

Suing the Lawyers Gets Easier



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The Minnesota Supreme Court recently expanded liability for attorney malpractice. Specifically, the court clarified when multiple acts by the same lawyer may give rise to separate claims for legal malpractice. A single mistake, as it turns out, can have long-reaching ramifications for practitioners.

In *Frederick v. Wallerich*, published on February 7, 2018, Frederick's attorney prepared a prenuptial agreement for Frederick in 2006. But the prenuptial agreement did not include signatures from two witnesses and so it was legally invalid. One year later, the attorney drafted a will for Frederick. The will did not leave any assets for Frederick's spouse, stating that the prenuptial agreement already specified what assets she was entitled to receive upon Frederick's death. When Frederick consulted with his attorney to prepare the will, the attorney told him that the prenuptial agreement was enforceable.

In 2013, Frederick's spouse filed for divorce and Frederick discovered that his prenuptial agreement was meaningless. Later that year, Frederick sued his estate attorney for malpractice. More than six

years had passed since the execution of the prenuptial agreement, clearly placing claims relating to the drafting process outside of the applicable statute of limitations. But Frederick's will was drafted within the statute of limitations. According to Frederick, the visits with his attorney to draft his will gave rise to a new cause of action for legal malpractice. In particular, Frederick argued that by failing to inform him of the invalidity of his prenuptial agreement, his attorney committed an independent act of malpractice. Although the trial court and the court of appeals disagreed, the Minnesota Supreme Court reversed and remanded.

Writing for the majority, Justice Hudson reasoned that Frederick's position was "significantly worsened" by the failure to advise him of the invalidity of his prenuptial agreement later on. Frederick allegedly faced an additional six years of appreciation of his assets (to the tune of about a million dollars) which he could have avoided by divorcing his spouse or entering into a postnuptial agreement. The type of negligent conduct differed: failing to advise Frederick on the invalidity of his prenuptial agreement "spanned multiple areas of law" and "multiple legal projects." And, of course, the attorney's actions took place at different times and during different transactions. Last, although the attorney's original mistake was the root cause of the second error, it did not prevent the attorney from meeting her duty of care with regard to the later transaction. Thus, the majority concluded that the will drafting was an independent act of negligence.

The majority cautioned, however, that the above facts are not exclusive considerations. Instead, the court adopted a fact-specific approach to determine whether two acts of negligence are independent. The court rejected the proposition that a lawyer has a duty to consult the law and learn the facts "each time" the lawyer provides advice to the client. The court also refused to consider

a "second lawyer" rule, which would provide that liability depends on whether a hypothetical second lawyer, if retained, would have been liable for malpractice.

The majority went on to examine whether separate compensable damages arose from the will drafting. Distinguishing *Antone v. Mirviss*, 720 N.W.2d 331 (Minn. 2006), which held that damages associated with a prenuptial agreement accrues at the time of marriage, the court held that subsequent acts could still cause separate damages and that Frederick indeed lost the opportunity to mitigate additional damages.

Chief Justice Gildea, dissenting, argued that *Antone* established a clear rule that a cause of action for malpractice based on a prenuptial agreement accrues on the date of marriage and there is no reason to deviate from that rule. Just one error was made—the failure to be aware of the witness requirement for prenuptial agreements—and repetition of the same error, according to the dissent, is not enough to create separate damages. Chief Justice Gildea also argued that the majority misapplied its own fact-specific framework.

Regardless of whether one agrees with the result in *Frederick*, practitioners must be aware of its consequences. Although the court rejected the notion that a lawyer has a duty to reevaluate her work each time she provides advice to her client, relying on earlier work product for new projects is clearly not without risk. When evaluating the application of the statute of limitations to potential malpractice cases, it is important to have knowledgeable counsel conduct the fact-specific inquiry outlined by the court.

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