Public policy bars assignment of actions against attorneys

For public-policy reasons, courts in Illinois and most other states protect the confidential nature of the attorney-client relationship by barring the assignment of legal malpractice claims.

It is axiomatic that society has an interest in safeguarding the attorney-client relationship. Courts have long recognized that this relationship is "unique[ly] personal" in nature. As such, it is consensual. Therefore, with rare exception, it requires the agreement of both the attorney and the client before it can arise. Even before it is formed, the relationship is confidential. This creates a climate for full disclosure of all relevant facts by the client to the attorney from the outset, without fear of reprisal or disclosure to third parties.

Legal Malpractice

By EDWARD J. ROLWES

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The public basis for protecting the personal nature of the attorney-client relationship is often assumed and even taken for granted as a given. To illustrate, just imagine how the legal professional would react if tomorrow the attorney-client privilege no longer existed, or the client could form an attorney-client relationship with or without the attorney's consent. Both scenarios are indeed unimaginable as they would strike at the core of the attorney-client agreement.

Courts have often cited public policy as a basis to safeguard both the personal and confidential bond between a lawyer and a client. Thus, the law allows an attorney to withhold communications with a client absent waiver of the privilege by the client except in rare instances. Also, with few exceptions, only a client can sue an attorney for malpractice even if a non-client is injured by the attorney's conduct. See, for example, *Schechter v. Blank,* 254 Ill.App.3d 560, 627 N.E.2d 106 (1993). Also, most courts hold that an attorney sued for malpractice cannot file a third-party claim against the client's successor counsel for contribution, especially if the claim is directed against the client's attorney in the malpractice claim.

Courts also have cited public policy as a basis to bar the assignment of legal malpractice claims to third parties. In doing so, most courts have held that allowing an assignment would undermine the confidential and personal nature of the relationship.

The leading case on this issue in Illinois is *Christerson v. Jones,* 83 Ill.App.3d 334, 405 N.E.2d 8 (3d Dist. 1980). Other cases include *Brocato v. Prairie State Farmers Insurance Association,* 166 Ill.App.3d 986, 520 N.E.2d 1200 (4th Dist. 1988), and *Clement v. Prestwich,* 114 Ill.App.3d 479, 448 N.E.2d 1039 (2d Dist. 1982).

While the *Schechter* case did not squarely address the issue at the appellate level, the initial dismissal of the suit was based on the conclusion that the bankruptcy liquidation trustee under Chapter 7 lacked standing to sue the attorney for the Chapter 11 reorganization trustee based on the rule barring assignment of such claims.

Courts generally articulate the same basic public-policy reasons for not allowing the assignment of legal malpractice suits. In *Christerson* the trustee's suit against the debtor was dismissed for lack of standing — the court concluding that placing the decision

Assign – *back page*

Assign

Continued from page 6

whether to file a suit against the lawyer in the hands of the third party would "divest" the client of the right to make this decision. The fear is, the practice could "relegate the legal malpractice action to the marketplace and convert it to a commodity to be exploited and transferred to economic bidders." *Goodley v. Wank & Wank Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83, 87 (1976).

The *Christerson* court cited with favor the analysis in *Goodley* that such a scenario would subject attorneys to suits by third parties "to whom the attorney has never owed a legal duty, and who has never had any prior connection with the assignor or his rights . . . [thus] commercial[izing] and debas[ing] the legal profession." The California court added that the scenario also would "encourage unjustified lawsuits," "promote champerty" and "force attorneys to defend themselves against strangers."

The *Goodley* court concluded that allowing assignments would "restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client."

The California court's decision in *Goodley* is the most often cited case to support the rule barring the assignment of legal malpractice claims.

The issue of assignability of legal malpractice cases sometimes arises when a victorious plaintiff is unable to collect a full judgment against a defendant. In this situation in particular, courts reason that allowing the assignment of the malpractice claim would place the attorney in the impossible position of both defending himself against a malpractice suit and maintaining the attorney-client confidences.

Some courts outside of Illinois have allowed the assignment of legal malpractice cases but this usually arises only when the malpractice suit is assigned along with bad-faith claim against an insurance company. See, for example, *Opel v. Empire Mutual Insurance Co.*, 517 F.Supp. 1305 (N.Y. 1981).

Other courts resolve the issue based on whether the action is a claim based in tort or contract. See, for example, *Ducote v. Commercial Union Insurance Co.*, 615 S.2d 1366 (La. App. 3d Cir. 1993).

Despite the few exceptions allowing assignments, the clear majority opinion and the law in Illinois is that, for public-policy reasons, malpractice suits are not assignable.