

Chapter 1

Legal Elements of a Claim

1-1 INTRODUCTION

The risks for District of Columbia (“D.C.”) lawyers from bar grievances and legal malpractice suits are significant. Indeed, during the period between August 1, 2018 and July 31, 2019, in the District of Columbia, 1,234 complaints were filed with the Office of Disciplinary Counsel.¹ Of the 1,234 complaints filed in the 2018-2019 Board term, the Office of Disciplinary Counsel opened 317 docketed complaints for formal investigation. Meanwhile, the amount that law firms or insurers are paying in indemnity or settlement payments in litigation is steadily increasing, making malpractice claims more expensive to litigate or settle than ever before.² Thus, it is critical that practitioners continue to develop an understanding of the basic elements of a legal malpractice cause of action and the steps to take to prevent or minimize liability for such claims.

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

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

¹ District of Columbia, Board on Professional Responsibility Annual Report 2018-2019, available at <https://www.dcbbar.org/getmedia/545efc5d-d66d-41f1-988a-28a214077b38/2018-19-Annual-Report> (last visited Jan. 13, 2021).

² Ames & Gough, Rising U.S. Legal Malpractice Claims Continue to Plague Law Firms, available by request at info@amesgough.com; ABA Standing Comm. on Lawyers’ Prof’l Liability, Profile of Legal Malpractice Claims 2012-2015 (Sept. 2016).

- (2) a breach of that duty;
- (3) a proximate causal connection between the negligent conduct and the resulting injury; and
- (4) actual loss or damage resulting from the attorney's negligence.³

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

1-2 DUTY

1-2:1 Generally

An attorney is not necessarily liable for every harm his or her professional negligence causes to a potential plaintiff. Instead, an attorney's liability is limited to the class of people to whom the attorney owes a duty to exercise ordinary care, skill, and diligence in the performance of professional services. Typically, an attorney owes a duty to only his or her clients. Indeed, "[a] threshold requirement for a legal malpractice action is the existence of an attorney-client relationship."⁴ This proof is essential because "[a]bsent such relationship, there is no duty to breach."⁵ Whether

³ *Harris v. U.S. Dep't of Justice*, 600 F. Supp. 2d 129 (D.D.C. 2009); see also *Seed Co. Ltd. v. Westerman, Hattori, Daniels & Adrian, LLP*, 961 F.3d 1190, 1196 (D.C. Cir. 2020); *Guo Wengui v. Clark Hill, PLC*, 440 F. Supp. 3d 30, 38 (D.D.C. 2020); *Beach TV Props., Inc. v. Solomon*, 306 F. Supp. 3d 70, 93 (D.D.C. 2018); *Venable LLP v. Overseas Lease Grp., Inc.*, No. 14-02010 (RJL), 2015 U.S. Dist. LEXIS 98650, at *5, 2015 WL 4555372, at *2 (D.D.C. July 28, 2015); *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 902 (D.C. 2013); *Antiballistic Sec. & Prot., Inc. v. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC*, 789 F. Supp. 2d 90, 95 n.3 (D.D.C. 2011); *Johnson v. Sullivan*, 748 F. Supp. 2d 1, 9 (D.D.C. 2010); *Martin v. Ross*, 6 A.3d 860, 862 (D.C. 2010); *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 664 (D.C. 2009); *Niosi v. Aiello*, 69 A.2d 57, 60 (D.C. 1949). Federal question jurisdiction will lie in a malpractice action if the federal issue is: (1) necessarily raised; (2) actually disputed; (3) substantial; and (4) capable of resolution in federal court without disrupting federal-state balance. *Gunn v. Minton*, 133 S. Ct. 1059 (2013); *Apton v. Volkswagen Grp. of Am., Inc.*, 233 F. Supp. 3d 4 (D.D.C. 2017) (same); *Capitol Hill Grp. v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 489 (D.C. Cir. 2009) (referring legal malpractice case to bankruptcy court because action arose in a case under Title 11).

⁴ *Hiligh v. Sands*, 389 F. Supp. 3d 69, 73 (D.D.C. 2019).

⁵ *Hiligh v. Sands*, 389 F. Supp. 3d 69, 73 (D.D.C. 2019); *Taylor v. Akin, Gump, Strauss, Hauer & Feld*, 859 A.2d 142, 147 (D.C. 2004) (finding law firm no longer owed plaintiff any

an attorney-client relationship exists or existed between an alleged client and an attorney is typically a question for a jury.⁶ However, as discussed herein, there are additional circumstances that give rise to an implied attorney-client relationship or that support a duty to a non-client third party.

1-2:2 Duty to Client

1-2:2.1 Who is the Client?

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

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

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

Third, D.C. courts have found that in limited circumstances, professionals owe a duty to exercise reasonable care to certain non-client third parties who are the direct and intended beneficiaries of the contracted-for services.⁷

duty with respect to the first lawsuit because the only source of such a duty (her tenancy) had come to an end).

⁶ *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 45 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

⁷ *Hopkins v. Akins*, 637 A.2d 424, 429 (D.C. 1993); *Williams v. Mordkofsky*, 901 F.2d 158, 163 (D.C. Cir. 1990).

1-2:2.2 Express Attorney-Client Relationship

The existence of an attorney-client relationship is the threshold question in a legal malpractice case.⁸ An express relationship, however, is the easiest to identify and is infrequently contested or litigated.⁹ In such a representation, the attorney-client relationship generally is expressed by a written contract.¹⁰ Doubt about whether a client-lawyer relationship exists can be eliminated by the lawyer, preferably in writing, so that the client will not mistakenly believe the lawyer is looking after the client's affairs when the lawyer has ceased to do so.¹¹

An express attorney-client relationship is personal and not vicarious.¹² Additionally, courts in other jurisdictions have held that an attorney in an express privileged relationship with a client may not be contractually relieved from the duty to exercise reasonable care; any attempt to do so is void as against public policy.¹³

1-2:2.3 Implied Attorney-Client Relationship

The D.C. Court of Appeals has confirmed that “neither a formal agreement nor the payment of fees is necessary to create an attorney-client relationship.”¹⁴ It is not necessary for an attorney

⁸ *Hiligh v. Sands*, 389 F. Supp. 3d 69, 73 (D.D.C. 2019).

⁹ Indeed, the existence of an attorney-client relationship is litigated infrequently because the parties typically recognize it when they have agreed to an express relationship. One of the only contexts in which the express relationship is litigated, therefore, is in determining who the real party in interest is after a bankruptcy. See *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 795 (D.C. Cir. 2010) (a trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed).

¹⁰ *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998); *In the Matter of Lieber*, 442 A.2d 153, 156 (D.C. 1982); *Udall v. Littell*, 366 F.2d 668, 676 (D.C. Cir. 1966).

¹¹ See *In re Dickens*, 174 A.3d 283, 297 (D.C. 2017); D.C. R. Prof'l Conduct 1.3, cmt. 9.

¹² This is a well-accepted premise nationwide. See, e.g., *Attorney Grievance Comm'n of Maryland v. Potter*, 380 Md. 128, 157 (2004); *Stephen W. Holaday, P.C. v. Tieman, Spencer & Hicks, L.L.C.*, 609 S.W. 3d 771, 778 (Mo. Ct. App. 2020), transfer denied (Aug. 27, 2020); *Crane v. Albertelli*, 592 S.E.2d 684, 685 (Ga. Ct. App. 2003); *American Cont'l Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12, 13 (Ky. Ct. App. 1998); *In the Matter of Cupples*, 952 S.W.2d 226, 234 (Mo. 1997); *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 17, 945 P.2d 317, 328 (Ct. App. 1996), as corrected on denial of reconsideration (Jan. 13, 1997); *Bump v. Stewart, Wimer & Bump, P.C.*, 336 N.W.2d 731, 736 (Iowa 1983); *In re Petition for Rule of Court Governing Lawyer Advert.*, 564 S.W.2d 638, 641 (Tenn. 1978); *Young v. Scarazzo*, 30 Pa. D. & C.2d 324, 334 (Pa. Com. Pl. 1963).

¹³ *Little v. Middleton*, 401 S.E.2d 751, 754 (Ga. Ct. App. 1991).

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

to take substantive action and give legal advice in order to establish such a relationship.¹⁵

Following the general rule that contracts are formed according to the objective manifestation of mutual intent, an attorney-client relationship generally cannot be created unilaterally by the client.¹⁶ All that is required to create an attorney-client relationship is that the parties, explicitly or by their conduct, manifest an intention to create the attorney-client relationship.¹⁷ A client's perception that an attorney is his or her counsel is a consideration in determining whether a relationship exists.¹⁸ However, the client's perception of the relationship is not dispositive to whether an attorney-client relationship exists; rather, D.C. courts consider the totality of the circumstances.¹⁹ An attorney-client relationship hinges on the client's intention to seek legal advice and the client's belief that they are consulting an attorney.²⁰ The intent of the person seeking advice is assessed from that person's viewpoint, not that of the attorney.²¹ The ultimate issue is whether the plaintiff reasonably believed he or she was seeking legal advice.²²

An attorney-client relationship can exist even if the parties do not have a written agreement, the client does not pay the attorney any fees, and the attorney does not give the client any legal advice.²³ In

¹⁵ *In the Matter of Lieber*, 442 A.2d 153, 156 (D.C. 1982).

¹⁶ *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 209 (D.D.C. 2013).

¹⁷ *In re Dickens*, 174 A.3d 283 (D.C. 2017); *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 209 (D.D.C. 2013).

¹⁸ *In re Dickens*, 174 A.3d 283, 296 (D.C. 2017); *In the Matter of Lieber*, 442 A.2d 153, 156 (D.C. 1982).

¹⁹ *In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015); *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998); *In re Robbins*, 192 A.3d 558, 563 (D.C. 2018).

²⁰ *Geier v. Conway, Homer & Chin-Caplan, P.C.*, 983 F. Supp. 2d 22, 36 (D.D.C. 2013); *N.L.R.B. v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 312 (D.D.C. 2009) (finding meager piece of evidence is not enough to carry that burden of establishing that the Union intended to seek legal advice or services from the NLRB, considered its communications confidential, and that its belief was reasonable).

²¹ *Jones v. U.S.*, 828 A.2d 169, 176 (D.C. 2003).

²² *Jones v. U.S.*, 828 A.2d 169, 176 (D.C. 2003); *see also Breen v. Chao*, 304 F. Supp. 3d 9, 26 (D.D.C. 2018) (once an attorney has entered an appearance in a pending lawsuit, the attorney may not unilaterally decide to consider a client unrepresented simply because the client has not paid fees or because a motion to withdraw from the case is pending before the court).

²³ *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 45 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

determining whether an attorney-client relationship exists, courts have considered factors such as:

- (1) the character or nature of the information allegedly shared with the attorney;
- (2) the passage of time between the alleged former representation and the current litigation;
- (3) the payment of fees; and
- (4) the existence of a formal agreement.²⁴

Additional factors considered include whether the client perceived that an attorney-client relationship existed (although as noted above, this is rarely dispositive on its own); whether the client sought professional advice or assistance from the attorney; whether the attorney took action on behalf of the client; and whether the attorney represented the client in proceedings or otherwise held himself or herself out to others as the client's attorney.²⁵

The D.C. courts have upheld claims against attorneys even in the absence of a retainer agreement or engagement letter. In *In re Bernstein*,²⁶ the attorney argued that he was not acting as an attorney for the clients based on the absence of a written retainer agreement for the particular matter, and the fact that he was never paid for his representation.²⁷ The court explained that the argument was “baseless” following the general rule that neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship.²⁸

The court found “substantial evidence” of an attorney-client relationship where the record showed that the attorney had contacted a third party on behalf of the alleged clients; threatened to sue the company; and filed a lawsuit on their behalf.²⁹ Further,

²⁴ *United States v. Crowder*, 313 F. Supp. 3d 135, 144-45 (D.D.C. 2018); *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 209 (D.D.C. 2013).

²⁵ *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 45 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014); *see also Hiligh v. Sands*, 389 F. Supp. 3d 69, 73 (D.D.C. 2019).

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

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

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

²⁹ *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998).

one of the clients repeatedly contacted the attorney about the case and issued a letter discharging him.³⁰

Courts also take care to look at the parties' intent in assessing whether a privileged relationship exists. In *United States v. Crowder*,³¹ the court found that there was no attorney-client relationship between an attorney and a co-defendant where the attorney and the alleged client never explicitly expressed a desire to form an attorney-client relationship, and the purported client had never paid the attorney nor signed any agreement.³² The sum total of the evidence suggesting an attorney-client relationship consisted of the attorney's statements in emails that he "reached out to" or "instructed" the alleged client to provide documents, and the attorney's implied threat to take court action to prevent the government from enforcing subpoenas against the co-defendant.³³

The attorney clarified to the court that he never represented the alleged client, nor even had a one-on-one conversation with her. The attorney explained that he found out about the government's subpoenas from his defendant-client and that he was interacting with the government in his role as defendant-client's attorney because of his concern that the government viewed the client as the alter ego of other entities.³⁴ The court assessed that the alleged client, for her part, did not indicate that she ever intended for the attorney to provide her with legal services.³⁵ The court therefore found no attorney-client relationship between the attorney and the alleged client.³⁶

In *Headfirst Baseball LLC v. Elwood*,³⁷ the court also determined that there was insufficient evidence to determine that an attorney-client relationship existed.³⁸ Neither party had presented emails or other documentation affirmatively establishing an attorney-client relationship. Moreover, there were no allegations of a

³⁰ *In re Bernstein*, 707 A.2d 371, 375 (D.C. 1998).

³¹ *United States v. Crowder*, 313 F. Supp. 3d 135 (D.D.C. 2018).

³² *United States v. Crowder*, 313 F. Supp. 3d 135, 145 (D.D.C. 2018).

³³ *United States v. Crowder*, 313 F. Supp. 3d 135, 145 (D.D.C. 2018).

³⁴ *United States v. Crowder*, 313 F. Supp. 3d 135, 145 (D.D.C. 2018).

³⁵ *United States v. Crowder*, 313 F. Supp. 3d 135, 145 (D.D.C. 2018).

³⁶ *United States v. Crowder*, 313 F. Supp. 3d 135, 145 (D.D.C. 2018).

³⁷ *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199 (D.D.C. 2013).

³⁸ *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 210 (D.D.C. 2013).

formal agreement, payment of attorney's fees, or conversations in which either party made express statements about the nature of the alleged relationship. Notably, there was a letter by which the attorney and a former law partner told the alleged client that the law firm did not represent him. Indeed, the evidence before the court almost exclusively consisted of declarations made by the alleged client, the former law partner, and the law firm attorneys. The court held that the declarations provided far less than what other courts have accepted as evidence establishing an attorney-client relationship.³⁹

In *Teltschik v. Williams & Jensen, PLLC*,⁴⁰ however, the court held that a genuine issue of material fact existed as to whether the attorney and the alleged client formed an attorney-client relationship.⁴¹ The attorney prepared a declaration claiming that she never formed an attorney-client relationship with the alleged client or had any fiduciary relationship with him.⁴² Contrary to the declaration, the court held that a reasonable jury could conclude that an attorney-client relationship existed where the plaintiff provided the court with evidence of “letters of attorney designation,” third parties addressed legal correspondence intended for the plaintiff to the attorney, and the attorney “received, read, and responded to [such] correspondence.”⁴³

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

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

³⁹. *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 210 (D.D.C. 2013).

⁴⁰. *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

⁴¹. *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 46 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

⁴². *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 45 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

⁴³. *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 46 (D.D.C. 2010), *aff'd*, 748 F.3d 1285 (D.C. Cir. 2014).

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

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

[a] lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.⁴⁴

When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.⁴⁵ Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6 of the D.C. Rules of Professional Conduct.⁴⁶

The comments to Rule 2.3 of the D.C. Rules of Professional Conduct provide a list of situations where this may become an issue, including an "opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender," an opinion regarding the legality of securities, or an opinion provided for a third person, such as the purchaser of a business.⁴⁷ This rule might also be implicated in other contexts. For example, corporations often retain attorneys to perform internal investigations that may serve the primary purpose of advising the corporation, but may also involve reporting the investigation results to shareholders or to regulatory agencies. In

⁴⁴ D.C. R. Prof'l Conduct 2.3(a).

⁴⁵ D.C. R. Prof'l Conduct 2.3(b).

⁴⁶ D.C. R. Prof'l Conduct 2.3(c).

⁴⁷ D.C. R. Prof'l Conduct 2.3, cmt. 1.

such circumstances, who exactly the client is (e.g., the corporation or only its board of directors) impacts whether Rule 2.3 may be implicated.

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

The U.S. Supreme Court has recognized that “the private attorney's role [is to serve] as the client's confidential adviser and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light.”⁴⁸ However, when an attorney is retained to provide an evaluation of a matter that will be shared with third parties, it represents a minor deviation from the normal attorney-client relationship. It may be that the attorney is caught between two potentially competing interests in the evaluation: to render an impartial opinion so that the client can benefit from candid advice but also to ensure that the evaluation does not contain any information that will harm the client if it is being shared with third parties.

Attorneys' obligations generally run directly—and exclusively—to their client, and not to the public at large. This is different from an accountant, for example, who often prepares reports for public consumption and “owes ultimate allegiance to the corporation's

⁴⁸ *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984).

creditors and stockholders, as well as the investing public.”⁴⁹ Thus, attorneys who are preparing materials for public consumption may face a tension of sorts.

Because of the tensions between the duties owed to the client and the purpose of the evaluation, the comments to Rule 2.3 of the D.C. Rules of Professional Conduct caution that “careful analysis of the situation is required.”⁵⁰ In addition, the requisite “informed consent” under Rule 2.3 may require that the attorney advise the client regarding the potential adverse effects of sharing an evaluation with a third party.⁵¹ Having this discussion before commencing the representation can help ensure that both the attorney and client understand the purpose of the representation (i.e., whether the attorney is to act as an advocate or as an impartial evaluator) and avoid client relations problems later. It can also be helpful to confirm the scope of the representation because, even if the parties do not expressly envision a public report, it is common to consider internal investigations as subject to Rule 2.3 just by the nature of the investigation involved. Indeed, Section 95 of the Restatement (Third) of the Law Governing Lawyers closely tracks Rule 2.3 and comments that the rule regarding evaluations for use by third parties applies to internal investigations because they “review[] management conduct for the protection of shareholders, the investment community, and sometimes regulators.”⁵² The Rule may also require attorneys to ensure that they are not creating a conflict by advocating for the client’s interests, on one hand, and seeking to provide an objective evaluation for consumption by others, on the other hand. Comment 3 to Rule 2.3 states:

For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction.⁵³

⁴⁹ *United States v. Deloitte LLP*, 610 F.3d 129, 135 (D.C. Cir. 2010) (citing *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984)).

⁵⁰ D.C. R. Prof’l Conduct 2.3, cmt. 3.

⁵¹ D.C. R. Prof’l Conduct 2.3(b).

⁵² Restatement (Third) of the Law Governing Lawyers § 95 (2000).

⁵³ D.C. R. Prof’l Conduct 2.3, cmt. 3.

Rule 2.3 of the D.C. Rules of Professional Conduct also addresses confidentiality concerns raised by evaluations or legal opinions as it provides that “[e]xcept as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.”⁵⁴ Rule 1.6 of the D.C. Rules of Professional Conduct concerns an attorney’s duty of confidentiality. Except when permitted under limited circumstances, a lawyer shall not knowingly reveal a confidence or secret of the lawyer’s client.⁵⁵ Thus, even though the attorney may not be acting strictly as the client’s advocate when rendering a legal opinion, the same rules of confidentiality likely apply.

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

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

1-2:3 Duty to Non-Clients

1-2:3.1 Generally

Generally, a third party to an attorney-client relationship cannot bring a legal malpractice claim against the attorney, even where the third party has purportedly suffered as a result of the attorney’s malpractice.⁵⁶ Even in the absence of an express or implied contract, however, certain non-clients may have standing to sue professionals for negligence.

⁵⁴ D.C. R. Prof’l Conduct 2.3(c).

⁵⁵ D.C. R. Prof’l Conduct 1.6.

⁵⁶ *Scott v. Burgin*, 97 A.3d 564 (D.C. 2014) (As a general rule, the obligation of the attorney is to his client and not to a third party. In this jurisdiction, whether a plaintiff falls into the class of persons who may sue an attorney for malpractice has been resolved as “a matter of law.”); *see also Hopkins v. Akins*, 637 A.2d 424, 428 (D.C. 1993) (beneficiaries of an estate may not sue attorney for estate’s personal representative); *Needham v. Hamilton*, 459 A.2d 1060, 1060-61 (D.C. 1983) (intended beneficiaries of estate may sue attorney who drafted the decedent’s will) (quoting *National Savings Bank v. Ward*, 100 U.S. 195, 200 (1880)).

The District of Columbia recognizes an exception for cases in which the third party can establish that it was the direct and intended beneficiary of a contract.⁵⁷ The mere fact that a third party is a foreseeable plaintiff is typically not sufficient to give rise to a duty under the intended beneficiary exception to the requirement that an attorney-client relationship exist in a legal malpractice action.⁵⁸

1-2:3.2 Intended Beneficiaries

In general, a plaintiff cannot recover in a legal malpractice action unless there is an attorney-client relationship with the attorney-defendant. However, in certain circumstances, an attorney may owe a duty to a party who is not a client but who is a direct and intended beneficiary to an agreement between the attorney and his or her client. For that exception to apply, it must clearly appear from the agreement between the attorney and client that the agreement was intended for the benefit of that third party.⁵⁹

In *Needham v. Hamilton*,⁶⁰ the D.C. Court of Appeals held that it is well established that:

the general rule is that the obligation of the attorney is to his client, and not to a third party.⁶¹

⁵⁷. *Hopkins v. Akins*, 637 A.2d 424, 429 (D.C. 1993) (recognizing attorney only has obligation to client, not to a third party, and that the exception applies “where it is alleged that the plaintiffs were the direct and intended beneficiaries of the contracted for services); *Williams v. Mordkofsky*, 901 F.2d 158, 163 (D.C. Cir. 1990) (evidence indicated that suing corporation was intended beneficiary of work done by attorney); *see also Scott v. Burgin*, 97 A.3d 564, 567 (D.C. 2014) (holding that “[e]xtending permission to sue an attorney for malpractice to those who would indirectly benefit from the dissolution of a client’s marriage introduces precisely this risk of unforeseen and unmanageable liability.”); *Footbridge Ltd. Tr. v. Zhang*, 584 F. Supp. 2d 150 (D.D.C. 2008), *aff’d*, 358 F. App’x 189 (D.C. Cir. 2009) (finding a dearth of evidence in the record supporting this third-party beneficiary relationship and that there was no evidence demonstrating intended beneficiary of work on loan transaction).

⁵⁸. *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99 (D.D.C. 2009).

⁵⁹. *Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983); *see also Scott v. Burgin*, 97 A.3d 564 (D.C. 2014) (“Third party claims for legal malpractice against attorneys may be sustained where the plaintiffs were the direct and intended beneficiaries of the contracted for services.”); *Williams v. Mordkofsky*, 901 F.2d 158 (D.C. Cir. 1990) (Corporation was entitled to maintain malpractice action against attorney, even though attorney had not represented it directly. Attorney had represented shareholders of corporation and an affiliated corporation, and evidence indicated that suing corporation was intended beneficiary of work done by attorney.).

⁶⁰. *Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983).

⁶¹. *Needham v. Hamilton*, 459 A.2d 1060, 1061 (D.C. 1983) (citing *National Savings Bank v. Ward*, 100 U.S. 195, 200 (1880)).

This denial of liability to anyone not in privity of contract is premised primarily upon two concerns: (1) that to allow such liability would deprive the parties to the contract of control of their own agreement; and (2) that a duty to the general public would impose a huge potential burden of liability on the contracting parties.⁶²

The court acknowledged Justice Cardozo's landmark decision in *Ultramares Corp. v. Touche*,⁶³ in which Justice Cardozo reasoned that to extend the duty to exercise reasonable care to persons beyond the party in privity might expose individuals "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."⁶⁴ The court recognized that the privity rule is not without exception, and that the exception may apply to third-party claims where it is alleged that the plaintiffs were the direct and intended beneficiaries of the contracted-for services.⁶⁵ Thus, in *Needham*, the application of the privity rule to legal malpractice cases involving the drafting or execution of wills was a matter of first impression.⁶⁶

Following the guidance of Justice Cardozo and courts in other jurisdictions, the Court of Appeals held that the intended beneficiary of a will could bring a malpractice cause of action against drafting attorneys despite a lack of privity between those attorneys and the beneficiary.⁶⁷ First, the court concluded that neither of the rationales supporting the requirement of privity applies to the situation presented involving a legal malpractice claim.⁶⁸ Second, "it is obvious that 'the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will . . .'"⁶⁹

⁶² *Needham v. Hamilton*, 459 A.2d 1060, 1061 (D.C. 1983) (internal citations omitted).

⁶³ *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

⁶⁴ *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983).

⁶⁵ *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983) (citing *Security Nat'l Bank v. Lish*, 311 A.2d 833 (D.C. 1973)).

⁶⁶ *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983).

⁶⁷ *Needham v. Hamilton*, 459 A.2d 1060, 1063 (D.C. 1983).

⁶⁸ *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983).

⁶⁹ *Needham v. Hamilton*, 459 A.2d 1060, 1063 (D.C. 1983).

Later, in *Teasdale v. Allen*,⁷⁰ the Court of Appeals took the ruling in *Needham v. Hamilton* one step farther, holding that the alleged intended beneficiaries of a testator had standing to bring an action for legal malpractice against the attorney who drafted the will, regardless of whether their precise standing as intended beneficiaries could be discerned from the four corners of the will itself. The court refused to adopt any per se rule that standing may be granted only to those whose precise status as intended beneficiaries can be discerned from the four corners of the will.⁷¹

In *Clark v. Feder Semo & Bard, P.C.*,⁷² the court held that a retirement plan participant was not the direct and intended beneficiary of a law firm's legal services related to the participant's employer's retirement plan, as required to state a claim for legal malpractice. The court reiterated the principle that the primary exception to the requirement of an attorney-client relationship occurs in a narrow class of cases where the "intended beneficiary" of a will sues the attorney who drafted that will.⁷³

Further, the court also discussed that the few cases that apply the intended beneficiary exception in other contexts require that third parties allege more than "mere harm" from the conduct in question. The court held that the fact that a third party is a foreseeable plaintiff is not sufficient to give rise to a duty under the intended beneficiary exception to the requirement that an attorney-client relationship exist in a legal malpractice action.⁷⁴

1-2:3.3 Voluntary Agency

It is well-accepted that an attorney does not owe the same duty to members of the general public as the attorney owes to his or her client.⁷⁵ However, in appropriate circumstances, an attorney is not exempt from the general principle that one who assumes to

⁷⁰ *Teasdale v. Allen*, 520 A.2d 295 (D.C. 1987).

⁷¹ *Teasdale v. Allen*, 520 A.2d 295 (D.C. 1987).

⁷² *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99 (D.D.C. 2009).

⁷³ *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99, 107 (D.D.C. 2009).

⁷⁴ *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99, 107 (D.D.C. 2009) (citing *Morowitz v. Marvel*, 423 A.2d 196, 199 (D.C. 1980)).

⁷⁵ *Security Nat'l Bank v. Lish*, 311 A.2d 833, 834 (D.C. 1973).

act, even gratuitously, may thereby become subject to the duty of acting carefully.⁷⁶

In *Security National Bank v. Lish*,⁷⁷ on appeal from the trial court's granting of summary judgment to the attorney, the Court of Appeals explained that in appropriate circumstances, an attorney is not exempt from the general tort/agency principle described above.⁷⁸

One engaged in supplying information has a duty to exercise reasonable care. Generally, this duty does not extend beyond one's employer. However, there is a recognized exception to this general rule. Where information is supplied directly to a third party (or indirectly for the benefit of a specific third party), then the same duty of reasonable care exists, notwithstanding a lack of privity. The validity of the principles enunciated by Justice Cardozo in the *Ultramares* and *Glanzer* cases was recognized by this court.⁷⁹

Specifically, the D.C. courts have adopted the expression of this proposition in Section 378 of the Restatement of Agency.⁸⁰ The Restatement provides:

One who, by a gratuitous promise or other conduct which he should realize will cause another reasonably to rely upon the performance of definite acts of service by him as the other's agent, causes the other to refrain from having such acts done by other available means is subject to a duty to use care to perform such service, or, while other

⁷⁶ *Security Nat'l Bank v. Lish*, 311 A.2d 833, 834 (D.C. 1973); see also *Gilbert v. Miodovnik*, 990 A.2d 983, 1011 (D.C. 2010) (courts have found that a physician may still incur a legal duty towards a patient "although his services are performed gratuitously").

⁷⁷ *Security Nat'l Bank v. Lish*, 311 A.2d 833 (D.C. 1973).

⁷⁸ *Security Nat'l Bank v. Lish*, 311 A.2d 833, 834 (D.C. 1973) (citing *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275, 276 (1922)).

⁷⁹ *Security Nat'l Bank v. Lish*, 311 A.2d 833, 834-35 (D.C. 1973) (citations omitted).

⁸⁰ *Franklin Inv. Co. v. Huffman*, 393 A.2d 119, 122 (D.C. 1978); *Dawson v. Nat'l Bank & Tr. Co.*, 335 A.2d 259, 261 (D.C. 1975) (Under some circumstances, a purely gratuitous undertaking to perform certain services may subject a person to a legal obligation.).

means are available, to give notice that he will not perform.⁸¹

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

1-3 BREACH

1-3:1 Breach of Duty Required

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

Whether an attorney violated the standard of care is an issue for the trier of fact hearing the legal malpractice action.⁸² Emphasizing upon the establishment of the violation of standard of care, the court held that:

To establish a prima facie case of attorney malpractice under D.C. law, the plaintiff must establish the applicable standard of care, that the attorney violated the standard, and that the violation caused a legally cognizable injury.⁸³

1-3:2 Standard of Care

Practitioners have a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise.⁸⁴ The court has highlighted this standard of care in a lawyer malpractice case:

⁸¹ Restatement (Second) of Agency, § 378 (1958).

⁸² *Burke v. Scaggs*, 867 A.2d 213, 221 (D.C. 2005); *Seed Co. Ltd. v. Westerman*, 832 F.3d 325, 337 (D.C. Cir. 2016); *Smith v. Haden*, 872 F. Supp. 1040, 1046 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir. 1995); *Mills v. Cooter*, 647 A.2d 1118, 1124 (D.C. 1994); *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Sec. Co.*, 751 F.2d 1262, 1266 (D.C. Cir. 1985).

⁸³ *Kaempe v. Myers*, 367 F.3d 958, 966 (D.C. Cir. 2004) (citing *O'Neil v. Bergan*, 452 A.2d 337, 341 (D.C. 1982)). *Hickey v. Scott*, 738 F. Supp. 2d 55, 61 (D.D.C. 2010)

⁸⁴ *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 75 (D.D.C. 1998).

Inherent in such reasonable care [] is the requirement that those with special training and experience adhere to a standard of conduct commensurate with such attributes. Thus, a lawyer must exercise that degree of reasonable care and skill expected of lawyers acting under similar circumstances.⁸⁵

The District of Columbia does not follow the locality rule, which, in some jurisdictions, measures the standard of care only in the context of attorneys practicing in that area. In the District of Columbia, a lawyer must exercise the degree of reasonable care and skill expected of lawyers acting under similar circumstances.⁸⁶ The conduct of lawyers is not measured solely by the conduct of other lawyers in the District of Columbia or a similar community.⁸⁷

The more complex and complicated the legal matters of the underlying retention, the more training and experience that may be required to assure the lawyer “exercise[s] that degree of reasonable care and skill expected of lawyers acting under similar circumstances.”⁸⁸ In *Battle v. Thornton*,⁸⁹ the court defined the standard of care to which attorneys practicing in the District of Columbia are held in matters involving special skills. There, a lawyer must exercise that degree of reasonable care and skill expected of someone who has “special training” (i.e., training as a lawyer), coupled with enough “experience,” to handle the case under the circumstances.⁹⁰ The question, however, remains: how “specialized” must an attorney’s training and experience be to satisfy the duty of care required for legal representation in a particular case? The trial court ruled on the pretrial motion in limine that “unless there is proof, prima facie proof that these attorneys, the defendants, held themselves out as specialists, the standard is not going to be the standard for specialists. It’s going to be a standard of general practice.” That is to say, only if the lawyers had held themselves out to appellants as Medicaid fraud

^{85.} *Battle v. Thornton*, 646 A.2d 315, 319 (D.C. 1994) (internal quotations omitted).

^{86.} *See Morrison v. MacNamara*, 407 A.2d 555, 564 (D.C. 1979).

^{87.} *Morrison v. MacNamara*, 407 A.2d 555, 564 (D.C. 1979).

^{88.} *Battle v. Thornton*, 646 A.2d 315, 323 (D.C. 1994).

^{89.} *Battle v. Thornton*, 646 A.2d 315 (D.C. 1994).

^{90.} *Battle v. Thornton*, 646 A.2d 315, 319 (D.C. 1994).

specialists would the court have based the applicable standard of care on the standard governing such specialists.⁹¹

1-3:3 Factors Establishing Breach

1-3:3.1 Generally

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

1-3:3.2 Failing to Properly Advise Clients

A court may find that an attorney breached the standard of care by failing to properly advise his or her clients. In *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Securities Co.*,⁹² the court held that the law firm knew, or should have known, that under the relevant federal securities act, a promoter may be sued and prosecuted "in the district where the offer or sale took place."⁹³ The court held that a failure to advise the defendant-companies that some targeted jurisdictions might deem their marketing plan an "investment contract" could constitute malpractice notwithstanding the more lenient inclinations of the U.S. District Court for the District of Columbia.⁹⁴

While the law firm argued that other federal circuits would not classify the plan as an investment contract, the court dismissed that argument and determined that those federal circuits would treat the plan as an investment contract if the investors could be expected in practice to rely on the promoter's advice.⁹⁵ The court concluded that the evidence raised substantial fact issues as to reasonableness of the firm's time spent on those issues and the

⁹¹. *Battle v. Thornton*, 646 A.2d 315, 319 (D.C. 1994).

⁹². *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Sec. Co.*, 751 F.2d 1262 (D.C. Cir. 1985).

⁹³. *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Sec. Co.*, 751 F.2d 1262, 1265 (D.C. Cir. 1985).

⁹⁴. *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Sec. Co.*, 751 F.2d 1262, 1265 (D.C. Cir. 1985).

⁹⁵. *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Sec. Co.*, 751 F.2d 1262, 1266 (D.C. Cir. 1985).

resulting fees, and whether the firm’s advice on investment offering constituted malpractice, thereby precluding summary judgment.⁹⁶

As discussed in Section 1-3:3.7 and Chapter 3, plaintiffs may not be required to provide expert testimony in support of claims alleging an attorney error that are so obvious or well-known as to be “common knowledge,” such as when an attorney misses the statute of limitations. However, expert testimony may be necessary for the plaintiff to establish how an attorney’s failure to advise could support a legal malpractice claim. In *Flax v. Schertler*,⁹⁷ the court held that the plaintiff failed to present expert testimony that explained why the attorneys were negligent in failing to advise her about the potential impact of the defendant’s bankruptcy petition. The court held:

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

⁹⁶ *Popham, Haik, Schnobrich, Kaufman & Doty, Ltd. v. Newcomb Sec. Co.*, 751 F.2d 1262, 1266 (D.C. Cir. 1985).

⁹⁷ *Flax v. Schertler*, 935 A.2d 1091 (D.C. 2007).

understand, but that would not likely have been within the common knowledge of a jury.⁹⁸

Notably, the failure to advise clients does not always result in a finding of malpractice. In *In re Greater Southeast Community Hospital Corp.*,⁹⁹ the court held that the law firms did not breach the standard of care by failing to advise Chapter 11 debtor-clients of the consequences of acquiring excess debt.¹⁰⁰ The court determined that deepening insolvency is not a tort. Therefore, a law firm's knowledge that a corporate transaction would deepen the corporation's insolvency would not mean that the law firm knew that the corporation's fiduciaries were breaching their duties of care or loyalty in approving such transactions.¹⁰¹ Thus, the failure to advise the debtors of the consequences of acquiring excess debt did not constitute a breach in the standard of care.¹⁰²

1-3:3.3 Adverse Results

Obviously, a result adverse to the client's goals or interests does not automatically mean that the attorney breached the applicable standard of care. In other areas of professional malpractice law (for example, with regard to health professionals), an inference of negligence under D.C. law cannot be based solely on the fact that an adverse result follows the professional's advice.¹⁰³

1-3:3.4 Undertaking to Accomplish a Specific Result

Attorneys are not insurers of the results of their efforts on behalf of clients. However, a client may assert that an attorney breached his or her duty to the client when, after undertaking to accomplish a specific result, the attorney then fails to effectuate the intent of

⁹⁸. *Flax v. Schertler*, 935 A.2d 1091, 1107 (D.C. 2007).

⁹⁹. *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324 (Bankr. D.D.C. 2006), as amended (Sept. 26, 2006).

¹⁰⁰. *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324 (Bankr. D.D.C. 2006), as amended (Sept. 26, 2006).

¹⁰¹. *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324, 358 (Bankr. D.D.C. 2006), as amended (Sept. 26, 2006) (“[D]eepening insolvency” is properly treated as theory of harm, not as separate cause of action).

¹⁰². *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324, 358 (Bankr. D.D.C. 2006), as amended (Sept. 26, 2006).

¹⁰³. *Flores-Hernandez v. U.S.*, 910 F. Supp. 2d 64 (D.D.C. 2012); *Bunn v. Urban Shelters & Health Care Sys., Inc.*, 672 A.2d 1056, 1060 (D.C. 1996) (“we cannot imply negligence . . . based solely on the fact that an adverse result occurred”).

the parties. Although the District of Columbia has not specifically addressed this issue, courts in other jurisdictions have recognized that when an attorney guarantees a specific result, the failure to achieve the result may render the attorney liable.¹⁰⁴ In *Abramson v. Wildman*,¹⁰⁵ the Maryland Court of Special Appeals held that when a lawyer promised the guarantee of a specific result, the promisor-attorney may be found liable for such unsuccessful performance.¹⁰⁶

Further, in *Graivier v. Dreger & McClelland*,¹⁰⁷ two doctors hired an attorney to prepare an operating agreement for the formation of their new company.¹⁰⁸ The plaintiff claimed that he requested that the attorney draw up the agreement so that the profits were divided in a specific manner. When the agreement failed to incorporate this request, the plaintiff sued the attorney for legal malpractice. Although the court stated that the plaintiff read the agreement prior to signing it and the plaintiff could have instructed the attorney to change any of the provisions, this did not relieve the attorney of liability in light of the plaintiff's specific instructions:

it is the lawyer's responsibility to his client to select and employ words in the construction of a contract that will accurately convey the meaning intended. And although he is not an insurer of the documents he drafts, the attorney may breach his duty towards his client when, after undertaking to accomplish a specific result, he then fails to effectuate the intent of the parties.¹⁰⁹

^{104.} See, e.g., *Abramson v. Wildman*, 184 Md. App. 189, 964 A.2d 703 (2009); *Harrison v. Deming, Parker, Hoffman, Green & Campbell, P.C.*, 541 S.E.2d 407, 409 (Ga. Ct. App. 2000); *Littleton v. Stone*, 497 S.E.2d 684, 686 (Ga. Ct. App. 1998).

^{105.} *Abramson v. Wildman*, 184 Md. App. 189, 964 A.2d 703 (2009).

^{106.} *Abramson v. Wildman*, 184 Md. App. 189, 964 A.2d 703 (2009).

^{107.} *Graivier v. Dreger & McClelland*, 633 S.E.2d 406 (Ga. Ct. App. 2006).

^{108.} *Graivier v. Dreger & McClelland*, 633 S.E.2d 406, 410 (Ga. Ct. App. 2006).

^{109.} *Graivier v. Dreger & McClelland*, 633 S.E.2d 406, 410 (Ga. Ct. App. 2006) (internal citations omitted). Indeed, as discussed in Chapter 2: Defenses to Legal Malpractice Claims, clients may be responsible for understanding factual aspects of documents they read and approve, but they usually cannot be expected to understand the legal significance of a document.

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

1-3:3.5 Failing to Obtain Client Authority

An attorney may be found to have breached the applicable standard of care where the attorney fails to obtain client authority before taking certain actions.¹¹⁰ For example, in *Bronson v. Borst*,¹¹¹ the D.C. Court of Appeals held that regardless of the good faith of the attorney, absent specific authority, an attorney cannot accept a settlement offer on behalf of a client.¹¹² Instead, the court recommended that the attorney should have terminated the relationship before the statute of limitations ran, or could have filed the suit and requested leave of the court to withdraw earlier in the litigation.¹¹³ The court concluded that by deciding to accept the settlement offer, the attorney chose the one option that should have been foreclosed to him.¹¹⁴ Accordingly, the court found no reason to deny the client an opportunity to amend its pleading to include a counterclaim for legal malpractice.

1-3:3.6 Ethical Rules

As discussed in Chapter 7, Identifying and Resolving Conflicts of Interest, a violation of the D.C. Rules of Professional Conduct, standing alone, cannot serve as a basis for a legal malpractice claim, but also are not wholly irrelevant.¹¹⁵ While ethical rules are not substantive law, violations of the ethical rules may be used in legal malpractice actions to assist in establishing the standard of care required of attorneys.¹¹⁶ Accordingly, to avoid establishing

^{110.} *In re Wilson*, No. 19-BG-34, 2020 D.C. App. LEXIS 134, 2020 WL 1950495 (D.C. Apr. 23, 2020) (attorney disciplined for failing to obtain client consent); *Macktal v. Garde*, 111 F. Supp. 2d 18 (D.D.C. 2000), *aff'd*, No. 00-7207, 2001 U.S. App. LEXIS 4010, 2001 WL 238170 (D.C. Cir. Feb. 23, 2001) (finding attorney did not commit malpractice by allegedly coercing client to accept settlement offer).

^{111.} *Bronson v. Borst*, 404 A.2d 960 (D.C. 1979).

^{112.} *Bronson v. Borst*, 404 A.2d 960, 963 (D.C. 1979).

^{113.} *Bronson v. Borst*, 404 A.2d 960, 963 (D.C. 1979).

^{114.} *Bronson v. Borst*, 404 A.2d 960, 963 (D.C. 1979).

^{115.} *Atlanta Channel, Inc. v. Solomon*, No. 15-1823 (RC), 2020 U.S. Dist. LEXIS 73371, 2020 WL 1984296 (D.D.C. Apr. 27, 2020); *Griva v. Davison*, 637 A.2d 830 (D.C. 1994); *Waldman v. Levine*, 544 A.2d 683, 690 (D.C. 1988).

^{116.} *Atlanta Channel, Inc. v. Solomon*, No. 15-1823 (RC), 2020 U.S. Dist. LEXIS 73371, at *17, 2020 WL 1984296, at *6 (D.D.C. Apr. 27, 2020).

the element of breach, D.C. practitioners should be aware of the restrictions contained in the Rules of Professional Conduct.

1-3:3.7 Use of Expert Testimony

As discussed in Chapter 3, Additional Requirements for a Malpractice Claim, in a legal malpractice action, the plaintiff typically must present expert testimony establishing the standard of care.¹¹⁷ Although, as discussed above, the issue of whether an attorney has breached the standard of care is for a jury to decide, expert testimony is admissible to assist the jury in determining whether an attorney breached the standard of care.¹¹⁸ Expert testimony is not required, however, where “the attorney’s lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge.”¹¹⁹

Conduct falling within this “common knowledge” exception may include: allowing the statute of limitations to run on a client’s claim; permitting entry of default judgment against the client; failing to instruct the client to answer interrogatories; failing to allege affirmative defenses; failing to file tax returns; failing to follow the client’s explicit instructions; and billing a client for time not spent providing services.¹²⁰

1-4 PROXIMATE CAUSE

1-4:1 Generally

A cognizable claim of legal malpractice requires that the alleged breach of duty by the attorney was the cause of damages suffered by the client.¹²¹ Proximate cause has been defined as “that cause which, in natural and continual sequence, [and] unbroken by an

¹¹⁷. *Television Capital Corp. of Mobile v. Paxson Comm’ns Corp.*, 894 A.2d 461, 469 (D.C. 2006), as amended on reh’g in part (July 5, 2006); *Hamilton v. Needham*, 519 A.2d 172, 174 (D.C. 1986).

¹¹⁸. *Smith v. Haden*, 872 F. Supp. 1040, 1045 (D.D.C. 1994), *aff’d*, 69 F.3d 606 (D.C. Cir. 1995); *Waldman v. Levine*, 544 A.2d 683 (D.C. 1988) (admitting expert witness testimony based on various provisions of the Code of Professional Responsibility for Lawyers).

¹¹⁹. *Flax v. Schertler*, 935 A.2d 1091, 1106 (D.C. 2007); *Forti v. Ashcraft & Gerel*, 864 A.2d 133, 138 (D.C. 2004); *see also* Chapter 3: Additional Requirements for a Malpractice Claim.

¹²⁰. *Carranza v. Fraas*, 763 F. Supp. 2d 113, 122 (D.D.C. 2011); *see also Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 51 (D.D.C. 2010), *aff’d*, 748 F.3d 1285 (D.C. Cir. 2014); *Kaempe v. Myers*, 367 F.3d 958, 966 (D.C. Cir. 2004).

¹²¹. *Chase v. Gilbert*, 499 A.2d 1203, 1211 (D.C. 1985); *see also Herbin v. Hoeffel*, 806 A.2d 186, 194-96 (D.C. 2002).