THE PROFESSIONAL LIABILITY OF ATTORNEYS IN ALABAMA

W. MICHAEL ATCHISON, ESQ.*
ROBERT P. MACKENZIE, III, ESQ.**

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"Miss Jean Louise, stand up. Your father's passin'."[1]

"Atticus Finch was taking advantage of him. Tricking lawyers like Atticus Finch took advantage of him all the time with their tricking ways."[2]

I. INTRODUCTION

In *To Kill A Mockingbird,* Atticus Finch is an Alabama attorney both admired, as when Reverend Sykes asks his congregation

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*Partner, Starnes & Atchison, LLP; A.B., 1965, Birmingham-Southern College; J.D., 1968, Cumberland School of Law, Samford University.
**Partner, Starnes & Atchison, LLP; B.A., 1978, University of North Carolina, Chapel Hill; J.D., 1984, Cumberland School of Law, Samford University.
[1]HARPER LEE, TO KILL A MOCKINGBIRD 211 (1960) (Warner Books 1982).
[2]*Id.* at 178.

to stand while Atticus leaves the courtroom, or criticized, as when Atticus cross-examines Mr. Bob Ewell. Lawyers must acknowledge that despite one's dedication to a client's cause, a lawyer's conduct in and out of the courtroom has always been subject to review. However, like physicians who once enjoyed almost total immunity from lawsuits, attorneys were considered off limits from civil actions. Now, as physicians can attest, the public's expectation of perfection has led to the belief that a bad outcome, medical or legal, may be the fault of someone else. Consistent with this perception is an increase in malpractice actions filed against attorneys in the State of Alabama. This paper discusses claims and defenses to a suit for legal malpractice.[3]

II. ATTORNEY/CLIENT RELATIONSHIP

An attorney's liability for negligence in handling a legal matter must arise from the attorney/client relationship,[4] a relationship generally contractual in nature. However, it may also arise from a gratuitous undertaking.[5] Succinctly stated, a lawyer owes no duty to a client unless such duty arises from a contract or an undertaking.[6] The attorney/client relationship usually begins when a client retains a lawyer to represent him in a cause or to generally advise him as counsel.[7]

A contract of employment between an attorney and his client may be expressed or implied. The Alabama Supreme Court has recognized that "in the absence of an express contract, the courts are reluctant to construe contractual dealings and services of lawyers . . . as implying a contract of guaranty or insurance of favorable results."[8] In so doing, the Alabama Supreme Court has noted that the "[i]nterpretation of law is and cannot be an exact and accurate

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[3]While the authors have tried to prepare this paper as students of the law, it is important to note that they typically act as advocates for defendants in suits for professional negligence.

[4]*See* Cunningham v. Langston, Frazer, Sweet & Freese, P.A., 727 So. 2d 800 (Ala. 1999).

[5]*See* Williams v. Jackson Co., 359 So. 2d 798, 800 (Ala. Civ. App. 1978); Shows v. NCNB Nat'l Bank, 585 So. 2d 880, 882 (Ala. 1991).

[6]*See Shows*, 585 So. 2d at 882.

[7]*See* Agnew v. Walden, 4 So. 672 (Ala. 1888).

[8]Broyles v. Brown Eng'g Co., 151 So. 2d 767, 771 (Ala. 1963).

science."[9]

However, the existence of a contract has been found when an injured person consulted a lawyer, disclosing facts constituting a legal claim, and the lawyer agreed to "take the case."[10] Despite assuring the client that a suit had been filed on his behalf, the attorney in that case took no action.[11] The Alabama Supreme Court upheld the Disciplinary Board of the Alabama State Bar's finding that, ultimately, an attorney-client relationship existed and the attorney had engaged in misconduct.[12]

From the outset of the attorney-client relationship, a lawyer cannot engage or perform any service in the employment of an opposing party or interest, or do anything prejudicial to his client.[13] A conflict of interest is best described when an attorney owes loyalty to a client whose interests are adverse to another client. These interests are sufficiently adverse if it can be demonstrated that the attorney owes a duty to one client to do or refrain from doing something which could be detrimental to his other client.[14] Even friendship with a fellow attorney may compromise the duty owed a client.[15] In a case predicated on ineffectiveness of counsel in a criminal setting, a Federal Appeals court said: "Friendship and neighborliness among attorneys are virtues to be admired, but they must not be allowed to transcend a lawyer's duty to his client."[16]

An attorney also owes a duty to exercise the utmost honesty, good faith, fairness, integrity and fidelity in his employment.[17] One Alabama court quoted a rule it called both "universal and hoary with age,"

> The relationship of attorney and client is one of the most sacred

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[9] *Id.* at 771.

[10] *See* Hunt v. Disciplinary Bd., 381 So. 2d 52, 54 (Ala. 1980).

[11] *See id.*

[12] *See id.*

[13] *See* Intergraph Corp. v. Marks, 670 So. 2d 858 (Ala. 1995). In *Intergraph* the defendant unsuccessfully sought to disqualify the opposing attorney on the grounds that the attorney had previously been employed as one of the defendant's in-house counsel. The defendant failed to timely file a Motion to Disqualify and to prove (1) an attorney/client relationship existed in the past and (2) the attorney represented the defendant on a substantially related manner. *See also,* ALABAMA RULES PROFESSIONAL CONDUCT RULES 1.7, 1.9 (1999).

[14] *See* Davis v. Alabama, 596 F.2d 1214, 1222-3, *reh'g denied*, 601 F.2d 586, *and vacated*, Alabama v. Davis, 446 U.S. 903 (1980).

[15] *See* Self v. State, 564 So. 2d 1023, *cert. quashed*, 564 So. 2d 1035 (Ala. Civ. App. 1989).

[16] *Davis*, 596 F.2d at 1217 n.6.

[17] *See* Hannon v. State, 266 So. 2d 825 (Ala. 1972).

> relationships known to the law and places upon the attorney a position likened to a fiduciary calling for the highest trust and confidence, so that in all his relations and dealings with his client, it is his duty to exercise the utmost honesty, good faith, fairness, integrity and fidelity, and *he may not at any time use against his former client knowledge or information acquired by virtue of the previous relationship.*[18]

Based upon this fiduciary relationship, the attorney becomes the "special agent" of his client.[19] The Alabama Supreme Court discussed this concept:

> [A]n attorney at law "is the special agent of his client, whose duties, usually are confined to the vigilant prosecution or defense of the suitor's rights. (citation omitted). The power of an attorney is not co-equal, co-extensive, or the equivalent of that of the client. He is, as has been said in numerous decisions of this court, *a special agent*, limited in duty and authority to the vigilant prosecution or defense of the rights of the client. He can enter into no bargains or contracts, though he may make agreements in writing touching the course of proceedings in pending suits, or the issue or return of executions on judgments he may have obtained, which will bind the client.[20]

A lawyer is presumed to have certain authority to act on behalf of his client.[21] Today, when associations and referrals are common, it would be well to keep in mind the tenet that a lawyer may not delegate his authority to someone else, so as to confer on that person the rights, duties and obligations held by the lawyer.[22] In *Johnson v. Cunningham,*[23] the court confirmed the long recognized rule:

> One who has a bare authority from another, to do an act, must execute it himself, and cannot delegate his authority to another; for being a confidence or trust, reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or, if known, might not be selected by him, for such a purpose . . . Taking the law to be as we have stated, and it follows, that an attorney at law, in virtue of his ordinary powers, cannot delegate his authority to another, so as to raise a privity between such third person, and his principal; or to confer on him, as the principal, his own rights,

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[18] *Id.* at 829.

[19] *See* Birmingham Elec. Co. v. Cochrane, 8 So. 2d 171 (Ala. 1942).

[20] National Bread Co. v. Bird, 145 So. 462, 463 (Ala. 1933); *see also* Craft v. Standard Accident Ins. Co., 123 So. 271 (Ala. 1929); Senn v. Joseph, 17 So. 543, (Ala. 1895); Robinson v. Murphy, 69 Ala. 543 (1881); Gullett v. Lewis, 3 Stew. 23 (1830).

[21] *See* Doe v. Abbott, 44 So. 637 (Ala. 1907); *see also* Singleton v. Allan, 431 So. 2d 547 (Ala. Civ. App. 1983); Kemp v. Donovan, 94 So. 168 (Ala. 1922).

[22] Fidelity & Cas. Co. v. Beekand Bros. Mercantile Co., 7 So. 2d 265 (Ala. 1942).

[23] 1 Ala. 249 (1840).

duties and obligations. [24]

The court went on to say that there are cases in which delegated authority may be implied, but if such action was contemplated by the parties, it should have been shown by proof. Therefore, good practice would dictate obtaining a client's permission in writing before associating a matter or referring it to other counsel.

The omissions and commissions of a lawyer are regarded as acts of the client whom he represents.[25] The attorney's act of binding the client must be within the scope of the attorney's authority.[26] While an attorney has control of the case as far as strategy is concerned, he does not have general authority to compromise the plaintiff's cause of action; the right to compromise does not arise from the power to sue or to defend,[27] nor is the authority to settle incidental to general rights granted the lawyer.[28] Specific authority from the client is essential.[29] As the court said in *Daniel v. Scott*,[30] "An attorney employed to represent a litigant in the prosecution or defense of a suit is a special agent of his client and has no implied or inherent authority or right to compromise and settle it."[31]

In certain circumstances, however, an attorney may on behalf of his client agree to conditions specific to the particular proceeding for which he was hired. In *Reeves v. Orkin Exterminating Company, Inc.*,[32] the Supreme Court cited the Alabama Code when it held: "An attorney representing a party to a lawsuit has the authority to bind his client by any agreement made in relation to that proceeding which is either made in writing or 'by an entry to be made on the minutes of the court.'"[33]

The statutory provision cited above, however, "does not enlarge the duties of an attorney, nor give him authority to

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[24] *Johnson*, 1 Ala. at 258; *see also* ALABAMA RULES OF PROFESSIONAL CONDUCT Rule 1.5(e)(2).

[25] *See* Lawrence v. Gayle, 312 So. 2d 385 (Ala. 1975).

[26] *See* Flowers v. McGill, 442 So. 2d 6 (Ala. 1983); Salter v. Carter, 58 So. 2d 454 (Ala. 1952).

[27] *See* Birmingham Elec. Co. v. Cochran, 8 So. 2d 171 (Ala. 1942); Senn v. Joseph, 17 So. 543 (Ala. 1895); Rosenbaum v. State, 33 Ala. 354 (1859); Stark v. Kenan, 11 Ala. 818 (1847).

[28] National Bread Co. v. Bird, 145 So. 462 (Ala. 1933).

[29] *See generally*, David v. Black, 406 So. 2d 408 (Ala. Civ. App. 1981).

[30] 455 So. 2d 30 (Ala. Civ. App. 1984).

[31] *Daniel*, 455 So. 2d at 33 (quoting Crawford v. Tucker, 64 So. 2d 411, 416 (Ala. 1952).

[32] 457 So. 2d 402 (Ala. 1984).

[33] *Id.* at 404, (citing ALA. CODE § 34-3-21 (1975)).

compromise the claim of his client, whether liquidated or unliquidated, admitted or controverted."[34] Whether a client authorized his attorney to bind him is generally a question to be answered by the fact finder.[35]

When a lawyer enters into a compromise settlement without authority, a client may bind himself to his lawyer's action by ratification.[36] Ratification may be shown or "inferred from long acquiescence on the part of the owner of the judgment."[37] Silence and inaction after the client has knowledge of the attorney's actions are also sufficient to ratify a lawyer's acts.[38] However, a client may not ratify in part.[39]

An attorney who accepts a retainer and undertakes to represent a client may not abandon his employment without justifiable cause or the client's consent.[40] Justice Somerville stated in *Howard* that:

> When an attorney accepts a retainer to conduct a legal proceeding, he enters into an entire contract to conduct the proceedings to a conclusion, and he may not abandon his relation without justifiable cause, or the consent of his client. If he does so, he forfeits all right to compensation, even for services already rendered, and renders himself liable to an action for damages resulting from his wrongful withdrawal and consequent neglect of the case; he may not abandon a cause at a critical stage, leaving his client helpless in the emergency.[41]

A client may, however, discharge the attorney as a matter of right, and without cause or justification.[42]

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[34]Senn v. Joseph, 17 So. 543, 544 (Ala. 1895), *cited with approval* in Hawk v. Biggio, 372 So. 2d 303, 304 (Ala. 1979).

[35]*See* Pipkin v. Lucas, 451 So. 2d 346, 347 (Ala. Civ. App. 1984).

[36]*See* National Bread Co., 145 So. at 463.

[37]McFry v. Stewart, 121 So. 517, 518 (Ala. 1929); *see also* Daniel v. Scott, 455 So. 2d 30, 33 (Ala. Civ. App. 1984) (holding that ratification may be implied from the circumstances surrounding the case, and further, that ratification of the attorney's act may be found by even the slightest evidence of the client's acquiescence).

[38]*See McFry*, 121 So. at 518. "Silence and inaction on [the client's] part after knowledge is a ratification as a matter of law." *Scott*, 455 So. 2d at 33 (quoting *McFry*, 121 So. at 518).

[39]*See McFry*, 121 So. at 518.

[40]*See* Howard v. McCarson, 110 So. 296, 297 (Ala. 1926).

[41]*Id.* (citing 6 C.J.S. § 186, 673, 674).

[42]*See In re* Cheriogotis, 188 B.R. 996, 1001 n.4 (Bankr. M.D. Ala. 1994).

III. ALABAMA LEGAL SERVICES LIABILITY ACT

All disputes that arise out of the attorney/client relationship are governed by the Alabama Legal Services Liability Act ("ALSLA"), which became effective on April 12, 1988.[43] The ALSLA was enacted as the result of a crisis that threatened the delivery of legal services to the citizens of Alabama.[44] The Alabama Legislature reasoned that the ALSLA was necessary to control the increasing costs of legal services and to assure the continuing availability of legal services to all citizens.[45] 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."[46] The ALSLA includes any action that can be brought against an attorney acting in his or her professional capacity.[47] The Alabama Code 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 service liability action embraces all claims for injuries or damages or wrongful death whether in contract or in tort and whether based on an 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 a litigant in a court in the State of Alabama now or in the future.[48]

The ALSLA encompasses all theories of liability including negligence, wantonness, breach of contract and fraud.[49] It may also apply to specific claims such as an attorney's alleged failure to

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[43] ALA. CODE § 6-5-570 (1993).

[44] *See id.*

[45] *See id.*

[46] ALA. CODE § 6-5-572. This is consistent with the legislative intent that provides that the ALSLA is "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).

[47] ALA. CODE § 6-5-572.

[48] *Id.*

[49] *See generally* Voyager Guar. Ins. Co. v. Brown, 631 So. 2d 848 (Ala. 1993); Leighton Ave. Office Plaza, Ltd. v. Campbell, 584 So. 2d 1340 (Ala. 1991).

properly investigate a claim, negligent addition of an improper defendant, and failure to diligently pursue the express wishes of a client.[50] The statute also governs a dispute in which an attorney advises a client to enter into an unreasonable settlement agreement[51] or when an attorney fails to follow the express wishes of the client.[52] Even though ALSLA encompasses claims for fraud,[53] the Alabama Supreme Court has declined to recognize a cause of action against an attorney for making a conditional prediction or "puffing" about the worth of the case.[54] Thus, an attorney's statement to the client as to the value of a potential plaintiff's case or potential of recovery is generally not an actionable tort.[55]

By its own strict language, the ALSLA does not limit its application to the attorney/client relationship. Indeed, its wording appears to cover all claims against an attorney.[56] The Alabama

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[50]*See* McDufiey 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).

[51]*See* Edmondson v. Dressman, 469 So. 2d 571, 573-74 (Ala. 1985). (The plaintiff entered into a settlement for $150,000 for the wrongful death of her husband, sought to be released from the agreement based on fraud and ineffective advice from her counsel, and alleged that as a result of the attorney's negligent investigation and advice, the plaintiff suffered damages when she accepted an offer substantially less than the amount to which she was entitled).

[52]KP & NP v. Reed, 626 So. 2d 1241, 1242-43 (Ala. 1992). In *Reed*, the plaintiffs' underlying case allegedly was dismissed without their consent. *See id.* at 1242.

[53]*Voyager*, 631 So. 2d at 850.

[54]Lawson v. Cagle, 504 So. 2d 226, 228 (Ala. 1987). In *Lawson*, the attorney was determined to be not guilty of malpractice for simply making a prediction of the case's value. The court noted:

> Neither attorneys, nor trial judges, nor jurors, nor clients can know the results of litigation until after the deliberations of an unbiased trier of fact. The value, if any, of this lawsuit is determined by the trier of fact solely on the law and the facts admitted into evidence. Therefore, the amount that a client will receive when his or her case is finally concluded is something that an attorney cannot know, and the expression of such an opinion or prediction by an attorney is something on which no client has a right to rely. Regardless of whether the attorney represents this as an opinion or as a fact, it is not of a character which would justify a reasonable reliance, for this could not be known and the client must know that this could not be known unless something had been done to pervert the orderly administration of justice.

Id. at 227-28.

[55]*See id.* at 228.

[56]The Alabama Code states in part that "it is the intent of the legislature to establish a comprehensive system governing all legal actions against legal service providers." ALA. CODE § 6-5-572 (1993). Furthermore, the Alabama Code provides in part that "a legal services liability action embraces any form of action in which a litigant may seek legal redress for a wrong or an injury [in] every legal theory of recovery, whether common law or statutory, available to a litigant in a court in the State of Alabama now or in the future." ALA. CODE § 6-5-572.

Supreme Court has, however, narrowed the scope of the ALSLA, holding that the ALSLA's application depends upon the presence of an attorney/client relationship between the plaintiff and the defendant attorney.[57] In *Cunningham,* the plaintiff attorney and the defendant law firm entered into a fee-splitting arrangement.[58] After the case was settled, the attorney alleged that he had not been paid his referral fee and brought a breach of contract and negligence suit against the law firm.[59] The law firm sought a dismissal, contending that the attorney failed to file properly under the ALSLA.[60] The trial court agreed and granted the defendant's motion to dismiss. The Supreme Court reversed the lower court reasoning that the ALSLA does not apply when there is no attorney/client relationship.[61] The court noted:

> [W]e address the broader issue raised: whether *any* claim against an entity that is a "legal service provider" – even a claim not related to that entity's activities in providing legal services – must be brought under the ALSLA. The answer is no.
>
> The language of the ALSLA makes it clear that that Act refers to actions against "legal service providers" alleging breaches of their duties *in providing legal services*. . . .[62]
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> . . . .
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> Therefore, we conclude, from the language of the statute, that the ALSLA does not apply to an action filed against a "legal service provider" by someone whose claim does not arise out of the receipt of legal services.[63]

Because there was no attorney/client relationship, the ALSA did not apply to the attorney's claim.[64] The attorney was able to maintain his action on common law theories of negligence and breach of contract. Ironically, had the attorney brought his claim under the ALSLA, a dismissal would have been proper in the absence of an attorney/client relationship; the defendant law firm owed no duty under ALSLA to the plaintiff.

The *Cunningham* decision followed an earlier opinion by the

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[57]Cunningham v. Langston, Frazer, Sweet & Freese, P.A., 727 So. 2d 800, 804 (Ala. 1999).

[58]*See id.* at 802.

[59]*See id.* at 802.

[60]*See id.*

[61]*See id.*

[62]Id. at 802.

[63]*Id.* at 804.

[64]*See id.* at 805; *see also* Glenn Armenter Law Corp. v. Counts, 683 So. 2d 964 (Ala. Civ. App. 1994), *aff'd,* 683 So. 2d 968 (Ala. Civ. App. 1996).

Court of Civil Appeals in *Peterson v. Anderson,*[65] which discussed the requirement of the attorney/client relationship. In *Peterson,* residual beneficiaries filed a will contest action that included a claim against the testator's attorney for breach of fiduciary duty to the testator.[66] The court held that the plaintiffs did not have standing to maintain a legal malpractice action against the testator's attorney.[67] In affirming the defendant's motion to dismiss, the court stated that "[a] person authorized to practice law owes no duty except that arising from contract or from a gratuitous undertaking."[68]

These decisions construe section 6-5-572(1) of the Alabama Code to preclude a cause of action under the ALSLA for non-clients even if the claims are related to providing legal services. Such a dismissal, however, may not completely favor the defendant. Even absent an attorney/client relationship, other causes of action may be based upon a theory of a fiduciary duty[69] or claims of abuse of process and malicious prosecution.[70]

The ALSLA covers other employees of a law firm in addition to the attorney. The Alabama Code defines a legal service provider as:

> Anyone licensed to practice law by the State of Alabama or engaged in the practice of law in the State of Alabama. The term legal service provider includes professional corporations, associations, and partnerships and the members of such professional corporations, associations, and partnerships and the persons, firms, or corporations either employed by or performing work or services for the benefit of such professional corporations, associations, and partnerships including, without limitations, law clerks, legal assistants, legal secretaries, investigators, paralegals, and couriers.[71]

In essence, the ALSLA applies to all acts by attorneys, their employees and assistants as long as the claim arises out of an attorney/client relationship.

In a suit for legal malpractice, application of the ALSLA generally benefits the defendant attorney. As later discussed herein,

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[65]719 So. 2d 216 (Ala. Civ. App. 1997).

[66]*See id.* at 217.

[67]*See id.* at 218-19.

[68]*Id.* at 218 (quoting Shows v. NCNB Nat'l Bank, 585 So. 2d 880, 882 (1991)).

[69]According to the American Law Institute Restatement (Third) of the Law Governing Lawyers, an attorney does have a duty of care to certain non-clients. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74.

[70]*See* Walker v. Windom, 612 So. 2d 1167 (Ala. 1992); Dickson v. Echols, 578 So. 2d 1257 (Ala. 1991).

[71]ALA. CODE § 6-5-572(2) (1993).

the ALSLA requires in most instances that the plaintiff produce expert testimony demonstrating that the defendant breached the standard of care.[72] The ALSLA mandates that the plaintiff prove that "but for" the negligence of the legal service provider, the underlying case would have been different.[73] The statute of limitations may be a more viable defense in the legal realm than in usual negligence actions.[74] Therefore, in most instances it is incumbent upon an attorney defending a legal malpractice claim to closely examine the claim and seek the protection of the ALSLA.

IV. STANDARD OF CARE

The duty imposed upon an attorney to act on behalf of a client is prescribed by the legislature. The Alabama Code requires an attorney to exercise "that 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."[75] Consistent with the Alabama Medical Liability Acts ("AMLA") of 1975 and 1987,[76] the Supreme Court has construed the ALSLA to require that attorneys provide reasonable care.[77] There are two distinctions to the general standard of reasonableness.[78] If the legal service provider publishes the fact that he or she is certified as a specialist, or if the attorney solicits business by publicly advertising as a specialist in a particular area of law, the standard of care would be such reasonable care, skill and

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[72]*See* Phillips v. Alonzo, 435 So. 2d 1266 (Ala. 1983).

[73]*See generally* Hall v. Thomas, 564 So. 2d 936 (Ala. 1990).

[74]ALA. CODE § 6-5-574.

[75] ALA. CODE § 6-5-572 (3).

[76]The Supreme Court of Alabama specifically noted in *Michael v. Beasley*, 583 So. 2d 245, 250 (Ala. 1991), that the ALSLA is modeled after the AMLA of both 1975 and 1987. *See* ALA. CODE § 6-5-540. There are, however, certain safeguards afforded under the AMLA that are not a part of the ALSLA. There is no language in the ALSLA to describe what criteria an expert must satisfy to be "similarly situated" as is provided under section 6-5-548 of the AMLA. *See* ALA. CODE § 6-5-548(b). There is no requirement in the ALSLA that the plaintiff include in his complaint a detailed specification and description of the act or omission rendering the legal services provider liable. *See* ALA. CODE § 6-5-551. In *Morrison v. Franklin*, 655 So. 2d 964 (Ala. 1999), the plaintiff's complaint was deemed to satisfy the "notice pleading" concept even though there was not a detailed specification of the attorney's misconduct and damage to the plaintiff.

[77]*See* W. Stancil Starnes, *The Professional Liability of Physicians in Alabama*, 15 CUMB. LAW REV. 631 (1984) (providing a comprehensive overview of the duty owed a patient by the physician).

[78]*See* ALA. CODE § 6-5-572(3)(b).

diligence as other legal service providers practicing as a specialist in the same area of the law ordinarily have and exercise in a like case.[79]

The standard of care or duty owed was prescribed long before the enactment of the ALSLA. In 1835, the Alabama Supreme Court held in *Evans v. Watrous*[80] that an attorney "is only bound to use reasonable care and skill, in managing the business of his client."[81] The court in *Watrous* correctly recognized the danger of holding a lawyer to stricter standards. The court commented that "no one would venture to act in that capacity" if the standard of liability was greater.[82]

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."[83] "An attorney 'is not answerable for an error in judgment upon points . . . of doubtful construction.'"[84] In performing professional services for a client, a lawyer may actually provide "wrong" but "reasonable" advice.[85]

In *Waters v. American Casualty Co.*,[86] the Alabama Supreme Court found that an attorney has a duty to "exercise ordinary diligence and skill throughout" the representation of a client.[87] Applying this standard to the plaintiff's allegations, the court held that a defense lawyer is required "to inform the insurer of a proposal [by] the plaintiff to settle within [the policy] limits . . . ."[88] The court cautioned in a much broader statement, however, that its opinion did not mean "that a mere mistake in judgment on the part of an attorney in recommending the acceptance or rejection of a settlement would constitute negligence or bad faith."[89] The decision in *Waters*, in effect, requires a lawyer to keep the client aware of all offers of settlement, but does not signify that it is necessarily malpractice for an attorney to make particular recommendations for acceptance or rejection of such settlement offers. Furthermore, an attorney does not

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[79] *See id.*

[80] 2 Port. 205, 210 (Ala. 1835).

[81] *Id.*

[82] *Id.*

[83] Pickard v. Turner, 592 So. 2d 1016, 1020 (Ala. 1992).

[84] *See* Herston v. Whitesell, 348 So. 2d 1054, 1057 (Ala. 1977) (quoting Goodman & Mitchell v. Walker, 30 Ala. 482, 496 (1857)).

[85] *Id.*

[86] 73 So. 2d 524 (Ala. 1953).

[87] *See id.* at 532.

[88] *Id.* at 532.

[89] *See id.* at 532.

have a duty to his client to obtain consent for a settlement if the client has already waived that right as a provision of an insurance policy.[90]

The duty imposed upon a lawyer does include the obligation to maintain reasonable knowledge of the law and changes in the law. In *Goodman & Mitchell v. Walker,*[91] the Alabama Supreme Court discussed the requirement that everyone is "presumed to know the law, and are held responsible for its violations."[92] However, attorneys, like all other professionals, "impliedly stipulate that they will bring to the service of their clients ordinary and reasonable skill and diligence."[93] More important, the court held that a lawyer "is liable for the consequences of [his] ignorance, or non-observance, of the rules of practice" in courts where he plies his profession as well as for want of care in the preparation of a case for trial.[94] There is, however, no requirement that an attorney must use a scientific technique that is not yet state of the art at the time of his or her representation to gather evidence, if it has not been used before in similar trials and is not well-known.[95]

Indolent and careless lawyers should be aware of court decisions relating to the searching out of evidentiary matters. According to the Court of Civil Appeals, "[it] is the solemn sworn duty of an attorney to ascertain, so far as he can, what the evidence is, and his duty is not at an end when he has conferred with his client."[96] The court also stated that a lawyer must see and talk with pertinent witnesses.[97] However, the decision to present a certain witness or

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[90]*See* Mitchum v. Hudgens, 533 So. 2d 194 (Ala. 1988).

[91]30 Ala. 482 (1857).

[92]*See id.* at 495.

[93]*Id.*

[94]*Id.* at 496.

[95]*See* Lightfoot v. McDonald, 587 So. 2d 936 (Ala. 1991). In *Lightfoot*, the plaintiff was found guilty of rape and thereafter, sued his former attorney for ineffective representation. *See id.* at 936-37. The plaintiff alleged that the defendant "breached his duty when he failed to order an independent forensic analysis of the physical evidence offered by the [S]tate against [the plaintiff]." *Id.* at 937. Particularly, the defendant attorney was alleged to be negligent for failing to have a DNA test performed that the plaintiff "contend[ed] would have produced conclusive proof of his innocence." *Id.* In affirming judgment for the attorney, the Supreme Court declined to hold the defendant attorney "negligent by failing to . . . obtain a test that had never been used as evidence in a criminal trial . . . in the United States, at the time of Lightfoot's 1984 trial." *Id.* The court noted that "DNA testing [was] . . . a recent scientific development, and it [was] . . . doubtful that any licensed attorney in the United States was familiar with the process in 1984." *Id.*

[96]Grigsby v. Liles, 147 So. 2d 836, 838-39 (Ala. Civ. App. 1961) *rev'd on other grounds*, 147 So. 2d 846 (Ala. 1962).

[97]*See id.* at 839.

introduce an exhibit is generally considered a tactical one.[98] The failure to call a certain witness or introduce a particular exhibit is not malpractice as long as that judgment is considered reasonable.[99] In general, an attorney will not be found "incompeten[t]" or "ineffective . . . merely because his opinion of appropriate trial tactics differs from the opinion of another attorney."[100] However, there is a duty imposed upon the lawyer to fully advise the client of the litigation process, including settlement discussions.[101] Furthermore, in the context of a disciplinary proceeding, the Alabama Supreme Court affirmed sanctions against lawyers for an "unmanageable case load" that prevented the delivery of quality legal services.[102]

V. BURDEN OF PROOF

In a suit for legal malpractice, the plaintiff has the burden of proving three separate claims. First, the traditional elements of an action for negligence apply.[103] The plaintiff "must prove a duty, a breach of the duty, that the breach was the proximate cause of injury, and damages."[104] Second, the plaintiff has the unique burden in a legal malpractice action of showing that "but for" the defendant attorney's act or omission, the plaintiff would have recovered in the underlying cause of action[105] or that the outcome of the case would have been different.[106] Third, only after the plaintiff satisfies the trier of fact that he has met his burden of proof as to the defendant attorney's negligent conduct should the court determine the issue of damages.[107]

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[98]Herring v. Parkman, 631 So. 2d 996, 1002 (Ala. 1994).

[99]*See id.*

[100]*See* Crews v. Houston County Dep't of Pensions and Sec., 358 So. 2d 451, 455 (Ala. Civ. App. 1978). This holding is consistent with the Supreme Court's decision in *Otwell v. Bryant*, 497 So. 2d 111 (Ala. 1986), wherein the court held that when there are various recognized methods of treatment, a physician is not liable for medical negligence simply because a plaintiff's expert would disagree or provide care in a different manner. *Otwell*, 497 So. 2d at 117-18.

[101]*See* St. Paul Fire & Marine Ins. Co. v. Edge Mem'l Hosp., 584 So. 2d 1316 (Ala. 1991).

[102]Davis v. Alabama State Bar, 676 So. 2d 306, 307-08 (Ala. 1996).

[103]*See* Malloy v. Sullivan, 387 So. 2d 169 (Ala. 1980).

[104]Herston v. Whitesell, 348 So. 2d at 1054, 1057 (Ala. 1977).

[105]Johnson v. Horne, 500 So. 2d 1024, 1026 (Ala. 1986); *see, e.g.,* Morrison v. Franklin, 655 So. 2d 964, 966 (Ala. 1995)(holding that the "dual burden" test does not require the plaintiff's pleading to contain the "but for" language).

[106]Hall v. Thomas, 456 So. 2d 67, 68 (Ala. 1984).

[107]*See Morrison*, 655 So. 2d at 965-67.

The plaintiff must present expert testimony to prove a prima facie case in a malpractice suit against an attorney.[108] Although in an early opinion the Alabama Supreme Court held that expert testimony was unnecessary,[109] more recently the court implied that lay jurors do not possess the degree of legal education, training, or experience to adequately evaluate the propriety of an attorney's actions.[110] In Alabama, therefore, the plaintiff is, therefore, required to produce expert testimony that the defendant attorney breached the standard of care and that injury proximately followed.[111]

In *Phillips v. Alonzo*[112] the court affirmed summary judgment based on the plaintiff's failure to produce expert testimony that the defendants breached the standard of care.[113] The defendants' motion for summary judgment was supported by affidavits from their own attorneys.[114] The affidavits stated that the professional services rendered to the plaintiff were in accordance with generally accepted standards in the legal community.[115] The plaintiff countered by filing his own affidavit that the court found "did nothing more than restate the allegations of his complaint."[116] The plaintiff did not present expert testimony by another attorney, or competent evidence of any kind, to show a breach of the professional duty by the attorneys.[117] The plaintiff's failure to produce expert testimony was cause for dismissal of the case.[118]

The ALSLA is silent as to the required qualifications and experience for an expert testifying in a legal malpractice action, stating only that the expert must be "similarly situated."[119] Although

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[108]Phillips v. Alonzo, 435 So. 2d 1266, 1267 (Ala. 1983); *see also* Moore v. Hornsby, 486 So. 2d 1262, 1263 (1986) (affirming the grant of defendant lawyer's motion for summary judgment because the plaintiff failed to present expert testimony demonstrating the lawyer's negligence).

[109]Goodman & Mitchell v. Walker, 30 Ala. 482, 500 (1857).

[110]*See generally* Tonsmeire v. AmSouth Bank, 659 So. 2d 601, 605 (Ala. 1995)(stating that "expert testimony is required in order to establish deviation from a standard of care in connection with [an] alleged breach [of an attorney's standard of care]").

[111]McDowell v. Burford, 646 So. 2d 1327, 1328 (Ala. 1994).

[112]435 So. 2d 1266 (Ala. 1983).

[113]*See id.* at 1267.

[114]*See id.*

[115]*See id.*

[116]*Id.*

[117]*See id.*

[118]*See id.*

[119]ALA. CODE § 6-5-572(3) (1993). "Similarly situated" generally means "legal service providers in the same general line of practice in the same general locality." *Id.*

the AMLA sets forth the specific qualifications that a medical expert must possess to be "similarly situated,"[120] there are no such specific qualifications in the ALSLA.[121] However, because the Alabama Supreme Court has observed that the ALSLA is modeled after the AMLA,[122] the trial court should closely examine the qualifications of any expert called and apply criteria similar to the requirements stated in the AMLA. Common sense, as well as case precedent and statutory construction, support the argument that an expert who testifies in a legal malpractice case must be knowledgeable of the law and have the capacity to testify. It is well recognized that the plaintiff's expert must be a licensed attorney and that the expert witness have the same degree of education and experience as the defendant attorney. The ALSLA provides that an attorney who holds himself out as being certified in a particular area of law shall be held to that same standard of "reasonable care, skill, and diligence as other legal service providers practicing as specialists in the same area of the law ordinarily have and exercise in a like case."[123] Given the different areas of legal expertise, the expert witness should have training and experience similar to that of the defendant attorney.[124] In accordance with the AMLA,[125] the trial court should mandate that an expert testifying against a legal services provider be licensed and practicing within the year leading up to the alleged act or omission by the defendant legal services provider.[126] Just as the practice of medicine constantly changes, so too does the practice of law. Decisions and legal opinions are rendered on a daily basis. Often, an opinion will be withdrawn and a different holding substituted. Any attorney testifying about the standard of care must be in a position to recognize those changes. It would simply be unfair to the defendant attorney to be subject to the criticisms of a plaintiff's expert who has not practiced law within the relevant time period or within the relevant area of law.

Whether an expert must be specifically licensed and practicing

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[120]ALA. CODE § 6-5-548.

[121]ALA. CODE § 6-5-572.

[122]Michael v. Beasley, 583 So. 2d 245, 250 (Ala. 1991), *overruled on other grounds, Ex parte* Pannell, No. 1962076, 1999 WL 588227 (Ala. Aug. 6, 1999).

[123]ALA. CODE § 6-5-580(2).

[124]For example, the trial court should require the plaintiff in a claim against a patent attorney to present an expert certified in patent law. A plaintiff filing a claim against an admiralty lawyer should be required to present an expert qualified in admiralty law, and if a plaintiff files suit against a tax attorney, the plaintiff should be required to present an attorney who specializes in tax law.

[125]ALA. CODE § 6-5-548(b)(3).

[126]*See id.*

in Alabama has not yet been decided by the Alabama Supreme Court. In *Crawford v. Hall*[127] the plaintiff's expert was not licensed to practice in the State of Alabama.[128] The defendant contended that the expert was therefore not qualified to state an opinion against an Alabama attorney.[129] The court decided the case in favor of the defendant on other grounds,[130] but declined to rule on whether the "same general locality" refers to a local or national standard of care.[131]

The Alabama Supreme Court has also not addressed the degree of knowledge an expert witness who testifies in a legal malpractice action must possess before the expert is allowed to testify. However, AMLA case law is instructive in defining the requirements of an expert in a professional liability context. In *Pruitt v. Zeiger*[132] the Alabama Supreme Court noted that "[t]he failure of an expert to establish the standard of care results in a lack of proof essential to a medical malpractice plaintiff's case."[133] In order to establish the standard of care, the court determined that the plaintiff's expert "was required to enumerate the prevailing medical procedures in the national medical community that reasonably competent physicians would ordinarily utilize when acting in the same or similar circumstances."[134] However, the court found that in the instant case, the "[t]estimony that the care rendered was 'below the standards' without establishing those standards [did] not satisfy [the plaintiff's] burden."[135] Specifically, the court determined that "[b]efore [an] expert witness can establish a deviation from the standard of care, the witness must establish the standard from which the deviation occurred."[136] Consequently, in applying the *Pruitt* rationale to a legal malpractice case, one can reasonably argue that an expert must be knowledgeable about the applicable law and standard of care before the expert criticizes how another attorney handled a legal matter or advocates another method of doing so.

Expert testimony must be based upon the standard of care as

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[127]531 So. 2d 874 (Ala. 1988).

[128]*See id.* at 876.

[129]*See id.*

[130]*See id.*

[131]*Id.*; *cf.* Zills v. Brown, 382 So. 2d 528, 532 (Ala. 1980) (holding that the community standard is one of the national medical community in a medical malpractice action).

[132]590 So. 2d 236 (Ala. 1991).

[133]*Id.* at 238.

[134]*Id.*

[135]*Id.* at 239.

[136]*Id.*

defined by the LSLA, not the personal opinion of the witness. In determining whether expert testimony is sufficient in a legal malpractice action, the courts typically consider whether the defendant satisfied the duty of a reasonable attorney in the community under like or similar circumstances. In *Henson v. Mobile Infirmary Ass'n*[137] the Alabama Supreme Court addressed the sufficiency of an expert's testimony when the expert in a medical malpractice action only offered his opinion to establish the standard of care.[138] The court noted that "by limiting his testimony to the statement of a 'personal opinion,' [the plaintiff's expert] failed to address a *community standard* (of what is reasonable 'care, skill and diligence')."[139]

Similarly, in *Pruitt*,[140] the court found that it was wholly insufficient for an expert to "merely [give] his opinion as to what [the defendant(s)] should have done under the circumstances presented. . . . 'The law does not permit a physician to be at the mercy of testimony of his expert competitors, whether they agree with him or not.'"[141] Furthermore, in *Hines v. Armbrester*[142] the court concluded that it could not find "that a physician would be liable just because another member of his profession would have treated the case in a different way."[143] The same rationale should apply for attorneys who are subject to suits brought under the ALSLA. Without establishing the standard of care, the testimony of a plaintiff's expert merely amounts to a second guessing of the defendant's attorney. In sum, without instituting these guidelines, defendant attorneys could be placed at the mercy of their professional colleagues.[144]

Generally, the doctrine of *res ipsa loquitur* does not apply to malpractice actions against attorneys, nor have Alabama courts specified any other exceptions to the requirement of expert testimony in a legal malpractice action. In *Holt v. Godsil*[145] the Alabama Supreme Court set forth certain situations in which the plaintiff in a medical malpractice case may not be required to present expert

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[137]646 So. 2d 559 (Ala. 1994).

[138]*See id.* at 563.

[139]*Id.*

[140]*Pruitt*, 590 So. 2d at 238.

[141]*Id.* (quoting Sims v. Callahan, 112 So. 2d 776, 783 (Ala. 1959)).

[142]477 So. 2d 302 (Ala. 1985).

[143]*Id.* at 307.

[144]University of Alabama Health Serv. Found. v. Bush, 638 So. 2d 794, 798 (Ala. 1994) (stating, in the context of the AMLA, that "the law does not place the physician at the mercy of professional colleagues").

[145]447 So. 2d 191 (Ala. 1984).

testimony.[146] Considering the unique burden of proof required of a plaintiff in a legal malpractice case, exceptions to the expert legal testimony requirement, although limited, could include instances in which the plaintiff is a licensed and practicing attorney, or in which a text or treatise which in and of itself establishes the standard of care has been admitted . Even if these exceptions apply, the plaintiff must still present evidence of causation or the plaintiff's case should fail.

The Alabama Supreme Court has described the general requirements of expert testimony in a legal malpractice case.[147] Expert testimony is necessary even when there has been an adverse finding against the defendant attorney's conduct in another forum.[148] A ruling of ineffective representation by the attorney in a criminal action is not sufficient to support a finding of a breach of the standard of care in a claim for legal malpractice. In *McConico*, the plaintiff was convicted of burglary and grand larceny while represented by the defendant attorney.[149] The judge denied the plaintiff's request for youthful offender status and the plaintiff was sentenced.[150] Following release, the plaintiff was convicted of murder and sentenced to life imprisonment pursuant to the Alabama Habitual Felony Offender Act.[151] The plaintiff then "filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama, alleging that his guilty plea in October 1976 had been involuntarily entered in the belief that he had been given youthful offender status."[152] The District Court determined that the defendant attorney had been ineffective in his representation because he failed to tell the

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[146]*See id.* at 192. The Alabama Supreme Court recognized the following situations as exceptions to the general rule: 1) when a foreign instrumentality is found in the plaintiff's body following surgery; *Id.* (citing, Sellers v. Noah, 95 So. 167 (1923)); 2) when the injury complained of is in no way connected to the condition for which the plaintiff sought treatment; *Id.* (citing, Parrish v. Spink, 284 Ala. 263, 224 So. 2d 621 (1969)); 3) when the plaintiff employs a recognized standard or authoritative medical text or treatise to prove what is or is not proper practice; Id. (citing Zills v. Brown, 382 So. 2d 528 (Ala. 1980)); and 4) when the plaintiff is himself or herself a medical expert qualified to evaluate the doctor's allegedly negligent conduct; Id. (citing, Lamont v. Brookwood Health Services, Inc., 446 So. 2d 1018 (Ala. 1983)).

[147]McConico v. Romeo, 561 So. 2d 523 (Ala. 1990). In *McConico's* writ of habeas corpus hearing the United States District Court for the Northern District of Alabama determined McConcio's attorney was ineffective in his representation of McConico on the burglary and grand larceny charges. *See id.* at 524.

[148]*See id.*

[149]*See id.*

[150]*See id.*

[151]*See id.*

[152]*Id.*

plaintiff of the denial of youthful offender status.[153] Following the District Court's determination, the plaintiff brought suit for legal malpractice.[154] The plaintiff's case was based upon the finding of ineffective counsel by the federal court.[155] This finding was not a sufficient substitute for expert testimony that the defense attorney breached the standard of care. The defendant submitted an affidavit stating that his representation was reasonable. The plaintiff failed to counter the defendant's affidavit with expert testimony and summary judgment was granted at the trial level and affirmed on appeal.[156]

Further support for the requirement of expert testimony is based on the holding of *Mylar v. Wilkinson*.[157] The plaintiff was convicted of first degree murder and sentenced to life imprisonment.[158] He then filed writs of error coram nobis and habeas corpus.[159] The United States Court of Appeals for the Eleventh Circuit granted the plaintiff's relief because of the attorney's ineffective counsel.[160] Following the ruling, plaintiff filed suit for legal malpractice.[161] In his claim for legal negligence, the plaintiff placed considerable stress upon the opinion of the Appeals Court.[162] The plaintiff argued that the finding by the Eleventh Circuit of the defendant attorney's ineffective counsel was evidence of a breach of the standard of care.[163] The Supreme Court of Alabama rejected the plaintiff's contention that a finding of ineffective counsel was equivalent to a finding of legal negligence.[164] Although the plaintiff established that the attorney had been found to have provided ineffective counsel, the plaintiff did not establish that he would have received a better result had the defendant attorney acted differently.[165] Therefore, while the plaintiff may have

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[153]*See id.* at 524.

[154]*See id.* at 525.

[155]*See id.* at 524.

[156]*See id.* at 526. The Supreme Court of Alabama granted summary judgment in favor of defendant attorney Romeo because McConico failed to bring the malpractice claim within the statute of limitations period. *See id.* at 525. However, the author interprets the *McConico* case to support the theory that an adverse finding in another forum against the defendant attorney is, alone, insufficient to prevail in a malpractice action.

[157]435 So. 2d 1237 (Ala. 1983).

[158]*See id.* at 1238.

[159]*See id.*

[160]*See id.*

[161]*See id.*

[162]*See id.*

[163]*See id.* at 1239.

[164]*See id.*

[165]*See id.*

presented evidence that the attorney failed to fulfill his duty, there was no evidence that this failure proximately caused the plaintiff's injury.[166]

McConico and *Myler*, along with other opinions by the Alabama Supreme Court, are entirely consistent with the legislative intent to distinguish between the standard of care for a legal service provider and a breach of the standard of care.[167] While the standard of care refers to the attorney's duty, a breach of the standard of care requires finding both a breach of duty and causation.[168] Even if the judge or jury were to find that the defendant attorney failed in his duty to the client by mistake or neglect, the defendant attorney may not have breached the standard of care if there is no evidence of causation.

The Supreme Court has declined to hold that a violation of the Alabama Rules of Professional Conduct is sufficient to maintain a cause of action or is a substitute for expert testimony.[169] 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 services 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 services liability action.[170]

In a case of first impression, *Terry Cove North, Inc. v. Marr & Friedlander, P.C.*,[171] the court held that a breach of a Disciplinary Rule under the Code of Professional Responsibility does not "provide the basis for a private civil cause of action."[172] The Alabama Supreme

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[166]*See id.*

[167]*See* ALA. CODE § 6-5-572(3)-(4) (1993); *see generally* Boros v. Baxley, 621 So. 2d 240, 242-43 (Ala. 1993).

[168]*See* ALA. CODE § 6-5-572(4).

[169]Terry Cove North, Inc. v. Marr & Friedlander, P.C., 521 So. 2d 22 (Ala. 1988).

[170]ALA. CODE § 6-5-578.

[171]521 So. 2d 22 (Ala. 1988).

[172]*Id.* at 23.

Court joined the majority of states in finding that the "Code of Professional Responsibility is designed not to create a private cause of action for infractions of disciplinary rules, but to establish a remedy solely disciplinary in nature."[173] The issue was again presented in *Ex parte Toler*,[174] a case in which the plaintiffs sought to introduce evidence of an attorney's violation of the Alabama Rules of Professional Conduct to prove a breach of the standard of care.[175] Relying on section 6-5-578 of the Alabama Code, the court held 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."[176] The court further rejected the attempt of the plaintiff's expert to base his testimony upon an alleged breach of the Rules of Professional Conduct.[177]

VI. DEFENSES

The ultimate defense to a claim of legal malpractice is a finding that the attorney provided reasonable care, thus satisfying the requirements of Alabama Code section 6-5-572. This paper does not address particular factual scenarios but rather focuses on specific defenses.

A. Statute of Limitations

Alabama Code section 6-5-574 defines the time allowed for commencement of any action against a legal service provider.[178]

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[173]*Id.* Cases in which other states have examined this issue and expressly held that a violation of a state disciplinary rule does not create a private cause of action include Noble v. Sears, Roebuck & Co., 109 Cal. Rptr. 269 (Cal. Ct. 1973); Spencer v. Burglass, 337 So. 2d 596 (La. Ct. App. 1976); Martin v. Trevino, 578 S.W.2d 763 (Tex. Ct. App. 1978); Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840 (Or. 1981); Tingle v. Arnold, Cate & Allen, 199 S.E.2d 260 (Ga. Ct. App. 1973); Brainard v. Brown, 458 N.Y.S.2d 735 (N.Y. 1983), *rev'd on other grounds*, Santulli v. Englert, Reilly & McHugh, P.C., 563 N.Y.S.2d (N.Y. 1990).

[174]710 So. 2d 415 (Ala. 1998).

[175]*See id.* at 416.

[176]*Id.* The court relied on the "or otherwise be used in support of recovery in a legal services liability action" language of section 6-5-578 of the Alabama Code to support the idea that evidence of a violation of the Rules of Professional Conduct is inadmissible to prove a breach of the standard of care. This theory may be extrapolated further to provide a confidentiality privilege in order to prevent a party from obtaining such information during the discovery phase of litigation.

[177]*See id.*

[178]Prior to the 1988 enactment of Alabama Code section 6-5-574, the statute of limitations was six years. ALA. CODE § 6-2-34 (1993); Baker v. Ball, 446 So. 2d 39, 40 (Ala. 1984).

> (a) All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards; provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided, further, that in no event may the action be commenced more than four years after such act or omission or failure; except, that an act or omission or failure giving rise to a claim which occurred before August 1, 1987, shall not in any event be barred until the expiration of one year from such date.
>
> (b) Subsection (a) of this section shall be subject to all existing provisions of law relating to the computation of statutory periods of limitations for the commencement of actions, namely, Sections 6-2-1, 6-2-2, 6-2-3, 6-2-5, 6-2-6, 6-2-8, 6-2-9, 6-2-10, 6-2-13, 6-2-15, 6-2-16, 6-2-17, 6-2-30, and 6-2-39; provided, that notwithstanding any provisions of such sections, no action shall be commenced more than four years after the act, omission, or failure complained of; except, that in the case of a minor under four years of age, such minor shall have until his or her eighth birthday to commence such action.[179]

No other section of the ALSLA has been as widely debated and subject to varying judicial interpretation as the statute of limitations. Since the statute was enacted, the Alabama Supreme Court has ruled and then reversed its position regarding the time when the statute begins to run. Most recently, the court has given strict and literal interpretation to the statutory language[180] which provides that "[a]ll legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards . . . ."[181] In contrast to its earlier opinions that construed the statute to begin to run only when the plaintiff first suffered a legal injury, the court has currently stated that the statute begins to run on the date of the attorney's act or omission.[182] The court's present position adopts what is best described as the "act or omission rule" as opposed to the "damage rule."[183]

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[179] ALA. CODE § 6-5-574. The time elements described are identical to the time requirements for filing against a health care provider as set forth in Alabama Code section 6-5-482.

[180] *Ex parte* Panell, No. 1962076, 1999 WL 1268388 at *7 (Ala. Dec. 30, 1999).

[181] ALA. CODE § 6-5-574.

[182] *See* Michael v. Beasley, 583 So. 2d 245, 252 (Ala. 1991); *see also* Cofield v. Smith, 495 So. 2d 61, 62 (Ala. 1986).

[183] *Ex parte Panell*, 1999 WL 1268388, at *5.

Given the nature of the concurring opinions in *Ex parte Panell*, it is likely that the court will revisit this issue.[184]

In *Panell*, the court adopted for the first time the "act or omission rule" for determining when the statute of limitations shall begin.[185] Panell filed suit against Henslee, alleging that the attorney negligently agreed to a settlement without Panell's consent.[186] According to the complaints Henslee also failed to initially file a claim or to later file a counter claim on Panell's behalf in regard to a dispute over corporate assets.[187] Panell alleged that in March 1993 he hired Henslee to file suit against Panell's business partner.[188] In June of 1993, before Henslee filed Panell's action, the business partner filed suit against Panell.[189] Panell alleged that after the initial lawsuit was filed against him, he instructed Henslee to file an answer and counter-claim asserting the claims Panell had originally asked Henslee to file.[190] Instead, Henslee filed a motion to dismiss.[191] On September 22, 1993, when a hearing was held on the motion to dismiss, the attorneys for both parties discussed settlement.[192] Panell alleged that Henslee agreed to a settlement on that date without Panell's consent.[193] On October 5, 1993, in accordance with the terms of the alleged settlement agreement, Panell executed warranty deeds conveying his interest in certain real property.[194] On January 31, 1994, the trial court noted on the case action summary sheet that the case had settled.[195] The trial court dismissed the case on August 18, 1994.[196] On January 30, 1996, almost two years to the date the trial court noted on the case action summary sheet that the case had been dismissed, Panell filed suit for legal malpractice against Henslee.[197]

Henslee moved for summary judgment on the grounds that that

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[184] *Id.* at *1, *8. Chief Justice See authored the majority opinion, and Mr. Justices Hooper and Maddox concurred. Mr. Justices Houston, Brown, and England concurred in the result. Mr. Justices Cook, Lyons, and Johnstone concurred in the results, but dissented from the rationale.

[185] *See id.* at *7.

[186] *See id.* at *1.

[187] *See id.*

[188] *See id.*

[189] *See id.*

[190] *See id.*

[191] *See id.*

[192] *See id.*

[193] *See id.*

[194] *See id.*

[195] *See id.*

[196] *See id.*

[197] *See id.*

Panell's claims were barred by the two-year statute of limitations as in Alabama Code section 6-5-574.[198] The trial court granted the motion, and on July 25, 1997, the Court of Civil Appeals affirmed Henslee's summary judgment without opinion.[199] On application for rehearing, the Alabama Supreme Court granted Panell's petition for writ of certiorari "to review the narrow issues of when Panell's legal-malpractice cause of action accrued and when the statute-of-limitations period provided by the ALSLA began to run."[200]

The plaintiff argued that his cause of action did not begin to accrue until he first suffered a legal injury.[201] According to Panell, there was no legal injury until January 31, 1994, the date the trial court entered the notation on the case action summary sheet stating that the case had been settled, or in the alternative, August 18, 1994, the date on which the trial court entered its judgment of dismissal.[202] If, as the plaintiff stated, he suffered no legal injury until January 31, 1994, or August 18, 1994, there would have been no damages on which to base a cause of action.[203] The plaintiff's complaint, which was filed on January 30, 1996, would have been timely. The court rejected Henslee's claim that no legal injury had been sustained before January 31, 1994.[204] The court found the plaintiff had suffered an injury on September 23, 1993, the day after he allegedly agreed to settle the case.[205]

In determining when the statute began to run, the court considered whether it started from the plaintiff's perspective, i.e., the date he suffered a legal injury, or from the defendant's perspective, i.e., the date of the attorney's act or omission.[206] In choosing to adopt the "act or omission rule," the court retreated from previous decisions and relied on a strict interpretation of Alabama Code section 6-5-574.[207] The court noted that it was bound by the unambiguous language of the statute which states in part: "[a]ll legal service liability actions against a legal service provider must be commenced within two years *after the act or omission or failure giving rise to the*

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[198] *See id.*

[199] *See* Panell v. Henslee, 723 So. 2d 117 (Ala. Civ. App. 1997).

[200] *Ex parte Panell*, 1999 WL 1268388, at *1.

[201] See id. at *2.

[202] *See id.*

[203] *See* Garrett v. Raytheon Co., 368 So. 2d 516, 519 (Ala. 1979); *see also* Payne v. Alabama Cemetery Ass'n., 413 So. 2d 1067, 1072 (Ala. 1982).

[204] *Ex parte Panell*, 1999 WL 1268388, at *7.

[205] *See id.*

[206] *See id.*

[207] *See id.* at *5-6.

claim."[208] The court reasoned that the legislative intent was for the statute to begin running on the date of the attorney's act or omission as opposed to the date when the plaintiff may have suffered a legal injury.[209] The court also considered and extensively quoted from a similar case brought before the Supreme Court of Nebraska.[210]

The adoption of the "act or occurrence rule" was not without debate and dissent.[211] Within the court, concern was expressed over the abandonment of the "damage rule," which had been the court's position long before the enactment of the ALSLA.[212] In a pre-ALSLA decision, *Cofield v. Smith*,[213] the plaintiff filed suit against his former attorneys, who represented him in a felony prosecution.[214] The plaintiff was convicted and sentenced in December 1978.[215] The plaintiff filed a claim for legal negligence in 1985, "alleging that the defendants were negligent in advising him to plead guilty to the offense as stated in the 1978 indictment."[216] This allegation was based upon a 1985 petition filed by the plaintiff for a writ of habeas

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[208]ALA. CODE § 6-5-574(a)(1993) [emphasis added], cited in *Ex parte Panell*, 1999 WL 128388, at *6.

[209]*Ex parte Panell*, 1999WL 128388, at *6.

[210]*See id.* at *6, (quoting Rosnick v. Marks, 357 N.W.2d 186 (Neb. 1984)).

> Legislatures have profound impact on statutes of limitations. The Legislature of Nebraska is no exception. In formulating the statute of limitations for actions based on professional negligence, Nebraska's Legislature has expressly stated that such actions "shall be commenced within two years next after the alleged act or omission." When it selected the language "act or omission" found in § 25-222, the Nebraska Legislature rejected actual damage as the index for inception of the time limit for a suit based on malpractice. Had the Nebraska Legislature desired actual damage to be an element of the statute of limitations under examination, and at the risk of emphasizing the obvious, the patently simple legislative course would have been insertion of such terminology into the statute, that is, malpractice actions "shall be commenced within two years next after actual damage has been sustained by the claimant." However, this court cannot indulge in substitutional injection of "actual damage" into the malpractice statute of limitations, a phrase which would render "alleged act or omission" meaningless and repudiate the manifest legislative intent found in the unambiguous language of § 25-222. In utilizing the language found in § 25-222, the Nebraska Legislature has opted for the occurrence rule, tempered or ameliorated by a provision for discovery.

Rosnick, 357 N.W.2d at 190-91.

[211]As Mr. Justice Cook summarized, "[T]oday's opinion will only, at best, create confusion. At worst, it would make it impossible to determine when the limitations period begins to run on professionalmalpractice [sic] claims." *Ex parte Panell*, 1999 WL 1268388, at *11.

[212]*See Ex parte* Burnham, Klinefelter, Halsey, Jones & Cater, P.C., 674 So. 2d 1287, 1289 (Ala. 1995); *see also* Kachler v. Taylor, 849 F. Supp. 1503 (M.D. Ala. 1994).

[213]495 So. 2d 61 (Ala. 1986).

[214]*See id.* at 61.

[215]*See id.*

[216]*Id.*

corpus.[217] That petition had been granted and the "court determined that the 1978 conviction was based upon a legally defective indictment."[218] The defendant attorneys filed a motion for summary judgment based on the appropriate statute of limitation.[219] The trial court granted the motion.[220] On appeal, the Alabama Supreme Court affirmed the lower court's decision and ruled that the action had been filed beyond the statutory period.[221] The court rejected Cofield's argument that he did not suffer any legal injury until 1985 when the 1978 conviction was found to be based on a legally defective indictment.[222] Rather, the court ruled that Cofield's legal injury occurred in December 1978 when he was first convicted.[223]

> The plaintiff's argument is premised on the erroneous assumption that no legal injury could have occurred on December 21, 1978 (the date the plaintiff pleaded guilty, allegedly on the advice of the defendants, and was convicted and sentenced under a legally defective indictment). It was on that date that the plaintiff's cause of action accrued, because it was at that time that the plaintiff would have first suffered a legal injury for which he would have been entitled to commence an action for damages against the defendants. Although the plaintiff's damages may have been compounded subsequently by virtue of the effect which the 1978 conviction had on the punishment enhancement provisions of Alabama's Habitual Felony Offender Act, the statute would, nonetheless, have begun to run on the date the conviction was entered. This is so even though the damages for which the plaintiff now makes claim could not have been fully known at that time.[224]

The court's reasoning focused on the plaintiff's injury rather than on the attorney's act. This rationale remained constant when the Alabama Supreme Court began to examine the statute of limitations as prescribed by the ALSLA.

The first interpretation of Alabama Code section 6-5-574 was in *Michael v. Beasley*.[225] The plaintiffs brought suit against the defendant attorney alleging that he had negligently performed legal services while representing them in a suit for personal injuries.[226] The

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[217] *See id.*
[218] *Id.*
[219] *See id.*
[220] *See id.*
[221] *See id.* at 63.
[222] *See id.* at 62.
[223] *See id.*
[224] *Id.* at 62-63.
[225] 583 So. 2d 245 (Ala. 1991).
[226] *See id.* at 245.

underlying case was tried before a jury and a verdict was returned against the plaintiffs on August 13, 1987.[227] The plaintiffs appealed and the Alabama Supreme Court affirmed the judgment on September 16, 1988.[228] The plaintiffs alleged they were not informed of the court's decision until March 22, 1989.[229] The suit for legal malpractice was filed on February 26, 1990.[230] The defendant attorney filed a motion to dismiss asserting that plaintiffs failed to sue within the applicable statute of limitations period.[231] In determining whether the plaintiffs had timely filed their action on February 26, 1990, the court considered whether the plaintiffs' claim against the attorney accrued on: August 13, 1987, the date of the jury's verdict in the underlying case; on September 16, 1988, the date the Alabama Supreme Court affirmed the judgment of the underlying case; or on March 22, 1989, the date the plaintiffs alleged they were told by the defendant of the court's affirmance ruling.[232] If the plaintiffs' action accrued on August 13, 1987, their claim would have been time barred.[233] "If, however, the accrual date was September 16, 1988, or March 22, 1989, [the plaintiffs'] claim would not have been barred . . . because they would file their claim within the two-year [statute of] limitations period."[234]

In deciding that the plaintiffs' case was barred, the court found the plaintiffs had suffered a legal injury sufficient for them to have maintained a claim for legal malpractice on August 13, 1987.[235] Although the court did not describe or enumerate the legal injury the plaintiffs suffered, the reasons are obvious. On the date of the adverse jury verdict, the plaintiffs became obligated to expend additional monies for the appellate process including the continuing service of an attorney, the cost of the transcript, the cost of the appeal, and the inconvenience of the appeal. In finding that the plaintiffs' injury accrued on the date of the jury's verdict, the court held that a plaintiff was not required to exhaust all appellate remedies before filing a claim for legal malpractice.

In *Ladner v. Inge*,[236] another case that relied upon the accrual of plaintiff's injury to determine the statute of limitations, the court

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[227]*See id.*
[228]*See id.* at 246.
[229]*See id.*
[230]*See id.*
[231]*See id.*
[232]*See id.* at 251.
[233]*See id.*
[234]*Id.*
[235]*See id.*
[236]603 So. 2d 1012 (Ala. 1992).

affirmed summary judgment in favor of the defendant attorney because the complaint was untimely.[237] The defendant had represented the plaintiff in two property transactions, one in 1979 and the other in 1983.[238] In each of these sale transactions, the plaintiff received unsecured promissory notes from the purchasers.[239] "At no time did the parties enter into a mortgage agreement."[240] The purchasers later defaulted on the promissory notes.[241] When the plaintiff was unable to collect on the promissory notes, suit was filed against the attorney for legal malpractice.[242] The suit was not filed until 1990.[243] The plaintiff claimed that the defendant attorney had failed to protect her interests in the 1979 and 1984 property transactions by not requiring more security for the indebtedness than the two notes.[244] In affirming the lower court's decision, the Alabama Supreme Court found that the plaintiff's cause of action accrued at the time the promissory notes were executed and not when the purchasers defaulted.[245] The plaintiff was injured on the date she accepted the promissory notes as collateral for the property, because she was then bound by the terms of the agreement.[246] The court rejected the idea that no injury accrued until the purchasers defaulted on the promissory notes.[247] In the following portion of the opinion, the court outlined the reasons why the plaintiff's cause of action accrued at the time of the original transactions and not later when the defaults occurred.

> We must conclude that Ladner's complaint, filed on May 9, 1990, was not timely. In this case, the transfer of Ladner's interest to the Clevelands took place in two separate transactions. (1) On May 1, 1979, Ladner sold her interest in the southeast corner of the property; and (2) on June 1, 1984, she sold her interest in the southwest and northeast corners of the property, taking a promissory note, pursuant to the option agreement. Promissory notes were drafted and warranty deeds were executed at those times. A cause of action accrues, and the statutory period of limitations begins to run, when the person is injured or when damages are sustained. *Malb's Associates., Inc. v. Phillips*, 589 So. 2d 164 (Ala. 1991); *Cofield v. Smith*, 495 So. 2d 61 (Ala. 1986);

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[237] *See id.* at 1013.
[238] *See id.*
[239] *See id.*
[240] *Id.*
[241] *See id.*
[242] *See id.*
[243] *See id.*
[244] *See id.*
[245] *See id.* at 1015.
[246] *See id.*
[247] *See id.*

> *Garrett v. Raytheon Co.*, 368 So. 2d 516 (Ala. 1979); *Michael, supra.* Ladner sustained the alleged injury or damage in regard to both transactions when she accepted the unsecured promissory notes and delivered the warranty deeds. Therefore, Ladner's cause of action accrued for the first transaction on May 1, 1979, and for the second transaction on June 1, 1984. Ladner was injured or damaged and her cause of action accrued at those times because she was committed to receive unsecured promissory notes, which are less valuable than promissory notes secured by mortgages. In addition to having no security interest and having her claims vulnerable to the priority enjoyed by holders of other claims, Ladner could not sell or assign the unsecured promissory notes in the same manner as she could have sold or assigned a note secured by a mortgage; nor could she have transferred it for a comparable value.[248]

The Alabama Supreme Court found in *Pearce v. Schrimsher*[249] that the statute of limitations began on the date the written instrument in question was executed, and not later, when its terms were disputed.[250] The plaintiffs filed suit on May 14, 1990, claiming that the defendant attorney had erroneously given them a title opinion for certain property they had purchased.[251] The property was purchased on July 3, 1985.[252] The lower court dismissed the action on the plaintiffs' failure to file within the applicable statute of limitations.[253] On appeal, the Alabama Supreme Court affirmed the trial court's ruling that the plaintiffs had failed to timely file their complaint.[254] The court noted that the plaintiffs' cause of action accrued on July 3, 1985, when it was alleged that the transaction was closed.[255] The plaintiffs were bound to the terms of the agreement at that time.[256] Applying the court's ruling in *Ex parte Panell*[257] to factual scenarios similar to *Ladner v. Inge* [258] and *Pearce v. Schrimsher*,[259] the statute of limitations would begin to run on the date of the attorney's act or omission. A court would then have to address the nature of the act, i.e., whether it related to the drafting of a document or to advice that

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[248] *Id.*
[249] 583 So. 2d 253 (Ala. 1991).
[250] *See id.* at 254.
[251] *See id.* at 253.
[252] *See id.*
[253] *See id.*
[254] *See id.* at 254.
[255] *See id.*
[256] *See id.*
[257] No. 1962076, 1999 WL 1268388 (Ala. Dec. 30, 1999).
[258] 603 So. 2d 1012 (Ala. 1992).
[259] 583 So. 2d 253 (Ala. 1991).

the client execute it. If one applies a strict interpretation, the act accrued during the drafting of the defective document. An argument, although illogical, could be made that the statute began running even before the client signed and became bound by the terms of the document. In the concurring opinions of *Ex parte Panell*, Justices Cook and Johnstone expressed concern over such a scenario.[260]

While the determination of when the statute of limitations begins has been subject to a changing judicial position, the court has issued consistent rulings about the tolling of the statute. The court has ruled that the statute is not tolled until the legal injury is fully recognized or appreciated at some later date.[261] There is no distinction

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[260]Mr. Justice Cook stated:

> [S]ome of the language in the main opinion seems to suggest that the limitations period could begin to run before, or, in fact, whether or not, a cause of action ever accrues. More specifically, that opinion states: "Accordingly, that part of Michael holding that under the ALSLA a legal-malpractice cause of action accrues, and the statute-of-limitations period begins to run, when the client first suffers actual damage was a misconstruction of the ALSLA." ___ So. 2d at ___. [sic] It is unclear what the main opinion intends with respect to the accrual of a cause of action. Indeed, it suggests that the limitations period may commence before, or without, the accrual of a cause of action or the plaintiff's incurring a legal injury.

Ex parte Panell, 1999 WL 1268388, at *9 [emphasis added].

Mr. Justice Cook further described the situation in which the statute of limitations accrues and then expires before any damages are sustained.

> A plaintiff sues multiple defendants. The complaint contains fictitious-party allegations. After the original limitations period expires, the plaintiff's lawyer moves to amend to substitute Defendant X, a material party, for one of the fictitious parties. The plaintiff learns 1 year, 11 months, and 29 days after the original limitations period has expired that Defendant X has not been brought into the lawsuit. The plaintiff has suffered no damage at this juncture, and a cause of action has not accrued. The plaintiff would suffer damage only if the amendment is not allowed. However, under the rationale of the main opinion, the plaintiff would have to file a legal-malpractice complaint immediately, because the act or omission giving rise to the claim was the failure to add Defendant X before the running of the original limitations period. This would be the result if, as the language of the main opinion suggests, that opinion operates to sever the connection between the act or omission and the cause of action.

Id. at *11.

Justice Johnstone stated:

> I respectfully submit that the Legislature would not be remedying that "crisis" [of the increasing threat of legal-malpractice actions] by authorizing clients to sue their lawyers for acts, omissions, or failures which have not yet been caused, and may never cause, any damage whatsoever. I know of no other theory of Alabama statutory or common law whereby a plaintiff can sue for wrongdoing without damage. Rather, the standard rules of statutory construction require an interpretation consistent with the expressly avowed purpose of the statute, albeit at odds with some ineptly drafted language in the statute.

Id. at *13.

[261]ALA. CODE § 6-5-574(a) (1993) is subject to ALA. CODE § 6-2-3 (1993) which sets forth a separate statute of limitations for a fraud claim. The Legislature, however, requires that even considering an allegation of fraud, a suit for legal

between the initial injury versus injuries that are later compounded for purposes of defining when the statute begins to run.[262] Otherwise, the plaintiff would be able to extend the statute by having it begin to run only on the date of last injury as opposed to the first.[263] Such an argument was considered and rejected in *Cofield v. Smith*.[264] The Alabama Supreme Court recognized that while a plaintiff may suffer multiple or compound damages as a result of alleged legal malpractice, the statute of limitations is not delayed until the final injury.[265]

B. Bifurcation of the Underlying Suit

The premise for filing any claim for legal negligence is the plaintiff's belief that he has been "wronged" by the attorney in the underlying action. While the statute of limitations offers a procedural determination of the plaintiff's right to maintain a cause of action, the defense may also rely upon the right to sever the suit for legal negligence. Such a right is recognized by statute.

> (a) If the liability to damages of a legal services provider is dependent in whole or in part upon the resolution of a underlying action, the outcome of which is either in doubt or could have been affected by the alleged breach of the legal services provider standards of care, then, in that event, the court shall upon the motion of the legal services provider, order the severance of the underlying action for separate trial.[266]

Requiring the plaintiff to prove he would have been successful in the underlying suit imposes on the plaintiff an absolute requirement to show that "but for" the negligence of the attorney, he would have recovered. In essence, there are two separate cases pending before the

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malpractice cannot be commenced more than four years after the act. ALA. CODE § 6-5-574(b) (1993).

[262]*See* Mississippi Valley Title Ins. v. Hooper, 707 So. 2d 209 (Ala. 1997); *see also* Jones v. McDonald, 631 So. 2d 869 (Ala. 1993).

[263]Based upon *Ex parte Panell* and the adoption of the "act or omission" rule, it would not be an issue whether the statute is tolled because of continuing damage. Rather, the court would limit its inquiry to the attorney's act as opposed to the plaintiff's injury. *See generally Ex parte Panell*, 1999 WL 1268388.

[264]495 So. 2d 61 (Ala. 1986). As stated in *Ex parte* Panell, this case has been superseded by statute.

[265]*See id.* at 62-63.

[266]ALA. CODE § 6-5-579(a) (1993).

court.[267]

Once severed, the first action relates to the underlying suit or controversy, while the second action relates to the claim for legal malpractice. Bifurcation is critical because (1) the plaintiff is required to litigate the underlying action in the same forum in which it was originally filed; (2) the standard of review in the underlying action may be more limited and may favor the defendant; (3) the admissibility of evidence should be limited to evidence that was or would have been admissible at the time; and (4) resolution of the underlying action may offer a causation defense and grounds for summary judgment if there is a finding that the plaintiff would not have prevailed.

In ruling upon a defendant's motion to sever, the trial court should note the strong legislative intent that such a motion *shall* be granted.[268] According to the statutory language, the trial court does not have discretion to deny a properly supported motion.[269] The court should also be guided by the Legislature's liberal language of "in whole or in part" which directs the action to be severed if any percentage of the plaintiff's damages is related to the outcome of the underlying case.[270] The plaintiff should not be allowed to circumvent this requirement by contending that the majority of damages is unrelated to the underlying action. Once the motion to sever is granted, the trial court should require the plaintiff to try the original case in the same forum in which it was heard or could have originally been heard. If the underlying case was before a judge, administrative body, or judicial panel, the plaintiff is required to retry the case in the same forum. The plaintiff should not be allowed to expand the legal remedy beyond what was originally available.

The Alabama Supreme Court, however, has yet to address whether upon order of bifurcation the plaintiff must try the underlying case in the forum and under the standard of review that would have originally applied. There is case precedent by a trial court.[271] The

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[267]Even if the suit is not formally bifurcated to require two separate trials, the plaintiff must still prove that "but for" the attorney's conduct, the plaintiff would have prevailed. Otherwise, the plaintiff does not satisfy the element of causation. ALA. CODE § 6-5-579.

[268]*See* ALA. CODE § 6-5-579.

[269]Even if the defendant does not move for severance pursuant to Alabama Code section 6-5-579, the legal malpractice action must necessarily still be viewed as two actions. The plaintiff must prove he would have recovered in the underlying action before the claim against the defendant can be considered. ALA. CODE § 6-5-579.

[270]ALA. CODE § 6-5-579(a).

[271]Shelton v. Dawson (Circuit Court of Jefferson County CV-93-09624). Discussion based on the Author's personal knowledge of the case.

plaintiff was terminated as a police officer and appealed the action to the Jefferson County Personnel Board. The Board affirmed the Police Department's decision. The plaintiff then appealed the ruling to the Circuit Court of Jefferson County. A legal malpractice action followed. The defendant filed a motion to sever and a motion to have the underlying case tried as if an appeal had been allowed. That trial would have been by a non-jury judicial panel as opposed to a civil jury. The trial court properly granted the motion and transferred the underlying case to the presiding judge of the Circuit Court of Jefferson County. A three-judge panel was appointed to hear the underlying case and rule whether the plaintiff would have been reinstated "but for" the negligence of the attorney. Before the hearing, the plaintiff dismissed the case in exchange for a mutual release.

Bifurcating the two cases also insures that the proper standard of review will be applied. In *Shelton* the standard of review for the three judge panel was to determine whether *any evidence* supported the ruling by the Personnel Board.[272] Furthermore, the plaintiff may also be limited to the scope of evidence that can be admitted. In *Shelton*, the judicial panel could only review the record before the Personnel Board.[273] The plaintiff would not be allowed to introduce evidence in the underlying case which could not or should not have been allowed in the original action.

C. *Evidence of Causation*

The plaintiff must prove that "but for" the negligence of the attorney, the plaintiff would have prevailed in the "underlying cause of action."[274] The underlying matter includes any cause of action whether civil, criminal, administrative, or in equity. In an 1842 opinion, the Alabama Supreme Court set down the general rule which still holds today that "[t]he measure of damages to which an attorney is liable [to his client] for the failure to perform his undertaking . . . is the loss which has resulted from his negligence."[275] The Alabama Supreme Court has properly dismissed legal malpractice actions when there was a showing that the plaintiff could not have recovered in the underlying action. In *Cribbs v. Shotts*[276] the plaintiffs brought suit

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[272]*See id.*

[273]*See id.*

[274]Johnson v. Horne, 500 So. 2d 1024, 1026 (Ala. 1986); Hulsey v. Coggin, 470 So. 2d 1202, 1205 (Ala. 1985).

[275]Madris' Adm'rs v. Shackleford, 4 Ala. 493 (1842).

[276]599 So. 2d 17 (Ala. 1992).

against the defendant attorney for failing to attend a hearing at which the court appraised property owned by the plaintiffs.[277] The plaintiffs contended that the court's appraisal was too low and that because their attorney was absent, their interest had not been protected.[278] The court affirmed the trial court's entry of directed verdict because the plaintiffs did not prove that the presence of the attorney would have made a difference in the value assigned to their property.[279]

> Although the result of the proceeding *may* have been different had Shotts been present at the hearing, the Cribbses were required to meet the higher burden of proving that the result *would* have been different. Without engaging in speculation, we are unable to say that the Cribbses met their higher burden.[280]

The court found that the plaintiffs "failed to show that, but for Shotts's alleged negligence, the disposition of the sale for division proceeding would have been different."[281]

In *Independent Stave Co. v. Bell, Richardson and Sparklin, P.A.*,[282] the court affirmed summary judgment for the defendants for their alleged failure to properly file a bankruptcy petition.[283] The plaintiff claimed "that the defendants negligently failed to file timely proof of [the plaintiff's] claim and thereby caused [the plaintiff] to be barred from recovering $426,000 from the bankrupt estate . . . . In addition, [plaintiff sought] damages based on expenses incurred in its failed attempt in the bankruptcy court . . . ."[284] The bankruptcy court ruled a timely proof of claim had not been filed.[285] Nevertheless, summary judgment was granted for the defendant attorneys because the plaintiff could not present substantial evidence that but for the failure to timely file a claim, plaintiff would have been able to recover from the bankruptcy estate.[286] The trial court noted that the plaintiff was an unsecured creditor.[287] There were other secured creditors with unpaid claims against the bankrupt estate.[288] Considering that the

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[277] *See id.* at 18.
[278] *See id.*
[279] *See id.* at 19.
[280] *Id.*
[281] *Id.*
[282] 678 So. 2d 770 (Ala. 1996).
[283] *See id.* at 772.
[284] *Id.* at 771.
[285] *See id.*
[286] *See id.*
[287] *See id.* at 772.
[288] *See id.*

assets of the bankruptcy estate were approximately $1,200,000, and that there were secured claims of approximately $5,000,000, the court recognized that the plaintiff would likely have never been in a position to recover for any of the claim even if proof had been filed in a timely fashion.[289]

Independent Stave Co. is also significant for the holding that a plaintiff may not recover consequential expenses incurred in an effort to remedy a lawyer's negligence. As part of its claim, the plaintiff in *Independent Stave Co.* sought to recover not only the money that it allegedly had lost from the bankrupt estate, but also monies spent trying to remedy the failure to timely file a proof of loss.[290] The court held that recovery of any consequential expenses is conditioned upon proof that the plaintiff would have recovered in the underlying case.[291]

The plaintiff in *Boros v. Baxley*[292] claimed that his underlying fraudulent misrepresentation action against a real estate broker was lost due to the failure of the defendants to timely file the complaint.[293] The Alabama Supreme Court affirmed the trial court's directed verdict "on the basis that [the plaintiff] had failed to show that he would have recovered against [the real estate agent and her company for] fraudulent misrepresentation had that case been timely filed."[294] There was no evidence that the plaintiff "relied upon [the real estate agent's] representations . . . . In fact, [the plaintiff's] own testimony establishe[d] that he disbelieved [the agent's] assertions . . . ."[295] Because the plaintiff failed to establish the necessary element of reliance in his underlying fraudulent misrepresentation claim, he failed to establish his legal malpractice claim.[296]

In *Hall v. Thomas*,[297] the plaintiff brought suit against his former attorney for alleged malpractice in the representation of Hall in a criminal matter.[298] In the underlying case, Hall was "charged with escape [while] . . . serving time for murder . . . . He was convicted in a nonjury trial on the escape charge and sentenced to three months."[299]

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[289] *See id.*
[290] *See id.*
[291] *See id.*
[292] 621 So. 2d 240 (Ala. 1993).
[293] *See id.* at 241.
[294] *Id.* at 241.
[295] *Id.* at 242.
[296] *See id.* at 243.
[297] 456 So. 2d 67 (Ala. 1984).
[298] *See id.* at 68.
[299] *Id.*

Afterwards, the court learned that Hall had been entitled to a jury trial, and therefore granted Hall a new trial with a jury.[300] Hall was again convicted and sentenced to the same amount of time.[301] In affirming the defendant attorney's summary judgment, the Alabama Supreme Court noted that there was no evidence that Hall suffered any damage as a consequence of the alleged negligence of the defendant attorney.[302] "A claim for malpractice requires a showing that in the absence of the alleged negligence the outcome . . . would have been different."[303] In the second trial, the plaintiff was convicted of the same charges and given the same sentence.[304] There was no difference in the plaintiff's status regardless of any action taken by the defendant attorney.[305]

The ruling in *Tyree v. Hendrix*,[306] another decision arising out of a criminal matter, affirmed the requirement that a plaintiff must prove he would have received a less severe penalty.[307] The plaintiff alleged that the defendant attorney erroneously told the plaintiff his conviction would entail less jail time.[308] The plaintiff contended that if he had been aware of the maximum amount of prison time he could have served, he would have considered a plea bargain arrangement.[309] The Alabama Supreme Court rejected the plaintiff's contention and affirmed the trial court's dismissal.[310] The court noted that the plaintiff's contention was "too speculative to support a claim of malpractice. There [was] no allegation that the district attorney offered a lesser sentence in exchange for a guilty plea or that the trial court would have accepted such a sentencing arrangement."[311]

While a plaintiff's failure to prove he would have prevailed in the underlying case is an absolute ground for dismissal for failure to prove causation in a legal malpractice action, the inverse does not necessarily hold true. To hold otherwise would invoke a doctrine of strict liability on the attorney which has not been embraced by the court. When there is a finding of attorney negligence in the

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[300] *See id.*
[301] *See id.*
[302] *See id.*
[303] *Id.*
[304] *See id.*
[305] *See id.*
[306] 480 So. 2d 1176 (Ala. 1985).
[307] *See id.* at 1177.
[308] *See id.*
[309] *See id.*
[310] *See id.* at 1178.
[311] *Id.* at 1177.

underlying matter, the trial court should submit to the jury the finding that the plaintiff would have recovered in the underlying case. The trial court should not, however, make the determination or instruct the jury as to whether or not the acts or omissions of the attorney constituted negligence. Such a finding by the court would invade the province of the jury. The jury should then consider whether the act or omission by the attorney was unreasonable and breached the standard of care. If the jury finds there was a breach, then the issue of damages is appropriate.[312]

D. Contributory Negligence

The Alabama Supreme Court has recognized that the attorney may assert contributory negligence as an affirmative defense.[313] The defense is generally available "(1) where the client was also an attorney and/or otherwise insisted on active participation in the conduct of the case, (2) where the client failed to follow the attorney's advice or instructions, and (3) where the client fails to disclose all relevant facts to the attorney."[314] The court has also implied that an attorney may assert assumption of the risk as an affirmative defense.[315]

E. Compliance with the Rules of Professional Conduct

The Alabama Legislature permits an attorney to introduce a finding of compliance with the rules of professional conduct.[316] Alabama Code § 6-5-578(a) provides:

> 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.[317]

Although the courts have not construed the meaning of this statute, it

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[312]ALA. CODE § 6-5-572 (1975). The Supreme Court of Alabama has interpreted the statute as not requiring that attorneys be infallible. *See* Pickard v. Turner, 592 So. 2d 1016, 1020 (Ala. 1992).

[313]Ott v. Smith, 413 So. 2d 1129, 1135 (Ala. 1982).

[314]*Id.* at 1134.

[315]Simpson v. Coosa Valley Prod. Credit Ass'n, 495 So. 2d 1029, 1033 (Ala. 1986).

[316]*See* ALA. CODE § 6-5-578(a) (1975).

[317]*Id.*

appears from the plain language of the statute that evidence of compliance with the rules of professional conduct can be used as both a defense and a rebuttal to a claim of negligence by a plaintiff. It is noteworthy that the plaintiff cannot introduce a finding of noncompliance.[318]

VII. SUMMARY JUDGMENT

In the event the suit cannot be dismissed pursuant to Alabama Rule of Civil Procedure (ARCP) 12, a motion for summary judgment can be properly filed pursuant to ARCP 54 and 56, supported by an affidavit of the defendant attorney.[319] The Alabama Supreme Court has recognized that an attorney's affidavit is sufficient to shift the burden of proof to the plaintiff.[320] If the plaintiff fails to present adequate expert testimony to create an issue of fact, then summary judgment may be properly granted.[321] In drafting and filing an affidavit, specific consideration should be given to the adequacy of the affidavit.[322] As described, the attorney or expert should satisfy both the procedural and substantive requirements in order to confirm the attorney's capacity and knowledge of the duty owed.[323]

VIII. CONCLUSION

There is every reason to expect a continuing increase in the filing of suits for legal malpractice. Members of the Alabama Bar who advocate and file suits for legal malpractice have greatly increased in number. Suits are now prosecuted by major firms throughout the state. The "stigma," if it ever existed, of filing these actions has now vanished. With the proliferation of these actions, the Alabama Legislature must give further attention to the rights of attorneys. The Alabama Legislature should expand the ALSLA and adopt those provisions of the AMLA not already adopted. This would

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[318] *See* Terry Cove North, Inc. v. Marr & Friedlander, P.C., 521 So. 2d 22, 23-24 (Ala. 1988); *Ex parte* Toler, 710 So. 2d 415, 416 (Ala. 1988).

[319] *See* Phillips v. Alonzo, 435 So. 2d 1266, 1267 (Ala. 1983).

[320] *See* McDowell v. Burford, 646 So. 2d 1327, 1328 (Ala. 1994).

[321] *See id.*

[322] *See* Crawford v. Hall, 531 So. 2d 874, 875 (Ala. 1988); *see also* Pruitt v. Zeiger, 590 So. 2d 236, 237-39 (Ala. 1991).

[323] *See Crawford*, 531 So. 2d at 875.

give a fuller and greater protection to lawyers in Alabama. It would allow the attorney to seek the admiration of the Reverend Sykes of the world as opposed to being the subject of contempt by the Bob Ewells.