White and Williams LLP

Professional Liability

In *Clark v. Stover*, the **Supreme Court of Pennsylvania** granted a Petition for Allowance of Appeal on the following issue:

*If an attorney ongoing [sic] represents a client post-occurrence of **legal malpractice**, should that continuing representation otherwise **toll the statute of limitations**?*

(January 28, 2020)

In *Meisels v. Fox Rothschild LLP,* the **Supreme Court of New Jersey** addressed whether a law firm is liable for **conversion and breach of fiduciary duty** for distribution of **funds wired to the firm's trust** account by a **third-party, non-client intermediary**. The court held that the law firm was **not liable** because it was not **made aware**, nor did it have any basis upon which it **reasonably should have been aware**, of the third-party non-client. (January 9, 2020)

In *Rawan v. Continental Casualty Company,* the Supreme Judicial Court of Massachusetts held that a **consent-to-settle** clause in a **professional liability** insurance policy did not violate the **Massachusetts Insurance Bad Faith statute, M.G.L. c. 176D**. The court held that there was no legislative intent to preclude consent-to-settle clauses in professional liability policies, and recognized that consent-to-settle clauses serve a valuable purpose in the professional liability context, including **protecting a professional's reputation and good will**, and **encouraging** professionals to **obtain** an important but **voluntary line of insurance**. The court also rejected the argument that only consent-to-settle clauses paired with **hammer clauses** are permissible. (December 16, 2019)

In *The Patriot Group, LLC v. Edmands,* the **Appeals Court of Massachusetts** addressed whether an attorney was liable for **defamation based on blog posts** falsely claiming that a company had committed tax and security fraud. Because the blog post restated claims the attorney had made notifying the company about his client's whistleblower status, the attorney argued that **litigation privilege** barred liability for defamation. Where litigation privilege applies, written or oral communications by a party, witness, or attorney prior to, in the institution of, or during and as a part of a judicial proceeding involving them are absolutely privileged even if uttered maliciously or in bad faith. Here, the **SEC whistleblower claims** referenced in the statements were **not judicial**, and could **not support application of the litigation privilege**. (November 13, 2019)

Practice Areas

Professional Liability

In *Shaw v. Shand*, the **Superior Court of New Jersey, Appellate Division**, considered whether **semi-professionals,** such as home inspectors, should be deemed to be "**learned professionals**" **exempt from liability** under the **Consumer Fraud Act** (CFA), when those semi-professionals are subject to regulation by a **separate regulatory scheme**. The court found that the judicially created "**learned professional" doctrine** should include only those professions **historically recognized** as "learned" based on the **requirement of extensive learning** or erudition. Accordingly, the court held that home inspectors and other licensed semi-professionals are not learned professionals simply because they are otherwise regulated, and that they remain **subject to CFA liability** absent a finding that a **direct and unavoidable conflict** exists between application of the CFA and application of any other regulatory scheme. (August 15, 2019)

In *Lucas v. 1 on 1 Title Agency, Inc.*, the **Superior Court of New Jersey, Appellate Division**, addressed whether a trial court that adjudicated a successful legal malpractice action likewise had **subject matter jurisdiction** to adjudicate a resultant **dispute for counsel fees** between the plaintiff and her counsel. The court found that, unless a petition to adjudicate a fee dispute has been filed under the **Attorney's Lien Act**, there is no subject matter jurisdiction, emphasizing that plaintiff's counsel were not parties to the malpractice action from which the disputed fees arose. (August 9, 2019)

In *Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C.*, the **Supreme Court of New Jersey** addressed whether the **entire controversy doctrine** operated to preclude a client from bringing a **legal malpractice** claim against its former law firm after the suit gave rise to the malpractice claim and the law firm's subsequent **collection action**for outstanding attorneys' fees had been fully adjudicated. The court stated that, while the clients were not required under the entire controversy doctrine to assert their legal malpractice claim in the underlying matter, the law firm's collection action did not constitute an underlying suit and the clients were required to assert their malpractice claim in that case. The court, therefore, held that the clients were barred from bringing their legal malpractice suit, unless they could demonstrate that they did not have a **fair and reasonable opportunity** to assert that claim in the collection action. (March 7, 2019)

In *Rupert v. King*, the **Supreme Court of Pennsylvania** granted permission to appeal on the issue of whether an **award of punitive damages** against an attorney under the **Dragnoetti Act** infringes upon the Pennsylvania Supreme Court's constitutional power **to regulate the conduct of attorneys**. (February 21, 2019)

In *180 Ludlow Development LLC v. Olshan Frome Wolosky LLP*, the **New York Supreme Court, Appellate Division, 1st Department**, addressed whether, in a **legal malpractice** action, the law firm's alleged **negligent** representation of the plaintiff **client** with respect to a zoning lot development and easement agreement was the **proximate cause** of the **client's** alleged **damages**. The court noted that **proximate cause** is generally a **question of fact** for the **factfinder** but in certain circumstances can be determined as a **matter of law**. The court held that this was one of those circumstances given that the **client's damages** were caused by its failure to keep the law firm informed and its unilateral decision that certain construction work would constitute a violation as defined in the subject agreement. (October 30, 2018)

In *Brean Murray, Carret & Company v. Morrison & Foerster LLP*, the **New York Supreme Court, Appellate Division, 1st Department**, addressed whether the doctrine of **equitable estoppel tolled** the **statute of limitations** of a **legal malpractice** claim brought by the plaintiff, a former **client** of the defendant law firm. The court held that the doctrine of **equitable estoppel** did not **toll** the **statute of limitations** because the former client possessed timely knowledge sufficient to have placed the former client under a duty to make inquiry and ascertain all of the relevant facts prior to the expiration of the applicable **statute of limitations** for **legal malpractice**. (October 30, 2018)

In *Gregory v. Greguras*, the **Superior Court of Pennsylvania** addressed waiver of the attorney-client privilege in a cause of action for **intentional interference with expectation of inheritance** filed by the decedent's children against their father's attorney. During opening statements of the trial, the counsel for the defendant-attorney told the jury that the defendant attorney would testify that he had fully advised the decedent as to the consequences of his estate-planning decisions. The court held that the last minute waiver of the attorney client privilege in opening statements resulted in prejudice and unfair surprise to the decedent's children. (September 20, 2018)

In *Balducci v. Cige*, the **Superior Court of New Jersey, Appellate Division**, found a **fee agreement unenforceable** because the attorney **failed to adequately inform** his client about the agreement's ramifications. The court held that if an attorney charges clients in **fee-shifting cases a fee based on an hourly rate**, the attorney is **ethically obligated** to disclose that the hourly rate-based fee could approach or exceed the client's recovery. The attorney must provide examples of how much hourly fees have totaled in similar cases. Counsel who require clients to advance costs are **ethically obligated** to provide information about litigation costs such as deposition and expert fees, and provide examples of what costs have totaled in similar types of cases. An attorney is also **ethically obligated** to inform the client that other competent counsel who represent clients in similar cases advance litigation costs and represent clients solely on a contingent fee basis without an hourly component. (August 30, 2018)

In *Hawkins v. Borough of Barrington*, the **Superior Court of New Jersey, Appellate Division**, addressed the plaintiff's burden of proving personal injury in a **professional negligence claim** involving a **real estate transaction**. The court held that professional negligence actions that do not involve a parent-child relationship, malicious use of process, or wrongful birth – which do not require enhanced proof – **require expert opinion** to set forth evidence of bodily injury or "demonstrable psychiatric sequelae proximately caused by the tortfeasor's misconduct." (August 17, 2018)

In *Medical Mutual Insurance Company of Maine v. Burka*, the **United States Court of Appeals for the First Circuit** held that an **insurer** did not owe a **duty to defend** a doctor under his **professional liability insurance policy**, where the doctor was accused of improperly accessing his wife's and his wife's parents' medical records in order to harass them. The court held that no duty to defend existed because the allegations in the complaint revealed no potential factual or legal basis for concluding that the doctor's actions resulted from '**Professional Services**' rendered within the scope of his duties as a physician. In particular, with respect to the confidentiality of medical records, the court noted that the definition of 'Professional Services' tied the **confidentiality obligation** to the **provision of healthcare services** to a patient claiming the breach of that obligation. The allegations in the complaints did not permit a finding that any doctor-patient relationship existed. (August 10, 2018)

In *Preferred Contractors v. Sherman*, the **Superior Court of Pennsylvania** addressed an insurer's claims for **negligence** and **common law indemnity** against an **insurance agent** for failing to provide an insured with a copy of a policy and for failing to provide the insurer with an accurate insurance application. The court held that the insurer's negligence claims were barred by the **economic loss doctrine** since they alleged **purely economic loss**. The court determined that there was no basis for a common law indemnity claim once the negligence claims were dismissed. (July 24, 2018)

In *Sang Seok Na v. Schietroma*, the **New York Supreme Court, Appellate Division, 2d Department**, addressed whether a plaintiff in an underlying personal injury action could recover damages for **legal malpractice** against an attorney. In this action, the plaintiff alleges that the attorney committed legal malpractice by **failing to timely move** to have the underlying personal injury action restored to the trial calendar. The court noted that in order to recover for legal malpractice, a plaintiff must prove that the **attorney failed to exercise the ordinary reasonable skill and knowledge** commonly possessed by a member of the legal profession and that this failure **proximately caused** the plaintiff to suffer damages. Moreover, a plaintiff must demonstrate that he or she w**ould have prevailed but for the attorney's negligence**. Seeing that it was entirely **speculative** that the plaintiff would have succeeded if not for the attorney's alleged error, the court dismissed the matter. (July 5, 2018)

In *Cohen v. Sive, Paget & Riesel, P.C.*, the **New York Supreme Court, Appellate Division, 1st Department**, addressed whether a law firm committed **malpractice** by failing to advise its client to **promptly notify its insurer** of its claim as required by the client's policy. The law firm argued that its client knew of the claim a month before it retained the law firm, and therefore the insurer would have denied the claim anyway. The court held that the record did not conclusively demonstrate that a month's delay would have precluded coverage; entry of summary judgment was therefore inappropriate. (June 14, 2018)

In *Yellin v. Zimmerman*, the **Supreme Court of New York, Appellate Division, 1st Department**, considered whether the lower court properly determined that a **breach of contract** cause of action is not redundant of a **malpractice claim**. The court held that the lower court properly determined that the breach of contract cause of action **was not redundant** of the malpractice claim because the breach of contract claim is "premised upon obligations distinct from those that **flow from professional standards of architectural practice**." (June 7, 2018)

In *Knopick v. Dennis Boyle and Boyle Litigation*, **the Superior Court of Pennsylvania** considered whether an email drafted by a **former non-attorney law firm employee** to himself using only a personal email account was protected by **attorney-client privilege** in a **legal malpractice litigation**. The email was created in anticipation of the former employee's meeting with an attorney outside the firm (and later a second attorney within the firm). The court held that the defendant law firm lacked **standing to assert attorney-client privilege** because the privilege belongs to the non-party, former employee and not the law firm. Furthermore, the email was not created as a confidential communication to an attorney for the purpose of securing legal advice or created upon directive of counsel. (May 30, 2018)

In *Iannucci v. Kucker & Bruh, LLP*, the **New York Supreme Court, Appellate Division, 2d Department**, addressed whether mere gaps in the plaintiffs' proof of damages in a **legal malpractice** action is sufficient to warrant summary dismissal. In reversing the motion court's grant of summary judgment to the defendant law firm, the court held that that

the defendant failed to tender sufficient evidence to eliminate all material issues of fact from the case. The court noted that even if the plaintiffs' damages could not be precisely calculated at the summary judgment stage, expenses to the client resulting from attorney delays are deemed to be **ascertainable damages** in connection with a legal malpractice cause of action. (May 16, 2018)

In *Suttongate Holdings Limited v. Laconm Management*, the **New York Supreme Court, Appellate Division, 1st Department**, addressed whether clients could assert a claim for **fraudulent inducement against their lawyer** in connection with a failed **joint venture**. The court held that the clients' allegations describing their attorney-client relationship stated a cause of action for **breach of fiduciary duty** because they alleged that he served as their attorney for years, both before and during the joint venture, negotiated unrelated contracts and handled unrelated lawsuits. The court also rejected the attorney's argument that the clients could not argue **justifiable reliance** in light of the clear terms of the contract because the attorney's alleged assurances and fraud "were the very cause of defendants' failure to review the documents carefully." (April 10, 2018)

In *Meyer, Darragh, Buckler, Bebenek & Eck, PLLC v. Law Firm of Malone Middleman PC*, the **Supreme Court of Pennsylvania, Western District** addressed whether a **predecessor law firm** could recover damages in ***quantum meruit*** from a **successor law firm** when the successor law firm and its client **retained a benefit achieved by the predecessor law firm and no contract governed the situation**. The court held that a predecessor law firm can recover in *quantum meruit*" only where the facts demonstrate **unjust enrichment**." (March 6, 2018)

In *Dormitory Authority of the State of New York v. Samson Construction Company,* the **New York Court of Appeals** addressed **whether negligence claims were duplicative of a breach of contract claim**. The allegations in that action centered on an **architect's alleged breach of contract** during the course of building a laboratory. Negligence claims were also asserted, which were identical except that it was alleged that the architect failed to comply with professional standards of care. The court found that, while under certain circumstances a professional architect may be subject to a tort claim, the only damages alleged were within the contemplation of the parties under the contract. Therefore, the court held that the **negligence claim was duplicative of the breach of contract claim**. (February 15, 2018)

In *Smith, Gambrell & Russell, LLP v. Telecommunication Sys., Inc.*, the **Supreme Court of New York, Appellate Division, 1st Department**, considered whether an attorney committed **legal malpractice** by **failing to file a timely motion** for **attorneys' fees** in a federal **patent**proceeding. In this action, the attorney's client alleged that the attorney's filing of a motion for sanctions instead of a motion for attorney's fees constituted malpractice. The court noted that the record demonstrated that the attorney contemplated filing a motion for attorney's fees but decided against it. Therefore, the court found while the client may be able to allege that the attorney made **an error in judgment,** the client did not have a claim for **malpractice.** (November 14, 2017)

In *Eurotech Construction Corporation v. Fischetti & Pesce, LLP*, the **New York Supreme Court, Appellate Division, 1st Department**, addressed whether, in a **legal malpractice action**, a law firm committed **malpractice** by failing to ensure that the firm's former client gave **timely notice to its excess insurance carrier** that the primary insurer's limits were likely to be exhausted in connection with an underlying personal injury action. The court explained that a **law**

firm may have an obligation to investigate insurance coverage. The court held that, although the former client had been advised by its insurer's third-party administrator to notify its excess carrier of the claim, the issue was not what the former client knew but whether the firm breached its duty by not providing timely information obtained in the underlying action. (November 9, 2017)

In *Kiribati Seafood Company, LLC v. Dechert LLP*, the **Supreme Judicial Court of Massachusetts** addressed whether an **attorney** is liable for **professional negligence** where the negligence is preceded by **judicial error**. In the underlying litigation, the former client's claims had been denied by the court because the former client's attorney failed to provide evidence – which the attorney possessed – that the court erroneously concluded was required for the client to prevail on its claims. In the professional negligence action, the Supreme Judicial Court held that the attorney's failure to provide the court with the evidence that it required is a **concurrent cause**, rather than a superseding cause, such that the attorney could be found liable for professional negligence. **Thus, the court warned that where a lower court has indicated that it has a different, even erroneous, view of the applicable law, the attorney is negligent if her client could prevail on the facts under the erroneous view of the law and the attorney fails to argue under that view of the law.** (October 11, 2017)

In *Maroulis v. Sari M. Friedman, P.C.*, the **New York Supreme Court, Appellate Division, 2d Department**, addressed whether, in a **legal malpractice action,** the law firm's former client sufficiently pleaded specific factual allegations demonstrating that, but for the law firm's alleged **negligence**, there would have been a more favorable outcome in the underlying proceeding or that the former client would not have incurred any damages. In dismissing the **legal malpractice** claim, the court held that the former client's conclusory allegations merely reflected a subsequent dissatisfaction with the settlement in the underlying matrimonial action and that the **former client failed to demonstrate that, but for the law firm's alleged negligence, there would have been a more favorable outcome.** (September 13, 2017)

In *Holland v. Kantrovitz & Kantrovitz LLP*, the **Appeals Court of Massachusetts** addressed whether a woman's claims for **legal malpractice** against a law firm who neglected to file her claim prior to the statute of limitations **survived the woman's bankruptcy**. The law firm took on representation of the woman for her slip and fall case but neglected to contact her and were unaware that she went through bankruptcy *pro se* before the statute of limitations on the claim had run. The court held that the **malpractice claim did not accrue until after the bankruptcy**, and thus was not extinguished by the statute of limitations. As for the bankruptcy's impact on the unfiled slip and fall case, which remained relevant as a measure of damages for the malpractice action, the court concluded that the bankruptcy would not have extinguished the claim but merely changed the real **party in interest** from the woman to the trustee. (August 15, 2017)

In *Advanced Chimney, Inc. v. Graziano*, the **New York Supreme Court, Appellate Division, 2d Department**, addressed whether an **attorney** may be **disqualified** since she was likely to be a **witness on a significant issue of fact**. According to Rule 3.7(b)(1) of the Rules of Professional Conduct, "[a] lawyer may not act as [an] advocate before a tribunal in a matter if . . . another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client." The court **did not disqualify** the **attorney** because there was no showing that the **attorney's testimony** may be **prejudicial to her**

client's case. (August 2, 2017)

In *Jay Deitz & Associates of Nassau County, Ltd. v. Breslow & Walker, LLP*, the **New York Supreme Court, Appellate Division, 2d Department**, addressed whether an **attorney** may also act as a **broker** in the **sale of a business**. The court determined that this relationship posed a **conflict** where the **retainer agreement** provided for a **contingency fee** in the event a **sale of the company** was completed. The court stated that a "**lawyer** is strictly **forbidden from undertaking a representation** where the **lawyer possesses a personal, business, or financial interest at odds with that of his or her client**." (August 2, 2017)

In *Fergus v. Ross*, the Supreme Judicial Court of Massachusetts addressed whether **apparent authority** to create an **agency** relationship existed between a **lawyer**, who financed a **real estate transaction** with a borrower, and the borrower's **referral source** to the lawyer. In referring the borrower to the lawyer, the referring party obtained a **sideloan** from the borrower out of the proceeds of the loan. Holding that apparent authority did not exist, the Court reasoned that the lawyer had not **acquiesced or ratified** the referral source's conduct regarding the side loan because only the words and conduct of the referral source connected the lawyer to the side loan and the loan documents did not mention the side loan. (August 2, 2017)

In *McGuire v. Russo*, the **Supreme Court of Pennsylvania** accepted review of whether the court should overturn a prior decision, which barred **legal malpractice** suits following **settlement** of a lawsuit absent an allegation of **fraud**, even in instances where an attorney's **negligence** led to a lesser **settlement**. (June 6, 2017)

In *C.S. Osborne & Company v. Bollinger, Inc.,* the **Superior Court of New Jersey, Appellate Division**, considered whether an insurance broker had a duty to provide quotes for higher policy limits to a policyholder. The court reasoned that **no special relationship existed between the insurance broker and the policyholder** necessitating the insurance broker to advise the policyholder of higher policy limits. Therefore, the court held that the **insurance broker did not have a duty to provide quotes for higher policy limits to a policyholder**. (May 1, 2017)

In *Villani v. Seibert*, the **Supreme Court of Pennsylvania** considered whether the **Dragonetti Act violates the Pennsylvania Constitution** by infringing on the Supreme Court's **exclusive power to regulate the practice of law**. The court held that the Act **is constitutionally sound** because it involves **substantive lawmaking** of the sort typically entrusted to the legislature and is a **law of general application** rather than specifically targeted to legal professionals. (April 26, 2017)

In *Stein Industries, Inc. v. Certilman Balin Adler & Hyman, LLP*, the **New York Supreme Court, Appellate Division, 2d Department**, addressed the application of the **doctrine of continuous representation** to calculate the **statute of limitations for legal malpractice** claims stemming from advice provided on the purchase of several companies. The three-year statute of limitation for legal malpractice claims is generally **tolled** until the attorney's **continuing representation** of the client with regard to the particular matter terminates. The court held that a question of fact remained as to whether a meeting that occurred two years after the purchase of the businesses regarding how to remedy the effects of the alleged deficient legal advice was sufficient to establish a continuous representation as to toll the running of the statute of limitations. (April 5, 2017)

In *Doe v. American Guaranty and Liability Company*, the **Appeals Court of Massachusetts** held that the plaintiff had **waived** the **attorney-client privilege** as to information that he revealed to his attorney in an underlying action because that information was **relevant, material and necessary** to his attorney's **defense** in the subsequent **malpractice** action brought by the plaintiff against the attorney. (March 1, 2017)

In *Freundlich & Littman v. Feierstein*, the **Superior Court of Pennsylvania** addressed whether **judicial privilege and/or judicial immunity shields** an attorney from any **civil liability** in an **abuse of process, misuse of process and wrongful use of process action**. The court held that **judicial privilege/immunity does not bar litigation of claims specifically arising under the Dragonetti Act**, which allows a plaintiff to seek recovery against another for the wrongful use of civil proceedings. (February 23, 2017)

In *Jeremias v. Allen*, the **New York Supreme Court, Appellate Division, 1st Department**, addressed the issue of **attorney malpractice** in regard to a **real estate transaction** whereby the **property buyers** took an assignment of a purchase and sale agreement involving a commercial building. The **property buyers** alleged that the **attorneys** failed to conduct **due diligence** on the transaction and failed to procure renewal leases. The court ultimately held that the sole cause of damages resulted from the **property buyers'** informed choice to take the **calculated risk** of closing on the assignment transaction prior to procuring a renewal lease from the primary tenant. (January 19, 2017)

In *Rodriguez-Vazquez v. Solivan Solivan*, the **United States Court of Appeals for the First Circuit** held that an attorney did not violate a court order when he made statements about a **confidential civil rights settlement** to the local press. The court reasoned that statements that the settlement "vindicated" the plaintiffs' rights did not equate to a concession of liability by the defendants. In addition, the court noted that the statement did not reveal the **terms and conditions** of the settlement. (December 23, 2016)

In *Heldring v. Lundy Beldecos & Milby, P.C.*, the **Superior Court of Pennsylvania** addressed the issue of whether an attorney can be held liable for **legal malpractice** when the attorney successfully recovers a **judgment** on behalf of his client, but the judgment is against a **business entity's trade name** and not the actual **legal entity**. The court held that, upon proper proof, an attorney's **failure to sue** the **correct party** may be a viable basis for a **legal malpractice** cause of action. (November 28, 2016)

In *Swift Funding, LLC v. Isaac*, the **New York Supreme Court, Appellate Division, 1st Department**, addressed whether an attorney was liable to an **assignee** for **conversion** where it was alleged that the attorney had **notice** of an **assignment** of the law firm's client's recovery of litigation proceeds and the attorney disbursed such proceeds in disregard of the **assignment**. The Court held that one who interferes with another's **possessory rights** in property by disposing of it may be liable for **conversion** and because the record presented triable issues of fact regarding the attorney's notice of the existence of the **assignment**, the **conversion** claim asserted against the attorney should not be dismissed. (November 10, 2016)

In *The Estate of Francis P. Kennedy v. Stuart A. Rosenblatt, C.P.A.,* the **Superior Court of New Jersey, Appellate Division**,addressed whether counsel should be **disqualified** on the basis of **conflict of interest** after the attorney who had filed and dismissed the underlying professional negligence action recommenced the action after joining the law firm that had defended the Estate in the previous action. The court looked to **Rule of Professional Conduct 1.10**, and

determined that the trial court's **disqualification order should be vacated** subject to the attorney filing certifications describing what pertinent information was accessed at the new firm, whether the information could be deleted, and how those who had accessed the file avoided reviewing confidential information material to the underlying action. The court held that this matter would be remanded if this process revealed that the substantive content of confidential information had been reviewed. (November 4, 2016)

In *Durst v. Durst*, the **United States Court of Appeals for the Third Circuit** addressed the application of **collateral estoppel** against a **co-trustee** of a **revocable, *inter vivos* trust** who participated in prior litigation regarding the **forced sale of a trust asset** but was never named a **formal party** to that litigation. Although the co-trustee was never formally joined as an **intervenor**, the trial court essentially treated him as such. The co-trustee participated in the case management conference, conducted discovery, submitted briefs, and participated in oral arguments. Because the court "took pains" to include the co-trustee as an intervenor, the court held that the co-trustee was properly precluded from re-litigating those issues in the subsequent and related malpractice litigation against the trust's attorneys.

*White and Williams' attorneys **Christopher Leise** and **Marc Penchansky** secured this favorable result for our client.* (October 19, 2016)

In *Weinberg v. Sultan*, the **New York Supreme Court, Appellate Division, 1st Department**, addressed whether a complaint alleging that a purchaser and her attorney exerted **undue influence** over the seller in a **real estate transaction** adequately alleged **fraud and legal malpractice**. The court held that the complaint **failed to allege any material misrepresentation**, a required element of fraud, and that the seller did not allege how the purchaser and her company exerted any undue influence over her or coerced her into a transaction that she alleged made no economic sense. The court also held that the purchaser's attorney made a **prima facie showing of a lack of proximate cause**, an essential element of legal malpractice. (September 1, 2016)

In *Kilmer v. Sposito*, the **Superior Court of Pennsylvania** addressed whether a client may sue her lawyer when the lawyer **incorrectly advised** her on the law, which led the client to **voluntarily accept a settlement** that was less than the client was **statutorily entitled to receive**. The court noted that an unsatisfied client may not generally challenge an attorney's **professional judgment** with respect to an amount of money the client should accept in a **settlement** unless the client can prove he or she was **fraudulently induced to settle**. In this case, the client could sue because the alleged malpractice was not the attorney's judgment on the value of the case, but counsel's failure to **correctly advise** the client on the law pertaining to her statutory right to half of her husband's estate. (July 1, 2016)

In *Baker v. Harrington*, the **First Circuit Court of Appeals** held that a **bankruptcy attorney** was properly **sanctioned** by the trial court for twice **describing** the **applicable law** in a manner that was **materially misleading** when it ordered the attorney to attend an in-person, semester long, three credit-hour class on legal ethics or professional responsibility in an ABA accredited law school. In briefs filed with the bankruptcy court, the attorney had asserted propositions of law which were unsupported or contradicted by the legal authority cited and at other times asserted propositions for which no legal support existed. (June 29, 2016)

In *Miller v. St. Luke's University Health Network*, the **Superior Court of Pennsylvania** held that a judgment could be entered on a **Dragonetti Act** claim even though the plaintiff failed to prove damages. However, mere proof of tortious

conduct did not entitle the plaintiff to a **presumption of damages** and the plaintiff could not recover absent proof of one or more of the enumerated damages set forth in **Section 8353** of the Act. (June 24, 2016)

In *Mortgage Grader, Inc. v. Ward & Olivo, LLP*, the **Supreme Court of New Jersey** addressed whether law firms organized as limited liability partnerships are required to **maintain malpractice insurance during a firm's windup period**. The court held that under Rule 1:21-1C, the mandate to carry malpractice insurance only applied to the performance of **"professional services,"** and therefore **"administrative activities"** such as a wind-up were not included in the term. Thus, **"tail coverage"** is not required to be carried. (June 23, 2016)

In *Rosalind W. Sutch, as Executrix of the Estate of Rosalind Wilson, Deceased v. Roxborough Memorial Hospital,* the **Superior Court of Pennsylvania** addressed whether the trial court **abused its discretion i**n imposing **sanctions** against the defendants' attorney for **contempt** by engaging in a **willful violation of a court order**. The court reversed the trial court's contempt order and held that the **order** allegedly violated by defense counsel was **not definite, clear and specific**, the plaintiff failed to meet its burden of proving defense counsel was in contempt, the trial court made unnecessary 'credibility determinations, the trial court violated defense counsel's **due process** rights by failing to hold an evidentiary hearing, and the trial court erred when it granted plaintiffs' counsel's alleged fees and costs based on a discounted version of ***quantum meruit*** in a contingency fee case. (June 15, 2016)

In *In the Matter of Frank J. Cozzarelli, An Attorney at Law*, the **Supreme Court of New Jersey** addressed the significance of **mental illness** in the **discipline of an attorney**. The court found that although the attorney "suffered a breakdown" following a criminal investigation, the evidence in the record did not indicate the attorney was deprived of **the ability to act purposefully and knowingly**, or **the ability to distinguish between right and wrong**. Because the attorney was not able to show a **mitigating defense** application, the Court adopted the disciplinary board's recommendation and disbarred the attorney. (May 2, 2016)

In *Innes v. Madeline Marzano-Lesnevich*, the **Supreme Court of New Jersey** addressed whether **attorneys who intentionally violate an agreement** can be liable for **attorneys' fees as consequential damages** to a non-client beneficiary of the agreement. Pursuant to an agreement between divorcing parents and the wife's attorneys, the attorneys were to hold the daughter's passports to restrict her travel outside of the United States. The attorneys subsequently released the daughter's passports to the wife, who then removed the child from the United States. The court held that the father **would be entitled to attorneys' fees** if it were found that the **attorneys intentionally breached their fiduciary responsibility** to him, regardless of the existence of an attorney-client relationship. (April 26, 2016)

In *Myer, Darragh v. Malone Middleman*, the **Supreme Court of Pennsylvania** addressed a dispute between two law firms over **attorneys' fees** earned in a wrongful death civil litigation settlement. The court held that the successor law firm, Malone Middleman, which settled the wrongful death case, was not a party to a contract between the predecessor law firm, Myer, Darragh, and an attorney who left Myer, Darragh and joined Malone Middleman. As **the departing attorney was an employee of Myer, Darragh and not a partner**, the court declined to extend *Ruby v. Abington Memorial Hospital*, which would have bound Malone Middleman to the contract between the departing attorney and Myer, Darragh regarding attorney fees had the departing attorney been a partner. (April 25, 2016)

In *John J. Robertelli v. The New Jersey Office of Attorney Ethics,* the **Supreme Court of New Jersey** held that the state Supreme Court and its ethics bodies have exclusive jurisdiction over attorney disciplinary matters. The court held the Office of Attorney Ethics may proceed separately even if the District II Ethics Committee has declined to docket the grievance. (April 19, 2016)

In *Mack v. Wells Fargo Bank, N.A.*, the **Appeals Court of Massachusetts** held that an **auction agency** was **not immune** from liability under the **litigation privilege** for continuing to advertise and schedule a **foreclosure auction** of the plaintiff homeowner's property in violation of a temporary restraining order and preliminary injunction. The court held that the privilege did not apply to the auction agency because the **foreclosure** was **non-judicial;** the auction agency was not named as a defendant in the plaintiff's original wrongful foreclosure complaint and was not a party, counsel, or witness in the institution of, or during the course of, the plaintiff's original law suit at the time that it engaged in the conduct; and did not engage in those actions in contemplation of being named as a defendant. The court held, however, that the law firm defendant's conduct in furtherance of the barred foreclosure proceedings **was immune from liability under the litigation privilege** because the law firm was pursuing the foreclosure in its **role as attorney** for the bank, and the plaintiff had advised the law firm of her intent to file suit against the bank if it did not postpone the foreclosure auction. (December 1, 2015)

In *CRC Litigation Trust v. Marcum, LLP*, the **New York Supreme Court, Appellate Division, 2nd Department**, dismissed a cause of action for **accounting malpractice** as untimely. Pursuant to CPLR 3211(a)(5), a defendant must establish, prima facie, that the time in which to sue has expired. A cause of action for accounting malpractice accrued upon the client's receipt of the **accountant's work product** and **must be commenced within three years of the accrual date**. The defendant met this initial burden. Further, the court found that the statute of limitations **was not tolled by the fact that plaintiff filed for bankruptcy protection** since the statute of limitations had already lapsed by that date. (October 28, 2015)

In *Antonelli v. Guastamacchia*, the **New York, Appellate Division, 2d Department,** addressed whether an attorney was liable for **legal malpractice** for his representation of a client in a real estate transaction. The court found that the attorney was entitled to summary judgment because even if he failed **to exercise the ordinary reasonable skill and knowledge** commonly possessed by a member of the legal profession, any such failure was not the **proximate cause** of the client's damages. (September 23, 2015)

In *Waters Edge @ Jude Thaddeus Landing, Inc. v. B&G Group, Inc.*, the **New York Supreme Court, Appellate Division, 2d Department**, addressed whether an **insurance broker** was liable to his client for **failing to advise the client to obtain additional coverage**, even in the **absence of a specific request**. The court held that the plaintiffs failed to state a cause of action against the insurance broker to recover damages for breach of a fiduciary duty because they **failed to allege the existence of a "special relationship"** above and beyond the ordinary broker-client relationship. (June 3, 2015)

In *Schiff v. Sallah Law Firm, P.C.*, the **New York Appellate Division, 2d Department**, addressed the issue of **legal malpractice** in the context of the **settlement** of a client's case. The court held that the law firm was entitled to summary judgment because it established that it did not fail to **exercise reasonable skill and knowledge** commonly

possessed by members of the legal profession and that the settlement of its client's case was **not effectively compelled** by any **mistakes** on the part of the law firm. (May 6, 2015)

In *Dr. Humayun Akhtar v. Casey & Keller, Inc.*, the **Superior Court of New Jersey, Appellate Division**, addressed whether the plaintiffs were entitled to summary judgment as a matter of law, or at least a new trial, where the **plaintiffs' expert's opinion** regarding defendant's breach was **unrebutted** by the defendant's expert. The court held that **plaintiffs were not entitled to summary judgment** for defendant's failure to introduce any expert testimony to address the issue of breach so long as plaintiffs' **expert's credibility was subject to question** or so long as the **factual predicate** to plaintiffs' expert's opinion remained **subject to reasonable dispute** on the record. (February 24, 2015)

In *Hill International, Inc. v. Atlantic City Board of Education*, the **Superior Court of New Jersey, Appellate Division**, addressed whether *N.J.S.A.* 2A:53A-27 should be construed to require a supporting **affidavit of merit** from a "like-licensed" professional in all **malpractice** or negligence cases. The court held that to support claims of malpractice or negligence liability, the affidavit of merit **must be issued by an affiant who is licensed within the same profession** as the defendant. (December 30, 2014)

In *Board of Trustees of Ibew Local 43 v D'Arcangelo & Co., LLP*, the **New York Supreme Court, Appellate Division, Fourth Department** addressed the issue of **proximate cause** in the context of an auditor's **professional malpractice** and its client's subsequent **investment loss**. The court held that had the auditor abided by **generally accepted auditing standards**, it would have **prevented** the client's investment loss. Therefore, the auditor's actions were the **proximate cause** of the investment loss. (January 2, 2015)

In *Mortgage Grader, Inc. v. Ward & Olivo, L.L.P.,*the **Superior Court of New Jersey, Appellate Division**, addressed whether an attorney should lose his **liability protection** as a partner in a limited liability partnership (LLP) where the **LLP failed to purchase a tail insurance policy** and was sued for malpractice. The court held that when attorneys practice as an LLP, and the **LLP fails to obtain** and maintain professional liability **insurance**, such a violation is grounds for the Supreme Court of New Jersey to **terminate or suspend the LLP's right to practice law** or otherwise to discipline it. However, the court dismissed plaintiff's complaint with prejudice against one of the defendants because plaintiff failed to serve him with an affidavit of merit as required by statute. (November 14, 2014)

In *Galecki v. Omnicare Dental,* the **New York Supreme Court, Appellate Division, First Department,** addressed the **statute of limitations** of a **medical malpractice** claim. The court held that a claim for malpractice that occurred over five years ago was properly dismissed for being brought beyond the **statute of limitations** even though the doctor had continued to see the patient within the statute of limitations period because the **continued treatment** was **unrelated** to the treatment at issue in the malpractice claim. (October 28, 2014)

In *Phillips and Wicks' End, Inc. v. Wilks, Lukoff & Bracegirdle, LLC* the **Supreme Court of Delaware**, addressed whether, in a **legal malpractice action**, expert testimony was properly excluded where the expert was a **New Jersey attorney**, who familiarized himself with **Delaware case law**. The court held that **expert testimony was properly excluded** as an expert witness must be familiar with the applicable standard of care in the locality where the alleged malpractice occurred, rather than merely reading case law, and that summary judgment was properly granted based on

the plaintiff's failure to present a qualified witness and make out a *prima facie* case of malpractice. (October 1, 2014)

In *Wally G. v. New York City Health and Hospitals Corporation*, the **New York Supreme Court, Appellate Division, First Department**, addressed whether **medical records** placed a public hospital **on notice** that the plaintiff's injuries may have been caused by **alleged deviations from the standard of care, so as to forgive the prerequisite of filing a notice of claim.** The Court held that since that the **medical records**, even as interpreted by Plaintiff's expert, do not yield a **non-speculative basis** for determining whether the deficits of the prematurely born child would have been less severe absent the alleged **deviations of the standard of care, it cannot be said that the medical records put the public hospital on notice of the claim.** (September 18, 2014)

In *Pollina v. Dishong,* the **Superior Court of Pennsylvania** addressed whether the investigatory findings of a **consultant** for the **Bureau of Program Integrity (BPI)** are **privileged** such that there can be no professional negligence claim against the consultant for allegedly failing to **exercise due care** in the investigation. The court found that **judicial immunity** did not apply because the investigation was not performed in the **regular course of judicial proceedings.** Similarly, the court found that **quasi-judicial immunity** was inapplicable because the BPI's function is **not equivalent** to that of the judiciary and involves **no discretionary decision-making authority.** Accordingly, the court determined that a professional negligence claim against such a consultant could proceed. (July 22, 2014)

In *Fessenden v. Robert Packer Hospital,* the **Superior Court of Pennsylvania** considered the liability of a hospital and doctor when they admitted leaving a **surgical sponge** in the plaintiff's abdomen following surgery. The plaintiff raised a **genuine issue of fact** as to negligence and causation by invoking the doctrine of ***res ipsa loquitur.*** The court held that, under the circumstances, *res ipsa loquitur* permitted the jury to infer **causation** and negligence on the part of the hospital even without **expert testimony.** (July 23, 2014)

In *Lisa Di Giacomo v. Michael S. Langella,* the **New York Supreme Court, Appellate Division, Second Department,** addressed whether the defendant attorney's allegedly inadequate motion papers constituted **legal malpractice** in an underlying personal injury action. The court held that the attorney established that the plaintiffs had **no reasonable excuse** for their failure to appear for trial, thus establishing that the alleged inadequacy of the motion papers prepared by the attorney on the plaintiff's behalf was **not the proximate cause** of the plaintiff's damages. (July 9, 2014)

In *Sokolsky v. Eidelman,* the **Superior Court of Pennsylvania** addressed the viability of **vicarious liability** and **corporate negligence claims against a skilled nursing facility in the context of a legal malpractice action.** With regard to vicarious liability, the court held that a plaintiff need not identify an individual provider, but can state a claim based on the alleged negligence of the **medical staff as a unit.** With respect to corporate negligence, the court held that a medical negligence claim against a skilled nursing facility is not limited to the duties identified in *Thompson v. Nason Hospital* but includes the factors set forth in **Section 323 of the Restatement (Second) of Torts.** (June 6, 2014)

In *Cusimano v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP*, the **New York Supreme Court, Appellate Division, First Department** addressed the issue of the **proximate cause** element of a claim for **legal malpractice**. The court held that because the plaintiff **failed to establish** that **but-for the defendants' allegedly inadequate representation**, she would have obtained a successful outcome at an arbitration, the plaintiff's claim is "**grounded in**

speculation and thus, **insufficient** to sustain a claim for legal malpractice." (June 17, 2014)

In *Cooney-Koss v. Barlow,* the **Supreme Court of Delaware** addressed the admissibility of **habit testimony** in a **medical malpractice suit.** The court held the treating anesthesiologist who had no memory of the plaintiff's surgery should be allowed to testify as to what he or she would have done in cases where the conduct in questions is part of the practitioner's **regular routine.** (March 7, 2014)

In *Nguyen v. O'Neill,* the **Superior Court of Pennsylvania,** addressed the **disbursement of settlement proceeds** under a **contingent fee agreement.** The court held **contingent fee agreements** are subject to careful scrutiny by the courts and since the agreement was **ambiguous** as to the calculation of the contingent fee, it would be **construed against the drafter/attorney** and the fee would be calculated after litigation and medical expenses were deducted from the settlement amount. (November 27, 2013)

In *Fair Laboratory Practices Assoc. v. Quest Diagnostics, Inc.,* the **United States Court of Appeals for the Second Circuit** addressed whether former general counsel to defendant and current general partner of the plaintiff violated his **ethical obligations** by participating in the ***qui tam* action** and whether plaintiff, all of its general partners, and its outside counsel could be disqualified from bringing any subsequent ***qui tam* actions** based on similar facts. The court held counsel acted unethically in disclosing client confidences and the **False Claims Act** does not **preempt** state ethical rules. Further, plaintiff, its general partners and its outside counsel could be **disqualified** from bringing any subsequent action based on the same facts. (October 25, 2013)

In *Ignelzi v. Ogg, Cordes, Murphy and Ignelzi, LLP,* the **Superior Court of Pennsylvania** addressed a **dissolving law partnership** dispute. One of the partners who departed the partnership to become a judge sought an **accounting** of the partnership such that he could receive his **contingent fees** owed on cases that were unresolved at the time of his departure. The court affirmed the trial court's order granting plaintiff's petition for **inspection of the partnership books** based upon the **statutory right** to do so, but vacated the trial court's order to compel defendants from accounting for contingent fee cases transferred from the former partnership to the successive partnership. The court noted that the **Rules of Professional Conduct** could affect the handling of the payment of any outstanding contingent fees, and that the parameters of the **partnership agreement** had to be determined before defendants could be required to account for the contingent fee cases. (October 7, 2013)

In *Cannonball Fund, Ltd. v Marcum & Kliegman, LLP,* the **New York Supreme Court, Appellate Division, First Department** addressed whether dismissal for failure to state a claim in a **professional liability action** is appropriate when the plaintiff failed to **allege proximate cause.** The court held that accepting the facts as alleged, Plaintiff could not show that the alleged malpractice of the auditor caused it harm. Thus, the court held that a plaintiff in the professional liability context must allege proximate cause in its complaint or risk dismissal for failure to state a cause of action. (October 1, 2013)

In *Cusack v. Greenberg Traurig, LLP,* the **Supreme Court of New York, Appellate Division, First Department,** addressed the **scope of an attorney-client relationship between an attorney and an employee of a corporation represented by that attorney** where the attorney requested that the employee complete a shareholder questionnaire in connection with the attorney's representation of the employer and the questionnaire misstated that the

attorney represented the employee. The court held the attorney's request that the employee complete a questionnaire **did not suffice to create an attorney-client relationship** or establish the privity necessary to support a claim of legal malpractice or breach of fiduciary duty. (September 26, 2013)

In *Aiello v. Burns International Security Services Corporation,* the **New York Supreme Court, Appellate Division, First Department,** addressed the issue of whether a hospital's security agency owed a **duty of care** to a patient of the hospital even though there was **no contractual relationship** between the patient and the security agency. The court held that in general, a **nonparty cannot impose liability** on a party to a contract for breach of that contract. While there are three exceptions to this rule, the court held those exceptions did not apply to the patient in this case. (September 3, 2013)

In *Kowalski v. St. Francis Hosp. & Health Ctrs.,* the **New York Court of Appeals** addressed whether a hospital and emergency room doctor owed an intoxicated patient a **duty to prevent him from leaving the hospital** when the patient, who had been treated at the same hospital a month earlier after having suicidal thoughts, arrived at the emergency room showing signs of severe intoxication and, while waiting to be transported to another facility, left the hospital and was hit by a car. The court held that there is no statute or principle of common law that would permit the restraint of a patient simply because his records showed that he had suicidal thoughts the month before. Thus, the hospital had **no duty to prevent the plaintiff from leaving the hospital.** (June 26, 2013)

In *Winstock v. Galasso,* the **Superior Court of New Jersey, Appellate Division,** addressed whether a client can sue his attorney for incorrect legal advice which resulted in a criminal conviction. The Appellate Division undertook a three prong analysis and concluded that "a rational jury in this case could find that **defendant's role as a legal advisor was a substantial factor that led plaintiffs to engage in criminal conduct."** In cases involving **tort or contract claims, issue preclusion** does not automatically prevent a plaintiff in a civil trial from contesting the admitted facts that formed the basis of his guilty plea. (May 6, 2013)

In *Citidress II Corp v. Ira Tokayer,* the **New York Supreme Court, Appellate Division** addressed whether the plaintiff's contentions were sufficient to support a cause of action for **legal malpractice.** The court held that speculative contentions about what might have happened had the attorney taken a different approach during litigation were **not sufficient** to support the allegations of legal malpractice. The court noted that since the plaintiff **failed to plead specific facts showing causation and damages,** its claims of legal malpractice failed to state a cause of action. The court further held that the plaintiff's **breach of contract** claims were subject to dismissal as **duplicative of the legal malpractice cause of action** because they arose from the same facts as those underlying the **legal malpractice action,** and did not allege **distinct damages.** (April 16, 2013)

In *O'Kelly v. Dawson*, the **Superior Court of Pennsylvania** addressed the application of the **statute of limitations** to a **legal malpractice claim.** The court held that the **statute of limitations** begins to run when the client should first be aware of his **attorney's malpractice.** In this case, the court found that the **statute of limitations** did not begin to run when the master issued **non-binding recommendations** that rejected the parties' proposed alimony agreement, but when the trial court entered its order adopting the master's recommendations. (February 19, 2013)

In *Gunn v. Minton,* the **Supreme Court of the United States** addressed whether **state law legal malpractice** claims for **patent matters** fall within the **exclusive jurisdiction of the federal courts.** The Court held that **28 U.S.C. § 1338(a),** which provides for exclusive federal jurisdiction over any case "arising under any Act of Congress relating to patents," **does not deprive the state courts of subject matter jurisdiction** over a **state law claim alleging legal malpractice in a patent case.** (February 20, 2013)

In *Cooper v. Lankenau Hospital,* the **Supreme Court of Pennsylvania** addressed whether the trial court's jury charge concerning **informed consent** improperly suggested that the plaintiff had to prove that the defendant doctor intended to harm the patient. The court held that that a plaintiff in a medical battery/lack-of-consent case **need not prove** that the defendant surgeon performed the unauthorized operation with the **intent to harm the patient.** Rather, by proving that the surgery or "touching" was intentional and not consented to, a patient establishes that it was "offensive" sufficient to render the unauthorized surgery a battery. Since those concepts were accurately recited in the entire charge, **the court upheld the jury's finding in favor of the defense.** (August 20, 2012) *White and Williams' Rosemary Schnall and Edward Koch secured this favorable result for our client.*

In *Mendel v. Erick Williams, M.D.,* the **Superior Court of Pennsylvania** addressed whether a Pennsylvania Court may assert **general or specific jurisdiction over an out-of-state corporate healthcare provider** in a medical malpractice action by a Pennsylvania resident who receives negligent treatment in a foreign jurisdiction. The court held that in this matter, **the corporate healthcare provider did not maintain continuous or systematic activities** as part of its general business **within the Commonwealth and prevented general jurisdiction in Pennsylvania.** Further, the court held the **two requirements for specific jurisdiction** in Pennsylvania, which includes 1) the jurisdiction must be authorized by state Long-Arm Statute; and 2) jurisdiction must comport with constitutional principles of due process, were also not met because the corporate healthcare provider did not meet the established **minimal contacts** requirements for **specific jurisdiction.** (August 20, 2012)

In *Go-Best Assets Limited v. Citizens Bank of Massachusetts,* the **Supreme Judicial Court of Massachusetts** addressed whether a **bank** had a **duty to investigate** whether an attorney was acting fraudulently in transferring funds out of the **escrow account** he maintained to hold **client funds.** The court concluded that a bank has no duty to question whether a person authorized to draw upon an account is misappropriating funds, and that the bank is only liable if it had actual knowledge of the fraud. (July 30, 2012)

In *Gere v. Louis,* the **Supreme Court of New Jersey** addressed whether *Puder v. Buechel*, 183 N.J. 428 (2005), created an **absolute bar** to **legal malpractice** claims **after the settlement** of the underlying case. The court held that *Puder* is the rare exception to the rule in *Ziegelheim v. Apollo*, 128 N.J. 250 (1992), which **permits legal malpractice** actions even **after settlement** of the underlying case. (March 6, 2012)

In *Cast Art Industries, LLC v. KPMG LLP,* the **Supreme Court of New Jersey** addressed the circumstances under which a **non-client third party to an audit** may recover under the **New Jersey Accountant Liability Act.** Under the Act, an accountant may be liable to a non-client third party where the accountant knew **at the time of the engagement by the client** that the services would be provided to the third party for a specific transaction. Because the court found that the phrase "at the time of the engagement" meant **"at the outset** of the engagement," and because there was no

evidence that the defendant knew at that time that its services would be provided to the plaintiff for its contemplated merger, the court held that there was no liability under the Act. (February 16, 2012)

In *Skonieczny v. Cooper,* the **Superior Court of Pennsylvania** addressed whether, pursuant to **Pa. R. Civ. P. 1042.3,** a **certificate of merit** in a professional negligence action must be filed within **60 days** of filing the **complaint,** where the action was commenced by **writ of summons** before the effective date of the rule. The court held that, based on the Supreme Court of Pennsylvania's promulgating Order limiting the application of the rule "to actions commenced on or after the effective date of [the] Order," **the rule does not apply** to cases commenced by writ of summons before its promulgation. (February 7, 2012)

In *Preferred Electric, Inc. v. R.G. Anderson, Inc.,* the **Supreme Court of Delaware** decided whether a disappointed bidder to a public bid contract stated a claim of **professional negligence against a surety bond agent** for an alleged failure to timely procure a bond. The court held that it would require speculation to find that the bidder would have been awarded the contract had it submitted a bond. Because **the court found no causation,** it did reach the issue of the agent's alleged negligence. White and Williams' own *James Yoder* and *Kim Kocher* represented the prevailing party, R. G. Anderson, Inc. Although the Superior Court opinion is unpublished, we would be happy to provide you with a copy upon inquiry. (December 16, 2011)

In *Rogers v. Cape May County Office of the Public Defender*, the **Supreme Court of New Jersey** addressed the **timeliness of a legal malpractice action** based on representation in a criminal matter. The New Jersey Supreme Court held that the defendant's legal malpractice action against his former attorney, a public defender, accrued when he was **"exonerated,"** which occurred when his indictment was dismissed with prejudice. (December 5, 2011)

In *Liggon-Redding v. Estate of Robert Sugarman,* the **United States Court of Appeals for the Third Circuit** addressed whether Pennsylvania Rule of Civil Procedure 1042.3, requiring the filing of a **certificate of merit in malpractice cases,** is substantive law that federal courts must apply. The court held that the rule is substantive and must be applied by the federal courts. (October 4, 2011)

In *Frederick v. Merrill Lynch,* the **Superior Court of New Jersey, Appellate Division** considered whether negligence claims could be maintained against Merrill Lynch for an alleged **failure to monitor its accounts for fraudulent activity** when another defendant induced the plaintiff to invest in a fictitious entity whose accounts were maintained by Merrill Lynch. The court upheld the dismissal of Merrill Lynch, holding that the **absence of any relationship** between the plaintiffs and Merrill Lynch **precluded the imposition of a duty** on Merrill Lynch to police the personal account maintained by a co-defendant for indicia of fraud. (November 9, 2010)

In *Higgins v. Thurber,* the **Supreme Court of New Jersey** granted a **Petition for Certification of Appeal,** agreeing to consider the following question: "Is plaintiff's **legal malpractice action** barred by the **entire controversy doctrine** given plaintiff's voluntary dismissal of similar claims in the prior **probate action?"** (September 15, 2010)

In *Guido v. Duane Morris, LLP*, the **Supreme Court of New Jersey**, addressed a **legal malpractice claim arising from allegedly negligent advice related to a settlement agreement.** The plaintiff was the majority shareholder and chairman of the board of directors of Allstates Worldcargo, Inc. (Allstates). The defendant represented the plaintiff in

an underlying action against Allstates and several of its officers and directors that resulted in a **complex settlement agreement that had nonobvious ramifications** on the plaintiff's majority ownership interests, and the long-term value of his stock. The defendants argued that a plaintiff must seek to vacate a settlement as a prerequisite to bringing a malpractice claim against the lawyers who advised him to enter into the settlement. The court held that, unlike the plaintiffs discussed in prior case law, the plaintiff **did not represent to the court that he was satisfied with the settlement or that the settlement was fair and adequate.** The plaintiff merely represented to the court that he understood and agreed to abide by the settlement terms. Based on this reasoning, the Supreme Court held that although a **plaintiff's failure to seek to vacate a settlement is a relevant factor** in determining whether he has a viable malpractice claim, **the failure to seek to have the settlement vacated does not, in and of itself, bar him from bringing a legal malpractice** claim against the lawyers who advised him to enter into the settlement. (June 3, 2010)

In *Sabella v. Estate of Milides*, the **Superior Court of Pennsylvania** reviewed the trial court's refusal to strike the entry of judgment of *non pros* in favor of defendants based on plaintiff's failure to file **a certificate of merit** in an abuse of process action against opposing counsel. In reversing the entry of judgment in favor of the defendants, the Superior Court held that a certificate of merit was not needed in this action because there was no attorney-client relationship between the plaintiff and the defendants. Absent such a relationship, the plaintiff could not sue the defendants for legal malpractice. Since a certificate of merit is required only in professional liability actions, the court reversed and remanded the case for further proceedings. (March 25, 2010)

In *Signature Bank v. Holtz,* the **New York Supreme Court, Appellate Division, Second Department** addressed a claim for **negligent misrepresentation** where the plaintiff, in reliance upon the audited financials prepared by the defendant-auditor for a third party, extended a loan to that third party just before the third party went bankrupt. The court held that the action should have been dismissed because the plaintiffs failed to allege any conduct on the part of the defendant linking the defendant to the plaintiff and showing that the defendant understood the plaintiff was relying on its audited financials when it extended the loan. (August 7, 2013)

In *Matter of Rosenberg,* the **Appellate Division, First Department** addressed the **appropriate discipline** for a defendant-attorney who admitted to **misappropriating funds from a trust** account by disbursing those funds to himself in excess amounts to which he was entitled, using the trust account to **comingle his personal funds with client funds,** and advancing funds to his clients during the course of pending litigation while representing them. Since the defendant had an otherwise unblemished disciplinary record; his conduct never harmed any of his clients; his practice, helping children with special needs, is extremely specialized as not too many attorneys practice this area of law; and he showed substantial remorse; the court upheld the finding that his **conduct** was based on **negligence** and **not venal intent** and held that **public censure,** rather than **suspension** was the **appropriate sanction** where the defendant presented **substantial mitigating evidence** and did not profit from the loans he made to his clients. (August 6, 2013)

In *Cooney-Koss v. Barlow,* the **Supreme Court of Delaware** addressed the admissibility of **habit testimony** in a **medical malpractice suit.** The court held the treating anesthesiologist who had no memory of the plaintiff's surgery should be allowed to testify as to what he or she would have done in cases where the conduct in questions is part of the

practitioner's **regular routine.** (March 7, 2014)