



# Malpractice in Estate Planning

**Irma K. Nimetz, Esq.**  
McCarthy Fingar LLP

**Trusts and Estates Law Section Annual Meeting**  
**January 15, 2025**  
**10:00 AM – 10:50 AM**



Irma Nimetz is a partner in the law firm of McCarthy Fingar LLP, where she specializes in litigation. She is a member of McCarthy Fingar LLP's [Appellate Practice](#), [Commercial Litigation](#), [Surrogate's Court Litigation](#) and [Trusts & Estates](#) groups, and is co-chair of the firm's Surrogate's Court Litigation group. In Surrogate's Court, Irma represents fiduciaries (executors, trustees and guardians) and actual or prospective beneficiaries of estates and trusts in a variety of contested proceedings, including, but not limited to, [Will & Trust Contests](#); [Property Turnover Proceedings](#); [Fiduciary Removal Proceedings](#); [Contested Accountings](#); [Spousal Rights Proceedings](#); [Kinship Proceedings](#); and Will or Trust Construction Proceedings.

Prior to joining McCarthy Fingar LLP, Irma was an attorney with the New York State Attorney General's Office, where she received the Louis J. Lefkowitz Memorial Award for outstanding performance by an Assistant Attorney General. Irma has experience handling governmental investigations against individuals, businesses and not-for-profit organizations, as well as defending actions and Article 78 proceedings brought against the State of New York and its agencies. Irma also has experience as a New York litigator with the Manhattan offices of two global law firms, Winston & Strawn LLP and Fulbright & Jaworski LLP (now Norton Rose Fulbright US LLP), where she handled all aspects of commercial litigation.

Irma is a frequent lecturer to community and professional groups on topics concerning Surrogate's Court litigation, trusts and estates, ethical issues confronting trusts and estates practitioners, and internet safety.

Irma has been recognized as a [New York Super Lawyer](#) in the areas of Estate & Trust Litigation, Estate Planning & Probate and General Litigation.

Irma graduated *magna cum laude* from Duke University and from Cornell Law School. She is admitted to practice law in the State of New York, State of New Jersey, and the District of Columbia, and in the Southern and Eastern District Courts of New York.

She is a member of the New York State Bar Association (Trusts and Estates and Elder Law and Special Needs Sections) and a Vice-Chair of the Estate Litigation Committee of the New York State Bar Association, a member of the House of Delegates of the New York State Bar Association, a member of the Board of Directors of the White Plains Bar Association, and a member of the Westchester County Bar Association (Executive Committee, Trusts and Estates Section), and the Westchester Women's Bar Association.

You can contact Irma at [inimetz@mccarthyfingar.com](mailto:inimetz@mccarthyfingar.com) or at (914) 385-1029.



# Disclaimer

This presentation has been prepared for informational purposes and general guidance only.

The information contained in this presentation does not constitute professional advice and is not intended to substitute for professional legal advice.



# Rising Legal Malpractice Claims In Estate, Trust and Probate Practice Area

ABA Standing Committee on Lawyers' Professional Liability, *Profile of Legal Malpractice Claims 2020-2023*:

- Estate, Trust and Probate - leading area of practice for legal malpractice claims
  - Up 1.6% over 2019 ABA Study (2016-2019)
  - Almost 14% of all claims reported in the data set (2020-2023)
- ABA Standing Comm. on Lawyers' Professional Liability, *Profile of Legal Malpractice Claims 2020-2023* (2024)



# Rising Legal Malpractice Claims In Estate, Trust and Probate Practice Area *continued*

- Why are claims rising against trust and estates practitioners?
  - Aging population
  - Huge number of “Baby Boomers” (born between 1946 and 1964)
  - More elderly deaths
  - Highest transfer of wealth than at any other time in this country’s history
  - Baby Boomers will pass down \$84.4 trillion in assets through 2045, with \$72.6 trillion going directly to heirs
  - Greater incidence of Alzheimer’s disease and dementia with aging population-raises questions of mental capacity, elder abuse and undue influence when estate plans are unexpectedly changed

ABA Standing Comm. on Lawyers’ Professional Liability, *Profile of Legal Malpractice Claims 2020-2023* (2024)

See Amanda O’Brien, *Legal Malpractice Claim Values Reach an ‘All-Time High’ in Last Year*, NYLJ, May 17, 2024, at 2 col. 1



# **ABA Standing Committee on Lawyers' Professional Liability, *Profile of Legal Malpractice Claims 2020-2023:***

- **Disposition of Claims:**

- No Payment, Claim Abandoned-81.93%
- Settlement Payment-Suit Filed-9.11%
- Settlement Payment-No Suit Filed-5.66%
- Suit Dismissed, Judgment for Defendant-3.27%
- Payment, Judgment for Plaintiff-.03%

- **Claims by Type of Alleged Error:**

- Administrative Errors-38.07%
- Substantive Errors-40.96%
- Client Relations-13.86%
- Intentional Wrongs-7.11%



# Elements of Legal Malpractice Claim

- Existence of attorney-client relationship
- Negligence: attorney's failure to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession
- Causation/Proximate Cause
- Damages-actual and ascertainable

*See Leder v. Spiegel*, 9 N.Y.3d 836, 837 (2007), *cert. denied* 552 U.S. 1257 (2008); *Stevens v. Wheeler*, 216 A.D.3d 537, 537-538 (1<sup>st</sup> Dep't 2023); *Buchanan v. Law Offs. of Sheldon E. Green, P.C.*, 215 A.D.3d 790, 792 (2d Dep't 2023)



# Legal Malpractice In Estate Planning

“Legal malpractice in estate planning presents a special situation, because in many situations (though not all), the client is dead before the malpractice is discovered. A dead client cannot sue, and ordinarily plaintiffs in a legal malpractice action must prove that they had an attorney-client relationship (*i.e.*, they were in ‘privity’) with the defendant lawyer. In the case of a will, the only person with an attorney-client relationship is the person making the will, who is now deceased and cannot sue. But can anyone else sue? Two candidates come to mind: (a) the decedent’s estate or personal representative, and (b) the beneficiaries of the decedent’s estate.” Roy D. Simon, Jr., *Simon’s New York Rules of Professional Conduct Annotated*, § 1.1:28 (2024)



# Privity

# **Legal malpractice claims asserted by the personal representative of the estate**



# Landmark Court of Appeals Decision: *Schneider v. Finmann*, 15 N.Y.3d 306 (2010)

- **Issue:**
  - Whether an attorney may be held liable for damages resulting from negligent representation in estate tax planning that causes enhanced estate tax liability
  
- **Holding:**
  - Personal representative of an estate may maintain a legal malpractice claim for such pecuniary losses to the estate

# ***Schneider v. Finmann*, 15 N.Y.3d 306 (2010)**

## ▪ **Facts:**

- Defendant law firm represented decedent from April 2000 until his death in October 2006
- April 2000, decedent buys a \$1 million life insurance policy
  - Over several years, decedent transferred ownership of life insurance policy from himself to entities of which he was principal owner and then in 2005, back to himself

## ***Schneider v. Finmann*, 15 N.Y.3d 306 (2010)**

- **Facts continued:**

- At time of death in October 2006, proceeds of \$1 million life insurance policy included as part of decedent's gross taxable estate
- Personal representative of estate commences a malpractice action in 2007, alleging defendants negligently advised decedent to transfer, or failed to advise decedent not to transfer, the life insurance policy, which resulted in an increased estate tax liability

# ***Schneider v. Finmann*, 15 N.Y.3d 306 (2010)**

- **Landmark Decision:**

- Abandons requirement of strict privity for estate representatives

- “[P]rivacy, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney...’[T]he estate essentially stands in the shoes of a decedent’ and, therefore, ‘has the capacity to maintain the malpractice claim on the estate’s behalf.’ The personal representative of an estate should not be prevented from raising a negligent estate planning claim against the attorney who caused harm to the estate.” *Schneider v. Finmann*, 15 N.Y.3d at 309(citations omitted)



McCarthy  
Fingar LLP

# ***Schneider v. Finmann*, 15 N.Y.3d 306 (2010)**

- **Landmark Decision *continued*:**
  - “[S]trict privity remains a bar against beneficiaries’ and other third-party individuals’ estate planning malpractice claims absent fraud or other circumstances”
    - “Relaxing privity to permit third parties to commence professional negligence actions against estate planning attorneys would produce undesirable results—uncertainty and limitless liability. These concerns, however, are not present in the case of an estate planning malpractice action commenced by the estate’s personal representative.” *Schneider v. Finmann*, 15 N.Y.3d at 310

# **Legal malpractice claims asserted by beneficiaries of the estate**



# LACK OF PRIVACY: LEGAL MALPRACTICE CLAIM DISMISSED

- ***Phillips v. Murtha, 215 A.D.3d 408, 409 (1<sup>st</sup> Dep't 2023)***
  - “In the context of estate planning malpractice actions, strict privity applies to preclude a third party, such as beneficiaries or prospective beneficiaries like plaintiffs, from asserting a claim against an attorney for professional negligence in the planning of an estate, absent fraud, collusion, malicious acts or other special circumstances.”
  - First Department affirms dismissal of amended complaint



## LACK OF PRIVACY: LEGAL MALPRACTICE CLAIM DISMISSED

- ***Rhodes v. Honigman, 131 A.D.3d 1151 (2d Dep't 2015)***
  - **Holding:**
    - “Lack of privity with an estate planning attorney is a bar against a beneficiary’s claims of legal malpractice against that attorney absent fraud, collusion, malicious acts, or other special circumstances . . . .” *Rhodes v. Honigman, 131 A.D.3d at 1152 (2d Dep't 2015)*
    - Beneficiaries of revocable living trust (decedent’s daughters by a previous marriage) lacked standing to bring legal malpractice action against decedent’s estate planning attorney

# LACK OF PRIVACY: ATTORNEY LIABLE TO BENEFICIARY OF DECEDENT'S ESTATE

- ***Betz v. Blatt*, 211 A.D.3d 1004 (2d Dep't 2022)**
  - **Facts:**
    - Plaintiff, in capacity as substitute executor of her father's estate, commenced legal malpractice action against defendant Arnold Blatt, an attorney who represented a former executor of decedent's estate, who was removed for cause

# LACK OF PRIVITY: ATTORNEY LIABLE TO BENEFICIARY OF DECEDENT'S ESTATE

- ***Betz v. Blatt, 211 A.D.3d 1004 (2d Dep't 2022) continued***
  - **Holding:**
    - Appellate Division, Second Department affirms finding of Supreme Court, Westchester County (J. Loehr), following a bench trial, in favor of executor on legal malpractice claim and judgment in favor of executor in the amount of \$1,856,699.36. Although defendant attorney was not in privity with the estate, evidence established the existence of special circumstances subjecting attorney to liability for legal malpractice

## ***Betz v. Blatt, 211 A.D.3d 1004, 1005 (2d Dep't 2022)*** ***continued***

- **“Fraud, Collusion, Malicious Acts, or other Special Circumstances”**
  - At trial, defendant attorney “admitted that even though he was ‘not competent to do accountings,’ he did not arrange or direct the former executor to arrange for a professional accounting. Further, despite his admitted unfamiliarity with probate law, it was apparent to the defendant that the proposed accounting he circulated on behalf of the former executor was ‘terrible.’ Nevertheless, the defendant neither alerted the Surrogate’s Court nor opposing counsel to the accounting problem
  - Defendant “admitted that he was aware that the payment of estate funds by the former executor to the former executor and the former executor’s children amounted to self-dealing, but that the defendant took no action other than providing advice to the former executor-- which the defendant further admitted he knew would be ignored”

## ***Betz v. Blatt, 211 A.D.3d 1004, 1005 (2d Dep't 2022)*** ***continued***

- **“Fraud, Collusion, Malicious Acts, or other Special Circumstances” *continued*:**
  - “”[A]lthough the defendant testified that the former executor’s conduct was ‘shocking,’ he nonetheless continued to disburse estate funds to the former executor-- including funds from the sale of a parcel of real property, which formed the estate’s primary asset”

## ***Betz v. Blatt, 211 A.D.3d 1004, 1005 (2d Dep't 2022)*** ***continued***

- **“Fraud, Collusion, Malicious Acts, or other Special Circumstances”**  
***continued:***
  - “[D]efendant’s failure to notify the Surrogate’s Court or withdraw as counsel upon discovering the self-dealing and misconduct of the former executor, together with the fact that the defendant fostered the former executor’s self-dealing and misconduct by continuing to disburse estate assets to the former executor despite his knowledge that the former executor was engaging in self-dealing and looting, constitutes the type of ‘fraud, collusion, malicious acts or other special circumstances’ for which an attorney may be held liable to third parties not in privity”

# Causation and Damages



# Causation and Damages

- **Causation**

- “The causation element requires a showing that the injured party ‘would have prevailed in the underlying action or would not have incurred any damages but for the lawyer’s negligence.’” *Schmidt v. Burner*, 202 A.D.3d 1117, 1119 (2d Dep’t 2022)(*citations omitted*)

# Causation and Damages *continued*

## ■ Damages

- “Damages in a legal malpractice case are designed to ‘make the injured client whole.’” *Alford v. Katz*, 208 A.D.3d 1587, 1588-1589 (4<sup>th</sup> Dep’t 2022)(*citations omitted*). See *Betz v. Blatt*, 211 A.D.3d 1004, 1005 (2d Dep’t 2022)
- “The plaintiff is required to plead actual, ascertainable damages that resulted from the attorneys’ negligence.” *Betz v. Blatt*, 211 A.D.3d at 1005-1006 (*citations omitted*)

# Statute of Limitations-Legal Malpractice



# Statute of Limitations – Legal Malpractice

- CPLR § 214(6)-3 years
- “The statute of limitations for a cause of action to recover damages for legal malpractice is three years, which accrues at the time the malpractice is committed.” *Tulino v. Hiller*, P.C., 202 A.D.3d 1132, 1135 (2d Dep’t 2022). See *McCoy v. Feinman*, 99 N.Y.2d 295, 301 (2002); *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 166 (2001). See also *Bonin v. Wells, Jaworski & Liebman, LLP*, 2017 N.Y. Misc. LEXIS 3830 at \*7 (Sup. Ct., New York Co. 2017)

# Statute of Limitations – Legal Malpractice

## ■ Continuous representation doctrine

- “[P]ursuant to the doctrine of continuous representation, the time within which to sue on the claim is tolled until the attorney’s continuing representation of the client with regard to the particular matter terminates.” *Tulino v. Hiller, P.C.*, 202 A.D.3d 1132, 1135 (2d Dep’t 2022)(*citations omitted*)
- “For the doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney.” *Tulino v. Hiller, P.C.*, 202 A.D.3d at 1135 (*citations omitted*)

# Statute of Limitations – Legal Malpractice

- **Continuous representation doctrine *continued***
  - “The essence of a continuous representation toll is the client’s confidence in the attorney’s ability and good faith, such that the client cannot be expected to question and assess the techniques employed or the manner in which the services are rendered.”  
*Fraumeni v. Law Firm of Jonathan D’Agostino, P.C.*, 215 A.D.3d 803, 804-805 (2d Dep’t 2023)(*citations omitted*)

# Statute of Limitations – Legal Malpractice

- **Continuous representation doctrine *continued***

- “The rules for tolling of the three-year statute of limitations under CPLR 214(6) by continuous representation are very strict but somewhat obtuse, and require (a) an agreement on the need for more work, (b) actual continuing work on the case, (c) no long gaps between events of work, as well as (d) a continuing relationship of trust and confidence between the attorney and client.” Andrew Lavcott Bluestone, Outside Counsel, *The Statute of Limitations in Legal Malpractice*, NYLJ, April 4, 2024 at 4, col. 4

# **Judiciary Law § 487. Misconduct by attorneys**



## Judiciary Law § 487. Misconduct by attorneys

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Judiciary Law § 487 (McKinney's 2024)



## Judiciary Law § 487. Misconduct by attorneys *continued*

- Injured party can recover treble damages
- Statute of limitations –CPLR § 213(1)-6 years
  - The Second Department has held that if legal malpractice action also alleges a cause of action to recover damages for attorney deceit under Judiciary Law § 487, it must be commenced within 3 years of accrual of cause of action. *See Catsiapis v. Pardalis & Nohavicka, LLP*, 219 A.D3d 563, 563-564 (2d Dep’t 2023)

*See Urias v. Daniel P. Buttafuoco & Assoc., PLLC*, 41 N.Y.3d 560 (2024).

*See also* Andrew Lavott Bluestone, Outside Counsel, *Judiciary Law § 487 in 2024*, NYLJ, November 27, 2024 at 4, col. 4

## Contact Information:

Irma K. Nimetz, Esq.  
McCarthy Fingar LLP  
711 Westchester Avenue  
Suite 405  
White Plains, NY 10604  
Email: [inimetz@mccarthyfingar.com](mailto:inimetz@mccarthyfingar.com)  
Telephone: (914) 385-1029

