**GEORGE MASON AMERICAN**

**INN OF COURT**



**Legal Malpractice 101 and Practice Pointers**

**To Avoid Claims During the Pandemic**

**February 23, 2021**

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**Civil Legal Malpractice in Virginia**

1. **INTRODUCTION AND BACKGROUND TO CIVIL LEGAL MALPRACTICE CLAIMS**
2. **Elements of a Claim:**
3. A cause of action for legal malpractice has three separate elements: [[1]](#footnote-1)
   1. The existence of an attorney-client relationship creating a duty;
   2. A breach of that duty by the attorney; and
   3. Damages that were proximately caused by the attorney’s breach of duty.
4. **Burden of Proof:**
5. A plaintiff in a legal malpractice action bears the burden of proving all three elements.[[2]](#footnote-2)
6. A legal malpractice action usually involves a “case within the case,” in which the plaintiff must present evidence that would have been presented in the underlying action.[[3]](#footnote-3) To that end, there must be sufficient evidence of a breach of duty and of proximate causation and damages to convince the trier of fact in the malpractice case that, in the absence of the attorney’s alleged negligence, the plaintiff would have prevailed in the underlying action.[[4]](#footnote-4)
7. **Standard of Care:**
8. The employment of counsel establishes a duty on the part of the attorney to the client, and failing to meet, or falling below the standard of care constitutes breach of the duty owed the client.
9. The standard of care is based on what the ordinary, prudent attorney would do under the same or similar circumstances.  The Virginia Supreme Court has stated:  “[The attorney] is not to be answerable for every error or mistake, but on the contrary, will be protected if he acts in good faith, to the best of his skill and knowledge, and with an ordinary degree of attention.”[[5]](#footnote-5)
10. In addition, a negligent attorney can also apply the defense of contributory negligence in the context of legal malpractice cases, or that the client’s own negligence contributed to the client’s resulting damages.[[6]](#footnote-6)
    1. An illustration of this comes into play when an attorney is asked to make a determination about the path the courts will take in an unsettled area of the law:
       1. The attorney cannot “look into a crystal ball” and foresee what will happen, but he or she can review the existing law and make a reasoned judgment about how a court might rule.
       2. In Virginia, there is no blanket “judgmental immunity,” however, the Supreme Court has held that “if an attorney exercises a ‘reasonable degree of care, skill, and dispatch’ while acting in an unsettled area of the law, which is to be evaluated in the context of ‘the state of the law at the time’ of the alleged negligence, then the attorney does not breach the duty owed to the client.”[[7]](#footnote-7)
11. **MEASURE OF DAMAGES**
12. **Rules/ Basic Principles**
13. Damages resulting from the negligence of an attorney are not presumed. Rather, the client has the burden of proving that the damages claimed were proximately caused by the attorney’s negligence.[[8]](#footnote-8)
14. An attorney is liable only for actual injury to his client and damages will be calculated on the basis of the value of what is lost by the client.[[9]](#footnote-9)
15. While the client is not required to prove the exact amount of incurred damages, the client is required to show facts and circumstances from which the trier of fact can make a reasonably certain estimate of those damages. [[10]](#footnote-10)
16. There is no single formula for measuring damages in attorney malpractice cases. In large part, the appropriate measure of damages must be determined by the facts and circumstances of each case.[[11]](#footnote-11)
17. **Cases**
18. Real Estate Contract/Breach of Fiduciary Duty:

* *Long & Foster Real Estate*v.*Clay*
  + Client listed a piece of real estate with an agent, who subsequently presented the client with a contract signed by a prospective buyer.[[12]](#footnote-12) The contract required the client to subordinate to a bona-fide construction loan, a term with which the client was not familiar. The agent was unable to explain the term adequately, but urged her client to enter into this contract, despite the client’s statement to the agent that she would not accept a contract containing a second trust on the property.
  + Shortly afterward, the client learned the term’s actual meaning from an attorney, who negotiated a new contract with the buyer that eliminated the subordination clause but provided for partial releases on the payment of specified amounts. The client refused to pay the agent’s commission, and a suit ensued.
  + The Fairfax Circuit Court held that the jury had sufficient evidentiary basis to conclude that the agent breached her duty of explanation. The damages were fair because the client would not have signed the first contract had the client been properly informed of the nature of subordination, and the client had to accept an unwanted provision for partial releases when the new contract was negotiated.
  + On appeal, the Virginia Supreme Court held that the proper measure of damages, for the agent’s breach of her fiduciary duty to explain the terms of the contract to her client, was the difference between the value of the note the property owner bargained for and the value of the note which she actually received.[[13]](#footnote-13)

1. Domestic Relations/Misrepresentation:

* *Duvall, Blackburn, Hale & Downey v. Siddiqui*
  + The Virginia Supreme Court debated whether the affected client proved the proper measure of damages that resulted from her attorney’s misrepresentation that he had submitted, and the court had entered, a support order that the attorney had drafted.[[14]](#footnote-14)
  + In *Duvall*, a wife retained a law firm to represent her in obtaining a divorce, spousal and child support. Prior to a scheduled support hearing, the husband and wife presented to their attorneys a separation agreement that they had drafted and signed.
  + The wife’s attorney told her that it would be difficult to enforce and stated that he would draft a consent order for support that would be enforceable. He sent an unsigned copy to the wife but told her that the order had been entered by the court.
  + In an enforcement proceeding in J&DR court, the wife was awarded support arrearages based upon a copy of the order provided by the wife. Representing herself, the wife subsequently obtained a divorce, and negotiated a property settlement with new support provisions.
  + The firm she initially hired filed a warrant in debt against the wife for unpaid legal fees. The wife, again acting *pro se*, filed an answer and counterclaim against the firm for legal malpractice.
  + The jury returned a verdict for the wife and the law firm appealed.
  + On appeal, the Virginia Supreme Court held that the proper measure of the wife’s damages for the attorney’s misrepresentation was the difference between what she bargained for, *viz.*, the value of the support provided in the consent order, and the value of what she actually received.[[15]](#footnote-15)

1. Breach of Fiduciary Duty/Conflict of Interest

* *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp.*
  + A law firm’s partner was also the president of a corporate client. The law firm handled certain transactions for the client which consisted of loans to a borrower, which were to have been secured by its accounts receivable, when in fact, these accounts were in the nature of consumer contracts (chattel paper).
  + After making the loans, the law firm and client learned that all of the borrowed funds were disbursed, the contracts were sold, and the third party threatened bankruptcy, in which the client might be deemed an unsecured creditor.
  + The client settled its claims with the borrower, and looked to the law firm for indemnification of any losses.
  + On appeal, the court held that contributory negligence was available as a defense to the law firm.
    - When the partner engaged in loan negotiations, reviewed the loan collateral, and signed various documents as the corporate client’s president, he “acquired critical knowledge about Galaxy and the loan transaction during the scope of [his] agency with Tidewater,” an as such, his actions were imputed to the corporate client.
    - The Firm asserted that the partner, in his capacity as president and director of the corporate client, formulated the proposed loan structure and negotiated the terms of the loan “in an effort to forge a favorable business transaction acceptable to his corporation.”
  + Although legal malpractice damages were determined by the facts and circumstances of each case, the proper measure of damages would be the difference between the value of the collateral bargained for and the value of the collateral actually received.[[16]](#footnote-16)

1. **WHEN IS A MISTAKE NOT MALPRACTICE? (AND WHEN IS IT MALPRACTICE?)**
2. **Rules/Basic Principles**
3. There can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment . . . . Otherwise, every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight.[[17]](#footnote-17)
4. In most cases, the decision to call or not to call particular persons as witnesses is a matter of trial counsel’s judgment which is not subject to attack in a malpractice action.
5. \*While there is no Virginia case on point, it is well settled in other jurisdictions that an attorney cannot be held liable for the good-faith exercise of judgment on a client’s behalf, even when that judgment is mistaken.[[18]](#footnote-18)
6. **Cases**
7. Failure to Timely Object/Decision Not to Use Certain Witnesses:

* *Jones v. Dere*
  + Client was sued to enforce a buy-sell agreement. The jury returned a verdict against the client, and the judgment against the client was affirmed on appeal in part because some of the alleged errors were unpreserved.
  + The client later sued the attorney for malpractice, alleging that the attorney was negligent in failing to object to the trial court’s jury instructions, in failing to object to the trial court’s ruling on unconscionability, and in failing to call certain witnesses.
  + The court found that the jury instructions were properly given, accordingly the attorney was not negligent in failing to object to the court’s rulings on those instructions.
  + And, since the trial court correctly held that it, not the jury, should have decided the question of unconscionability, and since the trial court also correctly held that the buy-sell agreement was not unconscionable, the attorney’s failure to preserve his objection on that point did not constitute negligence. Finally**,** the attorney’s decision not to use certain witnesses was a matter of trial strategy, which the court refused to second guess.

1. Failure to Interview and Present Available Witnesses/Failure to Bring a Claim as a Basis for Finding in Favor of Plaintiffs/ Failure to Inform Plaintiffs of a Conflict of Interest:

* *Woodruff v. Tomlin*
  + The Plaintiff clients sought review of an order that dismissed their legal malpractice action against defendant attorneys.[[19]](#footnote-19) Defendants represented plaintiffs in a lawsuit regarding an automobile accident.
  + The lower court stated that there could be no liability for acts and omissions by defendants in the conduct of litigation that had been based on an honest exercise of professional judgment.
  + On appeal, the 6th Circuit held that Defendants’ failure to seek a change of venue, failure to object to a jury instruction, decision to establish the physical facts of the case by use of an engineer’s plat rather than the testimony of an expert, and decision to make certain concessions in an appellate brief did not furnish a basis for a malpractice action.
  + However, the court held that several of Plaintiffs’ claims were improperly dismissed because they could have amounted to legal malpractice, including defendants’ failure to interview and present available witnesses, failure to bring to the attention of the trial court statutes as a basis for finding in favor of Plaintiffs, and failure to inform Plaintiffs of a conflict of interest.
  + According to the court, for loss to clients resulting from a want of proper knowledge of matters of law in common use, or of such plain and obvious principles as every lawyer was presumed to know, an attorney will be held liable.

1. **GENERAL CIVIL LEGAL MALPRACTICE CASE EXAMPLES (POTENTIAL CASES FOR AUDIENCE POLLING)**
2. *Williams v. Joynes*
   1. The defendant attorney had failed to file the plaintiff’s lawsuit within Virginia’s two-year statute of limitations, but advised the plaintiff, Williams, that he might still be able to file suit in Maryland.
   2. Williams failed to file a suit in Maryland, and then filed a legal malpractice case against the attorney.
   3. The trial court determined that the plaintiff’s failure to file a lawsuit in Maryland was a superseding cause that relieved the defendant attorneys from liability for the plaintiff’s loss of his personal injury action, but the Virginia Supreme Court disagreed.
   4. The Virginia Supreme Court held that Williams’ failure to file a Maryland suit was not a superseding event severing the link of proximate causation between the attorney’s negligence and the resulting harm suffered by Williams.[[20]](#footnote-20)
   5. It was the attorney’s negligent failure to file in Virginia that set in motion the need for Williams to even consider filing a Maryland lawsuit.[[21]](#footnote-21)
3. *Thorsen v. Richmond Society for the Prevention of Cruelty to Animals*
   1. The Richmond SPCA was able to maintain an action for legal malpractice on the grounds that the SPCA, which was the testator’s sole surviving beneficiary, was unable to receive the testator’s bequest of real property due to the error of the attorney Thorsen when preparing the will.
   2. As a result, the property passed intestate to other members of the testator’s family, thereby damaging the SPCA and depriving it of the full bequest.[[22]](#footnote-22)
   3. The Virginia Supreme Court held that the third-party beneficiary doctrine was a well-reasoned exception to the privity requirement of legal malpractice claims, thereby permitting a party to proceed with a malpractice action.[[23]](#footnote-23)
   4. However, if a third party cannot claim beneficiary status, the rule of contractual privity will prevent that third party from asserting a malpractice claim,[[24]](#footnote-24) and a malpractice claim cannot be assigned by a client to another party.[[25]](#footnote-25)
4. *Goldstein v. Kaestner*
   1. Former counsel failed to perfect an appeal of the judgment in the underlying landlord/tenant action, which judgment was entered against the former client for lost profits.
   2. The Virginia Supreme Court held that the proper standard of review for such legal malpractice actions was whether the former client could prove that had the former counsel perfected the appeal that the judgment against the former client in the underlying action would have been reversed as a matter of law.
   3. The court noted that in the underlying action, the tenant who brought suit against the former client had essentially been operating a continuation of the business it purchased when the fire destroyed the building, as evidenced by the facts that the business was operating under the same name, employed many of the same employees, and maintained the same inventory.
   4. The court therefore held that the lost profits in the underlying action were properly proved by using the history of profits of the former business. Hence, the court held that the judgment against the former client would not have been reversed and hence that judgment for the former counsel in the legal malpractice action was proper.[[26]](#footnote-26)
5. *Moonlight Enters., LLC v. Mroz*
   1. Plaintiff Moonlight Enterprise, LLC (“Moonlight”) sued two attorneys, including defendant Mroz, for legal malpractice arising out of a condominium purchase transaction.
   2. Mroz represented Moonlight in the condo purchase transaction. Two years after Moonlight bought the condo units, attorney Mroz filed a lawsuit on Moonlight’s behalf against the condo association wherein Moonlight disputed certain condo association fees. The condo association filed a counter-claim against Moonlight. One of Mroz’ s partners, Zachary, filed a response to the counterclaim.
   3. Soon thereafter, Zachary took over handling the litigation from Mroz but Mroz was still noted as a counsel of record in the lawsuit. The condo association prevailed on all issues in the lawsuit in January 2012 and won an award of $59,000.00 in attorney’s fees and costs.
   4. Moonlight hired new counsel to handle the appeal of the adverse judgment.
   5. In 2013, Moonlight filed a legal malpractice lawsuit against Mroz and Zachary charging Mroz with malpractice in his handling of the 2008 condo purchase transaction and charging Zachary with malpractice in his handling of the 2010 litigation against the condo association.[[27]](#footnote-27)
      1. The trial court dismissed the 2013 lawsuit based on a statute of limitations defense.
   6. Moonlight  filed a second legal malpractice lawsuit against Mroz and Zachary on February 20, 2015, exactly three years after the entry of the final order in the unsuccessful condo litigation.
      1. Both Mroz and Zachary filed pleas of the statute of limitations, and the trial court granted the motion.
   7. On appeal, the attorney’s for Moonlight argued that the statute of limitations as to the alleged malpractice by Mroz did not begin to run until the date of the entry of the final Order in the condo litigation (February 20, 2012) since he was still an attorney of record for Moonlight in the lawsuit.
   8. Moonlight argued that pursuant to Virginia’s “continuous representation” rule the statute of limitations does not begin to rununtil the attorney’s services rendered in connection with that particular undertaking or transaction have terminated.
   9. The Court found, applying the continuous representation rule, that Zachary had continued to represent his client by calling the Court to discuss the terms of the final order even after the court hearings had concluded. The Supreme Court therefore concluded that the trial court erred in granting the statute of limitations plea with respect to attorney Zachary.
   10. However, with respect to attorney Mroz, the court found that the continuous representation rule did nottoll the statute of limitation for Moonlight’s malpractice claim**.**The evidence showed that Mroz provided no *actual*legal services to Moonlight in the condo litigation after August 2011.
   11. The Court noted that under its prior application of the continuous-representation rule, the focus was not on whether a general attorney-client relationship has ended, but instead, “*when the attorney’s work on the particular undertaking at issue had ceased*.” Importantly, the Court also held that the attorney’s work must be “actual work” on a particular undertaking as opposed to “imputed” work. The tolling period ends – and thus the limitation period begins – when the attorney renders his “last professional services” related to the particular undertaking.

Note: Legal malpractice claims against different lawyers can have different limitation deadlines, even when the lawyers worked at the same firm for the same client.

**Criminal legal malpractice**

* + 1. **Elements of Criminal Legal Malpractice and How it Differs From Civil**
       1. The standard is: A cause of action for legal malpractice requires the (1) **existence of an attorney-client relationship** which (2) **gives rise to a duty**, **breach of that duty** by the defendant attorney, and that (3) the **damages claimed by the plaintiff client must have been proximately caused by the defendant attorney's breach**.” *Johnson v. Hart*, 692 S.E.2d 239, 243 (Va. 2010); *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 568 S.E.2d 693, 695 (Va. 2002); *Gregory v. Hawkins*, 468 S.E.2d 891, 893 (Va. 1996).
       2. A **legal malpractice** plaintiff who alleges that malpractice occurred during a ***criminal*** *matter* has additional burdens of pleading. *Desetti v. Chester*, 772 S.E.2d 907, 910 (Va. 2015).

a. A legal malpractice plaintiff who alleges that malpractice occurred during the course of a criminal matter must plead facts establishing this element of the cause of action: that the damages to be recovered were proximately caused by the attorney’s negligence *but* were not proximately caused by the legal malpractice plaintiff’s *own criminal actions*. *W.S. Carnes, Inc. v. Board of Supervisors*, 478 S.E.2d 295, 300 (Va. 1996).

* + - 1. The **additional burdens in a criminal case are:**

The Defendant must show they have ***obtained*** ***postconviction relief***. *See* *Adkins v. Dixon*, 482 S.E.2d 797, 801 (Va. 1997)).

* 1. The Defendant must prove they were ***innocent of the crime***. *Zysk v. Zysk*, 404 S.E.2d 721, 722 (1990) (“a party who consents to and participates in an immoral or illegal act cannot recover damages from other participants for the consequence of that act.”) (citing *Miller v. Bennett,* 56 S.E.2d 217, 218 (Va. 1949)).
     1. “Virginia law provides that an individual can only hold a defense attorney liable after demonstrating that he obtained post-conviction relief and innocence entitling him to release.” *Calloway v. Taylor*, 475 F. Supp. 3d 511, 515 (W.D. Va.), aff’d, 831 F. App’x 674 (4th Cir. 2020)
  2. The plaintiff must prove these elements by **preponderance of the evidence**, required to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, (1984).
     1. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
     2. These additional burdens are to ensure that courts do not assist the participant in an illegal act who seeks to profit from the act’s commission.” *Zysk*, 404 S.E.2d at 722.
        + 1. Virginia legal policy is that a **criminal** defendant may not profit from a crime in a subsequent **legal malpractice** action. *See Desetti v. Chester*, 772 S.E.2d 907, 910 (Va. 2015); *Taylor v. Davis*, 576 S.E.2d 445, 447 (Va. 2003); *Adkins v. Dixon*, 482 S.E.2d 797, 801-02 (Va. 1997).
          2. Criminal Defense Attorneys have three additional shields against liability in Virginia:

***Judgmental Immunity***

A lawyer cannot be liable “when [the attorney’s] opinions are based upon speculation into an unsettled area of the law. *Smith v. McLaughlin*, 769 S.E.2d 7, 14 (Va. 2015)

***Collectability as an Affirmative Defense***

“[For] a legal malpractice [claim], the fact of negligence alone is insufficient to support a recovery of damages. The client must prove that the attorney’s negligence proximately caused the damage claimed.” *Id.* at 14

Moreover, “[a]n attorney is liable only for actual injury to his client and damages will be calculated on basis of the value of what is lost by the client.” *Id.* at 15.

***No Damages for Pain and Suffering or Emotional Distress***

*Smith v. McLaughlin*, 769 S.E.2d 7, 21 (Va. 2015)

* + 1. **Elements for legal malpractice in criminal law**
       1. To sustain a claim for legal malpractice, plaintiffs are required to (1) plead and prove that an attorney-client relationship existed with the attorney, giving rise to a duty, and that (2) the attorney neglected or breached that duty, and (3) that the neglect or breach was a proximate cause of their claimed damages. *See*
    2. **Your client is guilty – can there be legal malpractice?**
       1. Yes, in a criminal case, if the plaintiff establishes proximate causation and attorney-client relationship, the attorney can be responsible for:
          1. A wrongful conviction severity (being convicted of a felony instead of a misdemeanor). *Desetti*, 772 S.E.2d at 911. Requires plaintiff to prove proximate causation. *Id*.
          2. A wrongful sentence duration (like habeas corpus). Requires plaintiff to allege that they would have been sentenced to any particular length of incarceration absent the attorney’s malpractice. *Id.*
          3. Failing to properly appeal a criminal conviction. *In re George E. Talbot Jr.* Virginia State Bar Disciplinary Board. https://www.vsb.org/disciplinary\_orders/talbotfinalorder.11605.pdf
          4. A wrongful plea deal acceptance. *Sampang v. Detrick*, 826 F. Supp. 174, 178 (W.D. Va. 1993).
       2. However, in VA plaintiffs can lack standing if the unless the verdict is overruled.
          1. Actual guilt is a material consideration because courts will not permit a guilty party to profit from his own crime. *See* *Desetti*, 772 S.E.2d at 910; *Adkins*, 482 S.E.2d at 802
          2. The plaintiff has the burden of alleging and proving as a part of their cause of action that post-conviction relief and has been obtained. *Adkins*, 482 S.E.2d at 801 (Va. 1997)
          3. A **decision adverse** to a criminal defendant in post-conviction proceedings **bars a recovery for the defense attorney’s malpractice**. *Id.*
    3. **As a criminal lawyer, do you need to prove the underlying criminal defendant innocent**
       1. No, an attorney just needs to follow the law and operate within their degree of care and skill when representing the client.
       2. An attorney must act with “a reasonable degree of care, skill, and dispatch in rendering the services.” *See* *Smith v. McLaughlin*, 769 S.E.2d 7, 13 (2015).
          1. Additionally, an attorney does not breach his duty to a client even when following “well-established law” that is reversed by an appellate court subsequent to the attorney’s action. *Id.*
    4. **Does a plea deal close door on legal mal?**
       1. Not in Virginia, but the court is reluctant to overturn plea agreements accepted with care and discernment. *See generally* *Sampang*, 826 F. Supp. at 174.
          1. In Virginia, a criminal judgment has no preclusive effect in later civil proceedings. *Selected Risks, Ins. Co. v. Dean*, 355 S.E.2d 579 (Va. 1987).
          2. “A plea accepted with care and discernment, as in the present case, should be subjected to collateral attack only for the most compelling reasons.” *Sampang*, 826 F. Supp. at 178.

However, some jurisdictions, a plea deal is treated as a final legal decision triggering collateral estoppel to bar legal malpractice claims.

* + 1. *Kaplan v. Sachs*, 224 A.D.2d 666, 667 (N.Y. App. Div. 2nd Dept. 1996); *Ahern v. Turner*, 758 S.W.2d 108, 109 (Mo. Ct. App. 1988).
    2. **Distinguishing between criminal malpractice and habeas corpus relief for ineffective counsel**
       1. Ineffective assistance of counsel is “the denial of a defendant's entitlement to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.” *McCord v. Bailey*, 636 F.2d 606, 609 (D.C. Cir. 1980)
          1. “The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Jones v. Clarke*, 783 F.3d 987, 991 (4th Cir. 2015)
       2. The legal standard for both ineffective assistance of counsel and legal malpractice in criminal proceedings is equivalent.
          1. “[T]he legal standards for ineffective assistance of counsel in [the criminal defendant/legal malpractice plaintiff's] criminal proceedings and for legal malpractice in this action are equivalent.” *Desetti*, 772 S.E.2d at 911 (citing *McCord v. Bailey*, 636 F.2d 606, 609 (D.C.Cir.1980)).
       3. However, receiving habeas relief is only one half of what a plaintiff needs to prove to succeed in a claim for legal malpractice in a criminal case. Plaintiffs must also establish damages.
          1. A habeas court's determination on the ineffectiveness of a criminal defendant's counsel and subsequent prejudice to that defendant establishes that constitutionally deficient performance proximately caused the outcome in the original criminal proceeding. *Id*.
          2. The court must then look to the damages flowing from the outcome of the criminal matter. *Id.*
    3. **Rule 3.8 issues / for prosecutors when they have to turn over evidence, etc.**)
       1. Under Va. Sup. Ct. R. pt. 6, § II, R. 3.8(a) prosecutors may not:
          1. File or maintain a charge that the prosecutor ***knows*** is not supported by probable cause.
          2. “Knows” denotes actual knowledge of the fact in question. *Livingston v. Va. State Bar*, 744 S.E.2d 220, 226 (Va. 2013).
          3. knowingly take advantage of an unrepresented defendant;
          4. instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;

This duty is an professional responsibility, and failure subjects attorneys to disbarment or suspension of their license to practice law. *See* *Ziglar v. Media Six, Inc.*, 61 Va. Cir. 173, 179 (Cir. Ct. 2003)

* + - * 1. make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and

The responsibility of a prosecutor to produce exculpatory evidence is pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963); *see also* *Commonwealth v. Williams*, 2014 Va. Cir. LEXIS 172, at \*6 (Cir. Ct. June 18, 2014).

* + - * 1. not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.
    1. **War stories / case examples / audience polling for case examples.**

*Sampang v. Detrick*, 826 F. Supp. 174 (W.D. Va. 1993)

* + Client who was a medical doctor, sues attorney for legal malpractice for representation received in a criminal action in which the client pled guilty to distributing controlled drugs without a real medical reason for doing so
  + Client alleges that the lawyer had a conflict of interest; that he conspired with the prosecutor; that his decision to plead guilty was done in haste and confusion and the lawyer rammed it down his throat even though he knew the client was innocent; and that the lawyer avoided him and refused to return his phone calls after the plea was entered.
  + To recover for **legal malpractice**, the court finds that the client had to prove that the lawyer represented him, that he neglected a reasonable duty; and that such negligence resulted in and was the proximate cause of the client’s loss.
  + The client conceded that the lawyer was adequately prepared for trial and that he made it clear that he, as the client, had to decide whether or not to plead guilty.
  + The court found, therefore, that the **client did not prove that the lawyer was negligent**.
    - His alleged injuries were the adverse consequences resulting from his conviction and the statements he made in open court while pleading guilty.
    - **No Malpractice**

*Cox v. Geary*, 624 S.E.2d 16 (Va. 2006)

* Individual after receiving compensation from Commonwealth, for being wrongfully incarcerated for 11 years, sues attorney’s that had represented him criminal trial and on appeal alleging legal malpractice.
* Individual alleges that the attorney’s actions in both trials resulted in his wrongful conviction and the resulting damages.
* Attorney’s defense is that they upheld their duty in representing the individual and were not liable for legal malpractice and had been released from liability through the Commonwealth.
* The Court held that under the common law, individual's unconditional release of Commonwealth from liability for his wrongful incarceration barred recovery against attorneys who represented him at criminal trial and on appeal, for their alleged liability for his wrongful incarceration, regardless of the theory upon which such liability was predicated.
* The attorney’s were negligent and would have been subject to damages.
  + - However, the individual suffered a single, indivisible injury for which he received compensation from Commonwealth.
  + By recovering from the Commonwealth, the individual was barred, regardless of the determination, from recovering from the attorneys.
  + **Malpractice (No Recovery)**

*Skindzelewski v. Smith*, 944 N.W.2d 575 (Wis. 2020)

* Individual committed a crime, pled guilty, and spent time in jail as a consequence for committing that crime until a circuit court vacated his conviction because the statute of limitations rendered the conviction erroneous.
* The individual sued his criminal defense attorney for legal malpractice because his attorney failed to raise the statute of limitations as an affirmative defense in his criminal case.
* The Plaintiff had to prove that: (1) an attorney-client relationship existed; (2) the attorney's actions were negligent; (3) the attorney's negligent actions caused the client's injury; and (4) the client suffered an actual injury.
* The court found that the individual had pled guilty to the crime of theft-by-contractor.
* But once postconviction counsel discovered the statute of limitations had lapsed prior to the State charging him, he was released from jail after serving only a portion of his sentence.
* Despite his guilt, the law afforded the individual a remedy for the erroneous conviction—namely, his liberty.
  + However, the law did not give him an additional monetary remedy against his negligent lawyer.
  + Doing so would be tantamount to rewarding this guilty defendant for his crime, which “would ... shock the public conscience, engender disrespect for courts and generally discredit the administration of justice.”
  + **No Malpractice**

*Nieves v. Office of the Pub. Def.*, 230 A.3d 227, 229 (N.J. 2020)

* Plaintiff was represented by a state public defender for criminal charges relating to an assault allegation.
* After his conviction, Plaintiff was granted post-conviction relief based on the ineffective assistance of counsel at trial.
  + DNA evidence later confirmed that Plaintiff was not the perpetrator, and the underlying indictment against him was dismissed.
  + Plaintiff subsequently filed a legal malpractice action seeking damages against the Office of the Public Defender and the attorney that represented him.
* The court held, “[a]n attorney certainly owes a duty of care to the individual being represented, but that does not alter the status of the public defender as a public employee, or the OPD's status as the public employer.”
* This duty was breached when the attorney failed to object to the evidence that Plaintiff was erroneously convicted under.
* Accordingly, the attorney’s that represented Plaintiff were liable to malpractice.
  + However, NJ state law provided immunity for public defenders barring recovery.
  + **Malpractice**

*Sehgal v. DiRaimondo*, 165 A.D.3d 435 (N.Y.S. 2018)

* Client, a lawful permanent residence of the United States who had pleaded guilty to violations of federal election laws, brought legal malpractice action against attorneys after he was placed in removal proceedings upon his return to the United States.
* Defendants had provided a legal memorandum in which they advised plaintiff that it was unlikely he would be deported as a result of his plea and that, if he were placed in removal proceedings, he could seek a waiver from inadmissibility.
* Plaintiff alleged that, in reliance on the advice, he pleaded guilty and later traveled abroad. Upon his return to the United States, plaintiff was detained, placed in removal proceedings, and incarcerated for approximately four months.
* The Court bars part of Plaintiff’s recovery on the grounds that he had accepted the plea deal and maintained belief of innocence.
* But, the Court also finds that the Plaintiff’s detrimental reliance on the Defendants’ advice was the proximate cause on the guilty plea and permits partial recovery.
  + **Partial Malpractice (Would have not been in VA)**
* Funny Story in Avoiding Malpractice– from https://blog.bluestonelawfirm.com/2012/02/legal-malpractice-news/the-back-story-in-a-legal-malpractice-case/
  + Brooklyn judge recused himself from hearing a legal malpractice case after the plaintiff was arrested for tampering with the judge’s car.
  + Judge said he was recusing himself because plaintiff was arrested on Jan. 19 for allegedly committing numerous counts of felony criminal mischief against the motor vehicles of the judge and other colleagues from Kings County Supreme Court.
    - “To avoid the appearance of any impropriety on my part, I must recuse myself from this action, even though I know I would be as fair and impartial as the individual assignment judge in deciding the motion before the court,” the Judge wrote.
  + The judge had dismissed the plaintiff’s case against his former lawyer and denied the subsequent motion to reargue, deeming it “frivolous.” Later, the plaintiff filed a new motion for relief from the court, which the judge described as “barely comprehensible stream-of-consciousness ranting.”

**PRACTICE POINTERS**

**Preventing Legal Malpractice Claims**

* Communication
  + Clear and frequent communication with your client is critical.
  + Managing client expectations is key.
  + Not just at the beginning of the matter but throughout the matter communicate to your client the available courses of action and their possible outcomes. Make sure to communicate the implications of any decisions, how long things will take, and the fees and any disbursements they will need to cover.[[28]](#footnote-28)
* Avoid Conflicts of Interest
  + Take the time necessary to screen for conflicts. Where conflicts are concerned, erring on the side of caution is never wrong.[[29]](#footnote-29)
* Don’t Dabble
  + When faced with an area of law you are unfamiliar with, consider referring the matter out or seeking help from an experienced practitioner in the field.
  + Avoid overconfidence
  + Trial lawyers are, by nature, very confident (or at least very good at acting confident.) But, overconfidence can get you into trouble. While confidence is a necessity for lawyers, when advising clients, a little humility may help as well.[[30]](#footnote-30)
* Covering Up Mistakes
  + All attorneys make mistakes. When mistakes happen, it is essential to come clean as soon as possible.
  + Admit your mistakes as early as you can to your client and supervising attorney. Doing so can go a long way toward avoiding a lawsuit and holding onto your job.[[31]](#footnote-31)
* Listen to Your Gut
  + If you are unsure about something, take the time needed to figure it out.[[32]](#footnote-32)
* Suing for Fees
  + The single easiest way to get sued for legal malpractice is suing your client for fees. Therefore, weigh the costs and benefits closely before initiating these proceedings.[[33]](#footnote-33)
* E-Discovery
  + As cases become more complex, it is essential that attorneys educate themselves on e-discovery procedures and requirements. It is not enough to simply hire an e-discovery expert or rely on a paralegal. E-discovery errors can have drastic consequences and could lead to a malpractice suit.[[34]](#footnote-34)

**Virginia Law Recent Opinions**

*Khattab v. Epperly*, 102 Va. Cir. 306 (Cir. Ct. 2019)

* Overview:
  + Administrator of the Estate of Raneen Ahmad A. Khattab and nine other individuals ("plaintiffs") filed a legal malpractice claim against attorney David Epperly ("Defendant") concerning defendant's prior representation of the plaintiffs in a wrongful death action. Defendant filed a demurrer to the claim. The Circuit Court of Richmond ("Court") sustained the demurrer with prejudice to dismiss the individual plaintiffs for lack of standing. **The Court however did not sustain the demurrer as to the personal liability of the defendant; nor did the Court dismiss the legal malpractice claim finding that the Plaintiff sufficiently alleged the elements of the action**.

*Mallory v. LeClairRyan, P.C.*, 102 Va. Cir. 338 (Cir. Ct. 2019)

* Overview:
  + Latonya Mallory ("Plaintiff") sued LeClairRyan ("Defendant") for legal malpractice.  Defendant's counsel advised Plaintiff in the creation and management of their business. Eventually, the Federal Government brought successful charges against Plaintiff and their business for violations of federal law. Defendant filed a demurrer claiming collateral estoppel. The Richmond City Circuit Court sustained the demurrer as the issue of whether the Plaintiff had relied in good faith on Defendant's legal advice had been determined in a prior District Court decision.

*21 E. Main, LLC v. Worth, Inc.*, 100 Va. Cir. 380 (Cir. Ct. 2018)

* Overview
  + 21 East ("Plaintiff") filed a petition to set aside a default judgement seven months after its entry on the grounds that the default resulted from the legal malpractice of their former counsel. Worth, Inc. ("Defendant") filed a demurrer arguing that the Salem County Circuit Court ("Court") did not have jurisdiction per Va. Code § 8.01-428(D). The Court sustained the demurrer rejecting Plaintiff's argument that § 8.01-428(D) granted the Court the unlimited authority to hear an independent action at any time.
* *Moonlight Enters., LLC v. Mroz*, 293 Va. 224 (2017)[[35]](#footnote-35)
  + Case Overview:
    - Legal malpractice action where the Supreme Court of Virginia refused to extend the “continuous-representation rule.” This rule tolls the statute of limitations for a legal malpractice claim until an attorney stops working on a matter. Here, while an attorney finished working on the matter, another attorney within their firm continued to do so. The plaintiff claimed that their action was not barred by the statute of limitations claiming that it was tolled until all counsel of record completed legal work on the matter. The Court rejected this argument in part emphasizing the unpredictability such an extension would bring to legal malpractice claims.
* *Smith v. McLaughlin,* 289 Va. 241 (2015)[[36]](#footnote-36)
  + Case Overview:
    - **Factual Backdrop:**
      * Plaintiff hired Firm 1 and Firm 2 to represent him on charges of felony sexual abuse. Plaintiff is found guilty, but through habeas proceedings secures a new trial where he is found not guilty of all charges four years later. Plaintiff hires Firm 3 to initiate legal malpractice suits against Firms 1 and 2. Firm 1 reaches a settlement agreement with the Plaintiff and drafts a release agreement with Firm 1 reserving the ability to sue Firm 2. While traditionally at common law the release of one co-defendant for the same injury released all co-defendants Va. Code § 8.01-35.1(A)(1) abrogated the common law rule allowing such an action.
      * Four months later the Supreme Court of Virginia holds in *Cox v. Geary*, 271 Va. 141 (2006) that § 8.01-35.1(A)(1) did not apply to legal malpractice claims. In response Firm 2 filed a plea-in-bar that was sustained. Plaintiff files a legal malpractice case against Firm 3 and wins a $5.7 million dollar verdict that is appealed to the Virginia Supreme Court.
    - **Holding:**
      * The Supreme Court of Virginia vacated and remanded on appeal:
        + The Court adopted the doctrine of “Judgmental Immunity. This doctrine holds that if an attorney is exercising a “reasonable degree of care, skill, and dispatch” while acting in an unsettled area of the law at the time of the alleged negligence then they will not be found to breach the duty owed to a client.
        + The Court found that the Third Firm was operating in unsettled law, as at the time they drafted the release statement there were two different lines of jurisprudence interpreting § 8.01-35.1(A)(1). Therefore, the Court held that the Firm 3 did not breach its duty to the Plaintiff.

**Hypothetical**

* Facts:
  + Scrooge Company (“Scrooge”) contracts with Cool Contractor (“Cool”) to undergo work on a construction project. When Scrooge fails to pay Cool per the terms of the contract, Cool employs Lawful Law Firm (“Lawful”) to assert mechanics liens against Scrooge. Between the filing of the first and second mechanics liens Scrooge creates a trust. Lawful initiates an enforcement action— but neglects to name as parties to the suit the trustees and beneficiaries of Scrooge’s trust. More than six months following the filing of the enforcement action Lawful files an amended complaint adding the trustees and beneficiaries of the trust. While at the time of filing the law allowed the addition of the trustees and beneficiaries as proper, at the time of the later appeal the law had changed and the Supreme Court granted judgement for Scrooge for the failure to timely add all necessary parties to the matter. Cool sues Lawful for legal malpractice. **What result?**
* Answer:
  + **Lawful Lawfirm is Not liable for legal malpractice.**
    - *“We think, therefore, that, when Sands Anderson filed the underlying suit to enforce the mechanics' liens, the law was clear: trustees and beneficiaries of deeds of trust recorded subsequent to the filing of a mechanic's lien but before the filing of the enforcement suit were proper but not necessary parties to the suit. Sands Anderson owed Heyward a duty of reasonable care and skill, and it would be unreasonable to hold them liable where, as here, they followed the well-established law. At the time the underlying enforcement suit was filed, neither they nor any other attorneys could have reasonably anticipated that Monk and its progeny would be overruled. Consequently, we hold, as a matter of law, that, in light of well-established law existing at the time, the facts alleged in the motion for judgment did not state a claim of legal malpractice.”[[37]](#footnote-37)*

**ADDITIONAL RESOURCES AND INSIGHTS**

## **Preventing Legal Malpractice Claims**

## **Engagement Letters and Retainer Agreements**

* Fees Governed by Va. Rule 1.5:
  + *“(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.”[[38]](#footnote-38)*
* Scope of Engagement Governed by Va. Rule 1.2:
  + *“(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”*
  + *“(b) A lawyer may limit the objectives of the representation if the client consents after consultation.”[[39]](#footnote-39)*
* Avoid engagement creep
  + Clearly define the scope of the agreement
  + State what work you will do AND what work you will not do.

## **Preventing Legal Malpractice Claims: Communication**

* Va. Rule 1.4:
  + *“(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”*
  + *“(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”*
  + *“(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.”[[40]](#footnote-40)*
* Keep regular contact
* Clients are less likely to sue lawyers they like – create a relationship
* Face-to-face visits
  + Make sure you timely respond to client’s inquiries!
  + Number one complaint.
  + Be careful with emails and texts

## **Preventing Legal Malpractice Claims: Don’t Dabble:**

* Rule 1.1. competence:
  + *“A lawyer shall provide competent representation to a client. Competent* *representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”[[41]](#footnote-41)*

## Recognize the Importance of Lawyer Mental Health and Self Care

* Lawyers suffer from mental health related issues at disproportionately high rates
  + Rates from 2016 Joint Study conducted by the American Bar Association’s Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation.
    - Of study 28% suffered from depression; 19% from anxiety; over 1/3rd substance abuse issues.[[42]](#footnote-42)
* Mental health and substance abuse problems compounded by pandemic[[43]](#footnote-43)
  + Increased isolation, feelings of loneliness
  + Increased “self-medication” – cultural acceptance of drinking before noon in the pandemic.
  + Lack of supervision, lack of early intervention.
  + Feeling of general hopelessness, lack of control.

1. *See Shipman v. Kruck*, 267 Va. 495, 501; *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 313, (2002). [↑](#footnote-ref-1)
2. *See Campbell v. Bettius*, 244 Va. 347, (1992); *Duvall, Blackburn, Hale & Downey v. Siddiqui*, 243 Va. 494, 497, (1992). [↑](#footnote-ref-2)
3. *Id.* [↑](#footnote-ref-3)
4. *Id.* at 11; *Campbell*, 244 Va. at 352. [↑](#footnote-ref-4)
5. *Glenn v. Haynes*, 192 Va. 574, 579-81 (1951). [↑](#footnote-ref-5)
6. *Lyle, Siegal, Croshaw & Beale, P.C. v. Tidewater Capital Corp.*, 249 Va. 426, 432 (1995). [↑](#footnote-ref-6)
7. *Smith v. McLaughlin*, 289 Va. 241, 254 (2015). [↑](#footnote-ref-7)
8. *Allied Productions*v.*Duesterdick*, 217 Va. 763, 764-65, (1977).  [↑](#footnote-ref-8)
9. *See Id.*  [↑](#footnote-ref-9)
10. *Goldstein*v.*Kaestner*, 243 Va. 169, (1992). [↑](#footnote-ref-10)
11. *See, e.g.*, *Jennings*v.*Lake*, 267 S.C. 677, 680, (1976); *Keister*v.*Talbott*, 391 S.E.2d 895, 899 (W.Va. 1990). [↑](#footnote-ref-11)
12. 231 Va. 170 (1986). [↑](#footnote-ref-12)
13. *Id.* at 176. [↑](#footnote-ref-13)
14. *Duvall, Blackburn, Hale & Downey v. Siddiqui*, 243 Va. 494, 495, (1992) [↑](#footnote-ref-14)
15. *Id.* at 498. [↑](#footnote-ref-15)
16. 249 Va. 426, 428, (1995) [↑](#footnote-ref-16)
17. *Jones v. Dere*, 36 Va. Cir. 519, 525-26 (Cir. Ct. 1995) (citing *Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980). [↑](#footnote-ref-17)
18. *Id.* at 525. [↑](#footnote-ref-18)
19. *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980). [↑](#footnote-ref-19)
20. 278 Va. 57, 63-64 (2009).  [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. 292 Va. 257 (2016). [↑](#footnote-ref-22)
23. *Id.* at 262.  [↑](#footnote-ref-23)
24. *Johnson v. Hart*, 279 Va. 617, 623-26 (2010). [↑](#footnote-ref-24)
25. *MNC Credit Corp. v. Sickels*, 255 Va. 314, 317 (1988). [↑](#footnote-ref-25)
26. 243 Va. 169, 172 (1992) [↑](#footnote-ref-26)
27. 293 Va. 224 (2017). [↑](#footnote-ref-27)
28. *Leboff, supra* note 28; Mark Bassingthwaighte, *Communication – It’s All In The Details*, alpsinsurance.com (Dec. 21, 2013), https://blog.alpsinsurance.com/communication-its-all-in-the-details-2. [↑](#footnote-ref-28)
29. Oberly, *supra* note 29; Mark Bassingthwaighte, *Watch Out For These Common Attorney Conflict of Interest Traps*, alpsinsurance.com (Mar. 3, 2015), https://blog.alpsinsurance.com/watch-out-for-these-common-conflict-of-interest-traps. [↑](#footnote-ref-29)
30. *Leboff, supra* note 28; David Oberly, *Top Tips for Avoiding Legal Malpractice Claims*, jdsupra.com (Oct. 19, 2018), https://www.jdsupra.com/legalnews/top-tips-for-avoiding-legal-malpractice-54492/; Rob Tameler, *Most Dangerous Areas of Practice for Dabbling*, alpsinsurance.com (Apr. 24, 2019), https://blog.alpsinsurance.com/most-dangerous-areas-of-practice-for-dabbling. [↑](#footnote-ref-30)
31. *Leboff, supra* note 28. [↑](#footnote-ref-31)
32. Dan Pinnington, *10 Ways to Avoid A Legal Malpractice Claim*, attorneyatwork.com (June 20, 2011), https://www.attorneyatwork.com/10-ways-to-avoid-legal-malpractice/. [↑](#footnote-ref-32)
33. Larry Upshaw, *Top Ten Ways to Avoid Legal Malpractice*, johnstontobey.com (Feb. 6, 2015), https://www.johnstontobey.com/top-10-ways-to-avoid-legal-malpractice/. [↑](#footnote-ref-33)
34. Michael S. Leboff, *Beware of These Seven Common Attorney Malpractice Tips*, aba.com (June 20, 2019), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2019/seven-common-attorney-malpractice-traps/. [↑](#footnote-ref-34)
35. *Moonlight Enters., LLC v. Mroz*, 797 S.E.2d 536 (Va. 2017). [↑](#footnote-ref-35)
36. *Smith v. McLaughlin*, 289 Va. 241, 769 S.E.2d 7 (2015). [↑](#footnote-ref-36)
37. *Heyward & Lee Constr. Co. v. Sands, Anderson, Marks & Miller,* 249 Va. 54 (1995). [↑](#footnote-ref-37)
38. Va. Sup. Ct. R. pt. 6, sec. II, 1.5. [↑](#footnote-ref-38)
39. Va. Sup. Ct. R. pt. 6, sec. II, 1.2. [↑](#footnote-ref-39)
40. Va. Sup. Ct. R. pt. 6, sec. II, 1.4. [↑](#footnote-ref-40)
41. Va. Sup. Ct. R. pt. 6, sec. II, 1.1. [↑](#footnote-ref-41)
42. Patrick Krill et. al. *The Prevalence of Substance Use and Other Mental Health Concerns Amount American Attorneys*, 10 J. Addiction Med. 46, (2016). [↑](#footnote-ref-42)
43. Mark É Czeisler et. al.*, Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic –United States, June 24-30, 2020*, 69 Morbidity and Mortality Wkly. Rep. 1050 (2020). [↑](#footnote-ref-43)