lawyer's personal interest in collecting a reward for the recovery of the stolen property. As a result of the violation of these fiduciary obligations, the lawyer was not allowed to keep the reward.[15]

D. Intentional torts

Although most injuries to clients by lawyers involve mistakes, they can also be the result of intentional torts. Two examples are fraud and conversion. A fictional example of a fraud against a client would be if a lawyer took a case on a contingent fee expecting to quickly settle it without incurring significant time or expense. Upon seeing that the opponent is not willing to pay a fair sum to settle and seeing that proper pursuit of the claim will involve significant time and expense, the lawyer advises the client that the case is worth substantially less than the lawyer really believes. The lawyer does so in order to get a settlement and avoid spending the time and money to pursue the claim through a trial. Advising a client on the value of a claim is usually a clear matter of judgment. But if a lawyer misrepresents what his judgment actually is, that could be the basis for a fraud claim.

Lawyers also sometimes come into possession of their clients' property, usually in the form of money. This provides the opportunity for lawyers to convert the property to their own use, whether by direct misappropriation or through some scheme of improper expenditures.[16] These situations usually appear in criminal or disciplinary proceedings, rather than a civil suit for conversion.

10. 241 Kan. 647, 740 P.2d 1046 (1987).
11. *Hunt*, 241 Kan. at 657-58.
12. *Hunt*, 241 Kan. at 658.
13. *Alexander v. Russo*, 1 Kan. App. 2d 546, 571 P.2d 350 (1977).
14. *Alexander*, 1 Kan. App. 2d at 546.
15. *Alexander*, 1 Kan. App. 2d at 553-54 (the court held that the client also was not entitled to the reward and ordered the reward be repaid to the insurance company).
16. *E.g.*, *In re Richardson*, 268 Kan. 831, 1 P.3d 328 (2000)(multimillion dollar loss from investment scheme by out-of-state lawyer licensed to practice in Kansas); *In re Leising*, 269 Kan. 162, 4 P.3d 586 (2000)(improper expenditures of conservatorship funds).

III. Liability to Third Parties

There are several situations in which lawyers can become liable to parties who are not their clients, including adverse parties. But these situations are appropriately much more restricted than those creating liability to clients.

A. Contract

Lawyers can incur direct contractual obligations to third parties. Whether a contract exists is analyzed by standard contract law principles: offer, acceptance, and consideration. A common example is when a lawyer agrees to pay a creditor of the client, or an insurance company with a subrogation interest, out of a prospective recovery. In *American Family Mutual Insurance Company v. Griffin*,[17] the court determined that no such contract existed because the lawyer had not responded to the insurer's letter stating "We trust you will protect our interest in this matter."

Another example is when a lawyer agrees to perform an escrow function to facilitate a settlement or transaction — to hold funds or documents until certain conditions occur and then disburse them in a specified way. Such escrow agreements can take the form of highly formal arrangements with detailed written agreements or very informal, oral arrangements. Whatever the form, lawyers should undertake escrows with full awareness of their contractual obligations to third parties.

B. Negligence

While negligence is the classic basis for a client's malpractice claim, it is a very different situation for adversaries and other third parties. Duties of care to third parties are very tightly restricted.

The general rule is that lawyers' duty of care is owed only to their clients and not to third parties. A duty of care owed by lawyers to third parties would often interfere with the paramount and exclusive duty to their clients and would discourage free access to the courts.

1. Generally, no duty to third parties

The general rule is that lawyers' duty of care is owed only to their clients and not to third parties. A duty of care owed by lawyers to third parties would often interfere with the paramount and exclusive duty to their clients and would discourage free access to the courts.[18] So, for example, a lawyer whose negligent advice to the client resulted in the filing of a lawsuit destined for failure may be liable to the client for the expenses of the lawsuit, but not to the adversary who incurred similar expenses in defending the suit. This principle provides a very important source of protection from liability for lawyers.

2. Intended beneficiaries of the lawyer's work for the client

Despite that general rule, Kansas courts have determined that lawyers have a duty of care to some non-adversary third parties under certain circumstances. In the recent case of *Johnson v. Wiegers*,[19] the Kansas Court of Appeals tried to organize the confusing law in this area by defining a three-step process to determine the intended beneficiaries of a lawyer's work. Step 1: if the third party is an adversary of the lawyer's client, no duty arises. Step 2: if the lawyer and client never intended for the lawyer's work to benefit the third party, no duty arises. Step 3: if it is possible to conclude that the lawyer and client intended for the lawyer's work to benefit the third party, then apply the six-factor balancing test from *Pizel v. Zuspann*[20] to determine whether the lawyer had a duty of care to the third party.

The six factors to consider are: (1) the extent to which the transaction was intended to benefit the third party,[21] (2) the foreseeability of harm to the third party, (3) the degree of certainty the third party suffered injury, (4) the closeness of the connection between the lawyer's conduct and the injury, (5) the policy of preventing future harm, and (6) the burden on the legal profession if liability is recognized under the circumstances.[22] The first of these factors — intent to benefit the third party — is the most important, and without it there can be no duty.

In *Pizel*, the lawyers drafted a revocable trust and an amendment to the trust. Many years later, after the client died, the trust was held ineffective. The would-be trust beneficiaries sued the lawyers in a negligence action and the jury found the lawyers negligent in their work to create the trust. All the factors applied in favor of recognizing a duty of care by the lawyers to the trust beneficiaries, so the lawyers were held to have a duty of care to them.[23]

In *Wilson-Cunningham v. Meyer*,[24] the lawyers representing the husband of a divorcing couple did not get the divorce decree filed before the husband died intestate. As a result, the wife received the spousal share of the husband's estate. The husband's children from a prior marriage sued the lawyers, claiming the delay in filing the decree resulted in a reduction of their inheritance. The court held the lawyers had no duty of care to their client's children because the lawyers' work in obtaining the divorce was not intended to benefit the children.[25]

Another unsuccessful attempt by a third party to establish a duty of care by a lawyer is found in *Bank IV*

17. 9 Kan. App. 2d 482, 681 P.2d 683 (1984).
18. *Tappen v. Ager*, 599 F.2d 376, 378 (10th Cir. 1979); *Nelson v. Miller*, 227 Kan. 271, Syl. ¶ 4, 607 P.2d 438 (1980).
19. ___ Kan. App. 2d ___, 46 P.3d 563 (2002).
20. 247 Kan. 54, 795 P.2d 42, *modified* by 247 Kan. 699, 803 P.2d 205 (1990).
21. *Johnson*, 46 P.3d at 566 (construing the *Pizel* term "affect" to mean "benefit").
22. *Pizel*, 247 Kan. at 65-68.
23. *Pizel*, 247 Kan. at 67.
24. 16 Kan. App. 2d 197, 820 P.2d 725 (1991).
25. *Wilson-Cunningham*, 16 Kan. App. 2d at 203-05.

Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson.[26] The bank required an opinion letter from its borrower's lawyer as a condition for making a loan to the client. The lawyer later allegedly committed malpractice against the client on a matter unrelated to the lawyer's statements to the bank in the opinion letter, but which reduced the client's ability to repay the loan. The court ruled that there was no duty of care by the lawyer to the bank because there was no intent by the lawyer and the client to benefit the bank by this particular work of the lawyer, and because the client and the bank were considered adversaries.[27]

3. Negligent misrepresentation

Another exception to the general rule that lawyers do not owe a duty of care to nonclients is that, in certain circumstances, lawyers may incur a duty of care to third parties to make accurate representations in business transactions. Kansas courts have not yet upheld such a claim against a lawyer in a published opinion, although it appears likely that they will.[28] The expected elements of a negligent misrepresentation claim against a lawyer would include: a material representation of fact by the lawyer, requested or authorized by the client; the lawyer is aware that the statement is to be used for a particular business purpose by a particular third party; the statement is false; made negligently; with justifiable reliance by the third party and which causes injury to the that party.[29] An example of this is a commercial transaction in which one party requests written assurances from the other party's lawyer as a condition to closing the transaction. In today's business climate, the law will surely develop further in this area.

C. Intentional torts

Because lawyers' liability to third parties for negligence is so tightly restricted, claims by third parties are usually based upon intentional torts. Like everyone else in our society, lawyers have a duty not to intentionally injure, unless they have a particular privilege or immunity to do so. Because lawyers work in the adversarial system of justice, and with clients who have legal rights in presenting their claims and defenses in court, the elements of the intentional torts relating to legal proceedings are structured to allow for the legitimate work of lawyers. The following are some of the intentional torts which may be asserted against lawyers.

1. Fraud

Fraud is a material misrepresentation of fact, known to be false when made or made with reckless disregard of its truth, with the intent that the plaintiff will act on the statement, with justifiable reliance by the plaintiff, which causes injury. These elements lead to several issues as applied to lawyers. First, is the representation one of fact or opinion? Opinions are not a basis for fraud. However, an "opinion letter" by a lawyer may represent the state of established law, and that may be a representation of fact. Even the representation of what is clearly an opinion may be fraud if it does not state the lawyer's real opinion.[30] Second, is reliance justifiable, especially in adversarial situations such as litigation and negotiation of a transaction?[31] Third, if the representation was not made directly to the plaintiff, did the lawyer intended the plaintiff to act on it?[32]

2. Malicious prosecution

The elements of malicious prosecution are: (1) the defendant initiated, continued, or procured a judicial procedure against the plaintiff; (2) the procedure lacked probable cause for success; (3) the defendant acted with malice; (4) the proceedings terminated in favor of the plaintiff; and (5) the plaintiff sustained injury.[33] The defendant may be the lawyer, the client, or both.

"Malice" is broader than personal hatred, spite, or revenge. It includes almost any motive or purpose other than securing the proper adjudication of the claim. Malice may be inferred from the lack of probable cause. Probable cause is determined not only by the facts disclosed to the lawyer by the client, but also by the facts which could have been learned through a diligent effort by the lawyer. Because of this, the Kansas Supreme Court has suggested that lawyers make a demand upon the adversary and extend the opportunity to respond with his version of the facts, as standard procedure. Such a demand letter (a "*Nelson v. Miller* letter") may be considered as evidence of good faith or lack of malice.[34]

"Probable cause" exists when there are reasonable grounds for suspicion, supported by circumstances strong enough to cause a cautious or prudent person to believe that the party committed the act of which he or she is complaining. It requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication.[35] A "favorable termination" of the case must have been on the merits, rather than a technical or procedural ground, or an affirmative defense such as the statute of limitation.[36]

26. 250 Kan. 490, 827 P.2d 758 (1992).
27. *Bank IV,* 250 Kan. at 502-06.
28. Kansas adopted the tort of negligent misrepresentation, as defined in RESTATEMENT (SECOND) OF TORTS § 552 (1976) in *Mahler v. Keenan Real Estate, Inc.*, 255 Kan. 593, 876 P.2d 609 (1994). It applies to suppliers of commercial information in favor of users of such information in their commercial transactions. Although the Restatement section does not mention lawyers, its language is broad enough to include such statements by lawyers. In *Gerhardt v. Harris*, 261 Kan. 1007, 1018-22, 934 P.2d 976 (1997), the Kansas Supreme Court discussed such a claim against a lawyer by a client but rejected it on factual grounds. Because lawyers have obligations of undivided loyalty and confidentiality to their clients, some tempering of the Restatement rule has been recognized by other courts. 1 R. Mallen & J. Smith, LEGAL MALPRACTICE § 7.14 (5th ed. 2000).
29. *Id.* at § 7.14.
30. *See Brownell v. Garber,* 199 Mich. App. 519, 503 N.W.2d 81 (1993).
31. *See Traders & General Ins. Co. v. Keith*, 107 S.W.2d 710, (Tex. Civ. App. 1937).
32. *See Rendler v. Markos*, 154 Wis.2d 420, 453 N.W.2d 202 (App. 1990).
33. *Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980).
34. *Nelson*, 227 Kan. at 284-85.
35. *See Miskew v. Hess*, 21 Kan. App. 2d 927, 931, 910 P.2d 223 (1996).
36. *Miskew*, 21 Kan. App. 2d at 939-41.

3. Abuse of process

Abuse of process consists of:

(1) the use of legal process primarily to accomplish a purpose not within the scope of the proceeding for which it was designed, (2) malice, and (3) injury.[37] "Process" is a compulsory order of a court, including summonses, writs of garnishment or attachment, writs of levy or execution, arrest warrants, orders to show cause regarding contempt of court, discovery proceedings, and subpoenas. This is an often misunderstood tort. Process is not abused when it is used for its proper purpose in a legal proceeding. It is abused when it is used primarily for an improper purpose,[38] such as a writ of execution used to seize exempt property not included in the property description in the writ. Malice requires an intent to procedurally misuse the process, such as for coercion or extortion.

4. False arrest or imprisonment

The elements of this tort are simply the unlawful detention or restraint of one against his will.[39] Malice or good faith is irrelevant, and the only intent necessary is the intent to confine or procure the confinement. The place of confinement can be a jail, mental institution, hospital, nursing home, juvenile facility, or almost anywhere. The detention is not unlawful if obtained under some valid authority or right, such as an arrest warrant or order of involuntary commitment duly issued by a court of competent jurisdiction. A lawyer who procures the unlawful detention is liable.

If conduct is privileged, it is not "misconduct." The most important of the privileges for lawyers is the privilege to advise.

5. Interference with advantageous relationship

The elements of this tort are: (1) the existence of a business relationship or expectancy, (2) knowledge of that by defendant, (3) that except for defendant's conduct, the plaintiff was reasonably certain to continue the relationship or realize the expectancy, (4) intentional misconduct by defendant, and (5) injury caused thereby.[40] If conduct is privileged, it is not "misconduct." The most important of the privileges for lawyers is the privilege to advise. Lawyers are privileged to purposely cause a client not to perform a contract, or not to enter into or continue a business relationship, by giving honest advice when requested and within the scope of the request.[41] The filing and prosecution of lawsuits, and statements made by lawyers in judicial proceedings, are also privileged.

6. Intentional infliction of mental distress (outrage)

This tort is established by: (1) extreme and outrageous conduct by defendant, (2) intentionally or recklessly inflicted on plaintiff, and (3) severe emotional distress.[42] Because it is common in our society to pursue legal rights or defenses by litigation, it would be difficult to show that litigation amounted to extreme and outrageous conduct or that the intent of the litigation was to cause severe emotional distress to the other party.[43]

7. Defamation

The elements of defamation are: (1) a false and defamatory statement of fact, (2) which is published — made known to other people, (3) that was not privileged, (4) was at least negligently made, and (5) which causes harm to plaintiff or is otherwise actionable without showing harm. Lawyers' statements are often not defamatory because they are opinions rather than fact, although that line can be difficult to draw. The analysis looks to whether the statement is susceptible of being proved true or false and how reasonable people would interpret it.[44]

There is an absolute privilege for lawyers' statements if made as part of a judicial proceeding, whether made in pleadings, affidavits, depositions, or open court, if it has reference to the subject matter of the case.[45] Even outside of court proceedings, lawyers acting as advocates for their clients can be granted some leeway for their statements.[46] Outside the role of advocate for a client in a particular matter, lawyers have no special protection for defamatory statements.[47]

8. Invasion of privacy

This category of legal theories includes: (1) intrusion upon seclusion, (2) publicity given to private life, and (3) publicity placing person in false light. The mere filing and pursuit of litigation is not an invasion of privacy, as there is no right to be free from litigation and because the litigation privilege applies to these actions.[48] These legal theories require a reasonable expectation of privacy under the circumstances.

37. *Hokanson v. Lichtor*, 5 Kan. App. 2d 802, 626 P.2d 214 (1981)(adopting the definition of Restatement (Second) of Torts § 682 (1977).

38. *See Jackson & Scherer Inc. v. Washburn*, 209 Kan. 321, 331, 496 P.2d 1358 (1972).

39. *Thompson v. General Finance Co.*, 205 Kan. 76, 468 P.2d 269 (1970).

40. *Turner v. Halliburton Co.*, 240 Kan. 1, 12, 722 P.2d 1106 (1986).

41. RESTATEMENT (SECOND) OF TORTS § 772 (1977).

42. *Young v. Hecht*, 3 Kan. App. 2d 510, 514, 597 P.2d 682 (1979).

43. *See Tappen v. Ager*, 599 F.2d at 381-82.

44. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990).

45. *Sampson v. Rumsey*, 1 Kan. App. 2d 191, 194, 563 P.2d 506 (1977); *Latimer v. Oyler*, 108 Kan. 476, 480, 196 P.2d 610 (1921).

46. *Garber-Pierre Food Products Inc. v. Crooks*, 78 Ill. App. 3d 356, 397 N.E.2d 211 (1979)(accusations of "blackmail" and "extortion" may not be defamation *per se*).

47. *Richie v. Paramount Pictures Corp.*, 532 N.W.2d 235 (Minn. App. 1995)(After civil suit for sexual abuse by parents was successfully concluded, the abused girl was asked to appear on a nationally broadcast television talk show and the lawyer was asked to provide a picture of the parents. The lawyer mistakenly provided a picture of the girl's aunt and uncle who had brought the suit on her behalf. They sued the lawyer for defamation. It was a question of fact whether the lawyer was acting as an advocate or as a business agent.)

48. *Tappen*, 599 F.2d at 381.

In the context of litigation, the expectation of privacy is reduced. However, when a lawyer's investigators gained entry by deception to the plaintiff's hospital room and obtained information from her about her claim against the lawyer's client, a cause of action was stated.[49] In another example, a criminal defense lawyer was held not to be entitled to the litigation privilege. The lawyer read and used at trial the mental health records of the sexual assault victim, which he had subpoenaed, knowing he had received them in error when they should have gone to the court clerk and been available only after a court review for relevancy.[50]

9. Conversion

If a lawyer in possession of money or property refuses to surrender it to a person who is entitled to its immediate possession, or transfers it to a person not entitled to possession, it can be a conversion. Where a lien exists on settlement proceeds that come into the hands of a lawyer, the lienholder may be inclined to claim conversion if the lawyer pays the proceeds to the client instead. Whether a lien, a security interest, or a subrogation right gives a right of immediate possession is beyond the scope of this article, but lawyers should be aware of this issue.[51] Some lawyers avoid the issue by ensuring that any liens are paid.

10. Conspiracy/aiding and abetting

Conspiracy and aiding and abetting are not usually considered independent torts, but ways to impose vicarious liability on one person for the tortious action of another. Because lawyers are agents of their clients, cooperative plans between them do not amount to conspiracy. However, where lawyers have agreed with someone other than a client in the commission of a tort, they may be liable for the tort by means of conspiracy.[52] Unless a privilege applies, a lawyer may also be liable under the theory of aiding and abetting by intentionally providing substantial assistance to a person (including a client) in the performance of a wrongful act when the lawyer is aware that it furthers illegal or tortious conduct.[53]

If a lawyer in possession of money or property refuses to surrender it to a person who is entitled to its immediate possession, or transfers it to a person not entitled to possession, it can be a conversion.

D. Statutes

Several statutes have been used to impose liability on lawyers, including the following:

1. Fair Debt Collection Practices Act

This federal act governs collectors of consumer debts, including many lawyers.[54] The act imposes notice requirements and certain restrictions and obligations on the process of collecting debts, including by lawsuit, and imposes actual damages, statutory damages, and attorney fees.[55]

2. Rule 11 / K.S.A. § 60-211

Rule 11 of the Federal Rules of Civil Procedure and its Kansas counterpart, K.S.A. § 60-211, provide that a lawyer's signature on a pleading, motion, or other court filing constitutes a certificate to the court in regard to the filing. These provisions require lawyers making such court filings to have (1) made a reasonable inquiry into the facts and the law, (2) drawn conclusions that would be considered reasonable by a competent lawyer, and (3) used the filing for a proper purpose. If the certification is not true the lawyer can be sanctioned by the court.

3. Discovery sanctions

Lawyers can be liable for monetary sanctions to third parties under K.S.A. § 60-226(f). It imposes obligations on the signing lawyer, similar to those in K.S.A. § 60-211, but is tailored to the discovery context. Motions for protective orders under K.S.A. § 60-226(c) also provide possible monetary sanctions against lawyers. K.S.A. § 60-237 also provides possible monetary sanctions against lawyers on successful motions to compel discovery. The Federal Rules, FED. R. CIV. P. 37, provide similar sanctions.

4. Costs and fees

The costs assessed at the conclusion of a case pursuant to K.S.A. § 60-2007 may include the prevailing party's attorney fees and expenses incurred because a position asserted by the losing party was without a reasonable basis in fact and not in good faith. A lawyer may be liable to the adverse party for these costs if the court finds the lawyer knowingly and not in good faith asserted such a position or if the lawyer later learned the claim was false and failed promptly to inform the court.[56]

IV. Damages Considerations

The damages resulting from legal malpractice can be difficult to determine. In regard to a client, the basic question is how the client's situation is worse because of the malpractice and what monetary value can be placed on that difference. If the client's claim has been lost because of the malpractice, the value of the lost claim, which was probably of uncertain value to begin with, must be determined.

The value of the malpractice claim is usually the amount the plaintiff would have received, net after expenses and fees, after a trial or a settlement. This has led to the use of the "case within a

49. *Noble v. Sears, Roebuck & Co.*, 109 Cal. Rptr. 269 (1973).
50. *Susan S. v. Israels*, 67 Cal. Rptr. 2d 42 (1997).
51. *See Farmers Insurance Exchange v. Zerin*, 61 Cal. Rptr. 2d 707 (1997); *Weiss v. Marcus*, 124 Cal. Rptr. 297 (1975).
52. *Hokanson v. Lichtor*, 5 Kan. App. 2d 802, 626 P.2d 214 (1981)(alleged conspiracy between lawyer, expert witness, and insurance company).
53. *Joel v. Weber*, 602 N.Y.S.2d 383 (1993)(entertainer contended his management company's law firm knowingly aided the manager's diversion of assets).
54. 15 U.S.C. § 1692 *et seq.*
55. *Clark's Jewelers v. Humble*, 16 Kan. App. 2d 366, 372, 823 P.2d 818 (1991).
56. In federal court, a similar provision is 28 U.S.C. § 1927.

case" method to determine the damages. The lost claim can be "tried" as part of the malpractice trial to determine what verdict would have been returned by a jury. This involves essentially the same proof that would have been presented on a regular trial of the claim. It also involves a change of position for the lawyer, who would have been advocating the claim, but now, as the adverse party, would minimize its value by proving its weaknesses.[57]

If the claim has not been completely lost, but only harmed, the client (or former client) must continue to pursue the claim and salvage its remaining value by trial or settlement. The malpractice trial would then determine the original value of the claim, and the damages would be the difference.[58]

An example of a damages issue is a lawyer who made a mistake in how he initiated a lawsuit against a government entity. This mistake required the client's new lawyer to start the proceeding over and raised concerns about the statute of limitation. The client settled the claim upon the advice of the new counsel and then claimed that the settlement amount reflected a "damaged claim" discount, for which he sought recovery from the original lawyer. The malpractice claim was settled, with the negotiation of the amount focusing on whether, and how much, the claim had been damaged in light of the facts that should have tolled the statute of limitation.

Some mistakes, such as missing a statute of limitation deadline, cannot be fixed. Fortunately, in some situations it is possible to take action to undo or prevent the damage. An example of this "claims repair" is a lawyer who drafted a contract for sale of land that included a reservation of mineral interests; however, the lawyer overlooked that provision in drafting the deed. The omission was discovered when mineral lease income went to the new owner. Because the contract included the reservation, an action to reform the deed was very likely to succeed, and a reformation of the deed to include the reservation was obtained by agreement.

Another consideration in fixing the damages from malpractice is comparative negligence. Where a malpractice claim is based on the negligence of the lawyer, it is appropriate to consider the negligence of all other parties, including the claimant, unless the claimant had no obligation to act.

An example of this principle is found in *Pizel v. Zuspann*. The lawyers who drafted and amended a trust agreement, which was later held to be ineffective, were assigned minority shares of the fault by the jury for their roles in failing to ensure the filing of a deed funding the trust. The rest of the fault was assessed to the deceased client and the claimants who were trustees of the trust for their own failures to ensure the filing of the deed.[59]

If the attorney–client contract is specific enough to be the basis for the malpractice claim, the limitation period is either three or five years, depending on whether the contract is in writing.

V. Other Issues

A. Statute of limitation issues

If the attorney–client contract is specific enough to be the basis for the malpractice claim, the limitation period is either three or five years, depending on whether the contract is in writing.[60] That period begins when the contract is breached, regardless of discovery of the harm.

If the malpractice claim alleges a tort, the two-year statute of limitation usually applies. The limitation period runs from the date of first substantial injury, or when the injury should have been discovered.[61] It can be difficult to determine when the injury first occurred. Where continuing legal proceedings will determine whether there is an injury, the injury is not considered to have occurred until those proceedings are completed, including any appeals.[62] Some of the intentional torts, such as malicious prosecution and false imprisonment, carry a one-year limitation period.[63]

It is not uncommon for a lawyer to continue to represent a client after making a mistake in the representation. In this situation, courts often apply "the continuous representation rule" to toll the limitation period until after termination of the relationship relating to the matter involved.[64] This rule fosters a continuation of the trust and confidence typical of the lawyer-client relationship, prevents needless disruptions of the lawyer–client relationship and facilitates actions by the lawyer to undo or minimize the loss.

B. Expert testimony generally required

The question of whether a lawyer has fallen below the professional standard of care is usually beyond the ability of juries to determine on their own because they are not lawyers. The same can be said of the question of whether reasonable lawyers could disagree about a matter of judgment; therefore, the law requires that, unless the mistake alleged is obvious even to nonlawyers, the plaintiff presenting a legal malpractice claim to a jury must offer expert testimony to prove the mistake.[65] This requirement can be an obstacle to the pursuit of some malpractice claims, both because of the potential challenge of obtaining a supporting opinion and because of the occasional substantial cost.

C. Vicarious liability

Pursuant to the regular principles of vicarious liability, law firms, partners, and supervising lawyers can all be liable for the actions of another lawyer in the firm. In professional corpora-

57. 5 R. Mallen and J. Smith, LEGAL MALPRACTICE § 33.1 (5th ed. 2000).
58. 5 R. Mallen and J. Smith, LEGAL MALPRACTICE § 33.1 (5th ed. 2000).
59. *Pizel*, 247 Kan. at 70.
60. K.S.A. § 60-512 (3 years); K.S.A. § 60-511 (5 years for written contract).
61. K.S.A. § 60-513.
62. *Pancake House Inc. v. Redmond*, 239 Kan. 83, 88, 716 P.2d 575 (1986).
63. K.S.A. § 60-514.
64. *Pittman v. McDowell, Rice & Smith Chtd.*, 12 Kan. App. 2d 603, 608-09, 752 P.2d 711 (1988).
65. *Bowman*, 235 Kan. at 870, Syl. ¶¶ 7 and 8.

tions, those liable for malpractice include the lawyers personally participating in the malpractice, any negligent supervisor, and the firm.[66] Vicarious liability in law firms that are limited liability companies and limited liability partnerships is similar to professional corporations.[67]

Determining vicarious liability for the malpractice of an associated lawyer, such as local counsel, co-counsel, and consulted counsel, can be difficult. Relevant factors include whether both lawyers have a lawyer–client relationship with the client and whether or not the specific part of the matter in which the mistake was made was delegated with the client's approval so that it was solely within the scope of work of the associated lawyer.[68]

When a person is referred by a lawyer to other counsel to handle the entire matter, there are very limited circumstances in which the first lawyer may be liable for the malpractice of the other lawyer. A lawyer may be liable for negligently referring a case to a lawyer not capable or trustworthy if a reasonable lawyer would not have made the referral. It has been held that a referring lawyer generally may rely on the fact that the other lawyer is licensed by that lawyer's state to indicate the lawyer's general competence and fitness to practice law.

In *Tormo v. Yormark*,[69] liability was an issue only because there was an additional circumstance that may have led a reasonable lawyer to be more careful in making the referral. The additional circumstance was the fact that the other lawyer solicited the referring lawyer in a manner violating the ethics rules. The court held that this was enough of a cause for suspicion that the referring lawyer may be required to make a further investigation into the other lawyer. The lawyer receiving the referral, who had been under indictment for fraud and was later convicted and disbarred, embezzled the proceeds of the referred claim. The negligence of the referring lawyer was held to be an issue of fact for the jury.[70]

When a person is referred by a lawyer to other counsel to handle the entire matter, there are very limited circumstances in which the first lawyer may be liable for the malpractice of the other lawyer.

Another circumstance that should require further investigation by the referring lawyer is when the referral is made to obtain more specialized counsel. In such a case, some investigation into the other lawyer's expertise would be expected.[71]

It is, however, appropriate in Kansas for a lawyer to receive a referral fee without entering into a lawyer–client relationship or doing any work on the case.[72] As this rule is relatively new, no reported cases have determined whether the fact of such a pure referral fee should impose any more of a duty of care on the referring lawyer than would exist without the fee.

Lawyers can also be vicariously liable for the actions of their non-lawyer staff, where the actions are within the scope of their employment. An example of this is a sole practitioner who admitted liability for the mistake of his experienced secretary. The secretary prepared deeds on the wrong form for a person who came into the office in an emergency situation when the lawyer was absent. Although the lawyer never even knew the client existed, and no fee was charged, the lawyer believed the secretary's actions were within the scope of her employment.

D. Relationship of the Kansas Rules of Professional Conduct to malpractice liability

The Kansas Rules of Professional Conduct (KRPC)[73] state:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. . . . Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.

Thus, for example, if a lawyer is found in a disciplinary proceeding to have violated Rule 1.1, which requires that "[a] lawyer shall provide competent representation of a client," that finding and the discipline imposed should not provide any evidence of a failure to meet the standard of care in a civil action for malpractice liability. The client would have to establish incompetent representation by the direct means of testimony of the standard of care and the failure to meet it. However, the KRPC rules reflect the standard of practice in several areas, such as the fiduciary duties of confidentiality and undivided loyalty, and an expert witness would likely use those rules as part of the basis for an opinion as to the standard and the alleged breach. For any matter on which the disciplinary rules are relevant to a potential malpractice situation, lawyers should be aware that the Disciplinary Administrator's office is available for impromptu consultation by telephone to help avoid violations of the rules.

E. Special rule for criminal cases

Kansas has recently adopted a special rule for malpractice claims arising from criminal cases; in order for claimants to establish that their rights were damaged or lost, they must have obtained post-judgment relief from the conviction. If no post-judgment relief has been obtained, such as by a successful appeal or by a motion under K.S.A. § 60-1507, there can be no proof of damaged or lost rights. This rule, which initially may seem onerous, is the result of a balance between the public policies involved and the

66. K.S.A. § 17-2715.
67. 1 R. Mallen and J. Smith, LEGAL MALPRACTICE § 5.5 (5th ed. 2000).
68. 1 R. Mallen and J. Smith, LEGAL MALPRACTICE § 5.9 (5th ed. 2000).
69. 98 F. Supp. 1159 (D.N.J. 1975).
70. *Tormo*, 398 F. Supp. at 1171.
71. *See Cohen v. Lipsig*, 459 N.Y.S.2d 98 (1983).
72. K.R.P.C. Rule 1.5 (g).
73. Kansas Sup. Ct. Rule 226.

unique post-judgment relief procedures available to a person wrongly convicted of a crime.[74] Of course, if post-judgment relief is obtained, that would severely restrict the client's damages arising from the malpractice.

VI. A Few More Examples

Three more examples of malpractice claims against Kansas lawyers illustrate several of the principles set out above.[75]

Collections practices generate more than their share of malpractice claims. In one claim, the lawyer had obtained a small judgment for an unpaid debt. After other collection efforts failed, the lawyer retained a private process server to carry out an execution of the judgment at the debtor's place of business. It resulted in a heated confrontation in front of the debtor's customer and led to a lawsuit against both the process server and the lawyer, seeking substantial actual damages and the potential for punitive damages. The claim was for alleged assault, battery, outrage, and negligent retention of the process server. The lawyer obtained summary judgment in his favor, on two grounds: First, the process server was an independent contractor, rather than his agent, so the lawyer was not vicariously liable for his actions. Second, the lawyer could not be liable to the adversary in negligence for retaining the process server because the lawyer had no duty of care to the adversary.

The field of estate planning and administration also generates an inordinate number of malpractice claims. In one case, the lawyer was retained by an elderly couple in poor health to assist them in revising their trust from one which favored the son to one which treated the son and daughter more equally. The lawyer did so, after concluding that the husband still had testamentary capacity. The daughter made the initial connection with the lawyer for her parents and was present with her parents at the lawyer's office, but did not participate in the conferences.

The field of estate planning and administration also generates an inordinate number of malpractice claims.

When the son learned of the amendment he filed a conservatorship action, which resulted in: (1) a declaration of his father's incompetency, (2) an order declaring the amendment void, and (3) the son's appointment as conservator. The conservator then sued the lawyer on behalf of his father for negligence, claiming that the lawyer fell below the standard of care by failing to recognize his client's incompetency. The conservator also claimed breach of the fiduciary duty of undivided loyalty, alleging that the lawyer was really representing the daughter's interests.

The conservator claimed as damages all the lawyers' fees charged to the client for the conservatorship trial and other related litigation and sought punitive damages. Expert witness opinions were obtained on both sides. A motion to amend to add a claim for punitive damages was roundly rejected by the court, and the case was eventually dismissed voluntarily.

In some cases, the malpractice case was part of long-standing, multifaceted litigation. This final example was such a case, generating malpractice claims from both the clients and the adversary.

The lawyer successfully obtained a sizeable judgment for his clients against a *pro se* defendant for malicious prosecution. The lawyer then received a handwritten notice from the defendant indicating an intent to file an appeal. The lawyer undertook collection efforts anyway, collecting a small portion of the judgment. The appeal was not pursued, and the lawyer decided not to file a motion to dismiss the appeal for failure to timely file a docketing statement. The lawyer believed the handwritten notice may have failed to commence an appeal. The lawyer also decided filing a motion to dismiss might lead to the effective pursuit of the appeal.

On the eve of a sheriff's sale, the judgment debtor filed bankruptcy, and the dissatisfied clients then fired the lawyer. A year and a half after filing the notice regarding a possible appeal, the judgment debtor sought appellate counsel. With the assistance of counsel, the docketing statement was allowed to be filed out of time. The appeal eventually resulted in a reversal of the judgment, because of an error by the trial court, with a remand for a new trial. Further proceedings led to the court's dismissal of the malicious prosecution action with prejudice.

The clients sued their former lawyer for malpractice, alleging his failure to file a motion to dismiss the appeal failed to meet the standard of care and that this failure, in turn, cost them their judgment. The lawyer obtained summary judgment in his favor for two reasons. First, his decision not to file the motion to dismiss the appeal was held to be a matter of legal judgment, for which he had immunity from liability. Second, it was also held that the clients did not suffer any injury to their claim, as the reversal on appeal left the claim intact.

Thereafter, the adversary sued both the lawyer and his former clients alleging wrongful execution, conversion, outrage, and abuse of process. The adversary sought actual and punitive damages alleging that the collection activity caused him to have a heart attack. The lawyer obtained summary judgment on this claim on the basis of the statute of limitation. The court held that the adversary's claim arose, if at all, when the judgment upon which the collection efforts were based was overturned. It did not matter whether further proceedings on remand would produce another judgment, for the collection activity had been based on the prior judgment.

74. *Canaan v. Bartee*, ___ Kan. ___ , 72 P.3d 911 (2003).

75. These examples are claims that were resolved without published appellate opinions.

VII. Conclusion

These principles and examples give an indication of the endless variety of ways and the sometimes convoluted circumstances in which legal malpractice claims can arise. Although some areas of practice generate more than their share of malpractice claims, no area of practice is immune.

Lawyers should work with diligence and dedication to meet the standards of practice in their areas of the law to avoid malpractice claims. Even more importantly, however, lawyers should constantly strive to exceed those standards for the benefit of their clients and the good of our justice system and the legal profession. One careless or inappropriate decision by a lawyer can overshadow that lawyer's many good decisions, and it can seriously injure the rights of a client or a third party and bring substantial disrepute to the legal profession.

Lawyers should also obtain malpractice insurance, for the protection of their clients as well as themselves. Insurance is widely available and is certainly worthwhile considering the value of the rights that can be lost or damaged and the costs of defending a claim. The defense provided by insurance when a claim arises is a particularly valuable benefit, and for many claims it is the only benefit necessary.

If a malpractice claim arises, it should be handled with wisdom and good judgment and, if possible, should be addressed while there is still time to affect the outcome of any underlying proceeding. The lawyer involved should, of course, learn from the claim in order to avoid generating similar claims in the future. Finally, the lawyer should then leave the claim in the past and go on as a smarter, wiser, and even better lawyer.

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