

1 **An Overview of Professional Liability Matters**

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- ▶ The Basics of Professional Liability Matters
- ▶ Avoiding Legal Malpractice
- ▶ Serving as an Expert in Professional Liability Matters

3 **Claims Against Lawyers in PA**

- ▶ Legal Malpractice
 - ▶ Negligence
 - ▶ Breach of Contract
- ▶ Dragonetti Act (Wrongful Use of Civil Proceedings)
- ▶ Fair Debt Collection Practices Act
- ▶ Other – Consumer Fraud, Libel/Slander, Civil Rights, etc.

4 **Elements of a Legal Malpractice Claim**

- ▶ Duty (Standard of Care)
- ▶ Breach
- ▶ Causation (“Case within a Case”)
- ▶ Damages

5 **Legal Malpractice – Unique Issues in PA**

- ▶ No comparative negligence
- ▶ No delay damages
- ▶ Statute of limitations?
- ▶ Uncollectibility as an affirmative defense

6 **Frequency of Legal Malpractice Claims**

- ▶ Estate, Trust and Probate
 - ▶ 12.05% of legal malpractice claims in 2015
 - ▶ 7.59% of legal malpractice claims in 1995

Source: ABA – Profile of Legal Malpractice Claims 2012-2015

- ▶ 12.18% of MLM legal malpractice claims in 2015

7 **Frequency of Legal Malpractice Claims**

8 **Areas of Practice**

9 **Top 10 Legal Malpractice/Ethics Mistakes**

- ▶ 10. Screening Clients
- ▶ 9. Misrepresentation
- ▶ 8. Trust Account
- ▶ 7. Business Interest
- ▶ 6. Neglect
- ▶ 5. Dabbling
- ▶ 4. Engagement Agreements
- ▶ 3. Suing the Client
- ▶ 2. Conflict of Interest
- ▶ 1. Missed Deadlines

10 **MLM Example #1**

- ▶ Attorney is preparing an estate plan and advanced healthcare directive for Father.
- ▶ Son #1 is assisting Father in gathering information and communicating with Attorney.
- ▶ Attorney sends proposed estate plan to Father by e-mail, copying Son #1.
- ▶ In accordance with Father's wishes, the estate plan leaves the majority of his assets to Son #1.
- ▶ However, Father did not want Son #1 to know his estate plan and is upset that Attorney communicated with Son #1 without his consent.
- ▶ Father demands that Attorney compensate him for his emotional distress and compensate Son #2 and Daughter for unequal distribution.

11 **MLM Example #2**

- ▶ Mother retains Attorney to prepare estate plan.
- ▶ Mother tells Attorney that she is getting forgetful in her old age.
- ▶ Attorney sends Mother to be evaluated by Psychiatrist who determines that she has capacity.
- ▶ The estate plan is not signed for 10 months. Attorney recommends to Mother that she be re-evaluated by Psychiatrist but does not follow through on this recommendation.
- ▶ Mother passes away, leaving most of her assets to Son #1.
- ▶ Son #2 filed a lawsuit, alleging that Mother lacked capacity at the time she signed the estate plan.

12 **Serving as an Expert Witness in Professional Liability Matters**

- ▶ Pennsylvania Rule of Evidence 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise.

13 **Certificate of Merit**

- ▶ Pennsylvania Rules of Civil Procedure 1042.1 to 1042.8.
- ▶ Required in any case where it is alleged that a professional deviated from the required professional standard of care.
- ▶ 60 days after complaint is filed.
- ▶ Must state that 1) an appropriate licensed professional has 2) provided a written statement that 3) the conduct fell below the standard of care and caused harm to the plaintiff.

14 **Considerations When Retaining an Expert Witness**

- ▶ Qualifications/reputation
- ▶ Ease to work with

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- ▶ Ability as a witness
- ▶ Reasonableness of fees

15 **Role of an Expert**

- ▶ Provide objective expertise – help attorney evaluate case
- ▶ Not an advocate

16 **Possible Functions of an Expert**

1. Review documents and provide oral opinion
2. Consult regarding avenues of discovery, deposition preparation, settlement value, etc.
3. Prepare written report
4. Provide deposition testimony (Federal Court and some state courts)
5. Testify at trial

17 **Contents of an Expert Report**

- ▶ List of documents reviewed
- ▶ Factual summary
- ▶ Opinions

Considerations:

- ▶ Can you opine on the likely outcome of the underlying matter?
- ▶ How exhaustive should report be?

18 **Other Issues**

- ▶ Are communications with attorney and draft expert reports discoverable?
- ▶ What billing arrangements are acceptable?
- ▶ Should you prepare an engagement letter?
- ▶ Who is your client?
- ▶ Are there liability/ethical concerns?

19 **Steve's Experiences as an Expert Witness**

- ▶ Case Study
 - ▶ *P.R., et al. v. DEFENDANT LAW FIRM*

20 **Factual Background**

1. Plaintiffs' sister P.R., age 45, suffered a cerebral aneurism in 2004 and became totally incapacitated.
2. After P.R. ran out of savings, Plaintiffs retained Defendant Law Firm in the latter part of 2010 initially to apply for and obtain Medicaid benefits for P.R. in New Jersey under its home and community based waiver program for the traumatically brain injured.
3. P.R. received at that time income from Social Security in the amount of \$1,950.00 per month and a state teacher's pension in the amount of \$3,450.00 per month.

21 **Factual Background – Continued**

4. In January, 2011, Defendant Law Firm prepared a special needs "qualified income" trust (QIT) naming P.R. as the beneficiary, one Plaintiff - sister as Trustee and the other Plaintiff - sister as

successor Trustee. The trust was executed by P.R.'s mother. The Defendant Law Firm then purported to assign all of P.R.'s income to the trust and attempted to apply for the waiver program.

5. The N.J. Division of Medical Assistance and Health Services (DMAHS) informed Defendant Law Firm that it would not permit the use of the QIT to qualify for M.A. in the waiver program. Defendant Law Firm then advised Plaintiffs - sisters of the foregoing and they thereafter admitted P.R. to a nursing facility in February of 2011.

22 **Factual Background – Continued**

6. Defendant Law Firm advised Plaintiffs that the QIT would be effective in preserving P.R.'s income and it thereafter applied for M.A. as a medically needy applicant in N.J.'s nursing home program.
7. After attempting unsuccessfully to secure M.A. at the county level, Defendant Law Firm appealed the county board's denial and requested a hearing which ultimately also proved to be unsuccessful. The ALJ held that the Social Security could not be assigned to the Trust under the Social Security Act and the state teacher's pension could not be assigned to the Trust under the Employee Retirement Income Security Act (ERISA). Accordingly, the income was countable for purposes of determining initial eligibility. The Defendant Law Firm then requested reconsideration of the decision of the Office of Administrative Law.

23 **Factual Background – Continued**

8. In the meantime, the Defendant Law Firm secured an opinion from the state teacher's pension board that the pension could be paid directly to the trust provided the pension was "voluntarily revocably" assigned to the special needs trust.
9. Ultimately, all attempts to qualify for M.A. proved unsuccessful but by that time the nursing facility was owed \$105,000.00, and much of the money that was ineffectually assigned to the trust was spent for P.R., but not for her care in the facility. Nursing facility then sued P.R. and Plaintiff - sisters for the outstanding balance due.

24 **Factual Background – Continued**

10. Plaintiff - sisters obtained other counsel and settled the underlying lawsuit by entering into a payment arrangement and agreeing to pay off the full balance from any proceeds awarded in a malpractice action.
11. Plaintiff - sisters never tried to compromise the debt allegedly owed by them through negotiation. Furthermore, there was an email from their new counsel to the sisters that it really did not matter whether the debt was correctly calculated or was compromised in mitigation of damages because the Defendant Law Firm would be liable for whatever the Plaintiff - sisters paid to the nursing facility out of pocket.

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