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ATTORNEY LIABILITY IN THE WAKE OF *WILLIAMS* v. *ELY*

I. INTRODUCTION

In *Williams v. Ely*,¹ the Supreme Judicial Court of Massachusetts re-affirmed many of the established elements of legal malpractice. The court, however, appeared to expand liability in holding that "the absence of a guarantee does not ... foreclose liability for the adverse consequences of a negligent failure to advise a client of the uncertainty of the advice given."² The Supreme Judicial Court held the defendant attorneys liable for not informing their clients of the uncertainty of the law on the issue of disclaiming a contingent remainder interest for federal gift tax purposes.³ The court stated that the advice the firm provided was a reasonable view of the law at the time it was given.⁴ The court, however, held that the attorneys failed to disclose to the plaintiffs that the law was unsettled and that there was some degree of risk that the law might shift against their position.⁵ Because the law constantly evolves, the Supreme Judicial Court's decision in *Williams* may leave many Massachusetts attorneys wondering whether they may give legal advice or opinions to clients without liability for future unforeseen shifts in the law. This article will discuss the implications of the court's holding on an attorney's duty and liability to his client when the law is unsettled in a particular area.

II. CASE IN CHIEF

In *Williams*, the plaintiffs held contingent remainders in testamentary trusts.⁶ They brought a legal malpractice action against partners of the now defunct law firm of Gaston Snow & Ely Bartlett ("Gaston Snow"). The plaintiffs based their suit on the failure of Gaston Snow's attorneys to properly advise them of the risk of federal gift tax consequences for persons disclaiming a remainder interest in a trust.⁷ The action commenced on February 4, 1988.⁸ The issue of liability was separated for trial, and in June of 1991, the Superior Court made findings and rulings and ordered

¹ 423 Mass. 467, 668 N.E.2d 799 (1996).

² *Id.* at 477, 668 N.E.2d at 806.

³ *Id.* at 476, 668 N.E.2d at 806.

⁴ *Id.*

⁵ *Id.*

⁶ *Williams v. Ely*, 423 Mass. 467, 469, 668 N.E.2d 799, 802 (1996).

⁷ *Id.*

⁸ *Id.*

judgment for the plaintiffs.⁹ In October of 1991, Gaston Snow filed for bankruptcy.¹⁰ In May of 1992, the bankruptcy judge allowed the plaintiffs to liquidate their claims.¹¹ The bankruptcy trustee and plaintiffs settled claims against those partners who elected to participate in the bankruptcy reorganization plan.¹² The Supreme Judicial Court, on its own motion, transferred cross appeals regarding the remaining partners and plaintiffs.¹³

The cause of action arose in October 1975, when Ralph Williams, a vice president of The Fiduciary Trust Company, consulted his cousin, Charles Jackson, a partner of Gaston Snow, as to whether he could effectively disclaim his contingent interests under the family trusts without creating any federal gift and estate tax liability.¹⁴ Jackson referred the question to a partner in the firm's estate planning division who subsequently circulated a memorandum among the tax and estate planning partners.¹⁵ The tax and estate planning partners approved the memorandum.¹⁶ In November 1975, Jackson advised Williams that a disclaimer of his interest would not give rise to federal gift and estate tax liability.¹⁷ In January 1976, Gaston Snow sent Williams a letter unequivocally stating the firm's opinion on the issue.¹⁸

In December 1975, Williams executed two disclaimers prepared and filed by Gaston Snow in the appropriate registries of probate, renouncing his remainder interests in the family trusts.¹⁹ In November and December, 1976, his siblings, Thomas B. Williams and Frances W. Perkins, relied on Gaston Snow's advice and disclaimed their contingent interests.²⁰ In December 1976, Ralph Williams prepared the disclaimers and Gaston Snow billed the siblings for services concerning the disclaimers.²¹ The firm, however, did not file them in the proper registries of probate until 1977.²²

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Williams v. Ely*, 423 Mass. 467, 469, 668 N.E.2d 799, 802 (1996).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Williams v. Ely*, 423 Mass. 467, 469, 668 N.E.2d 799, 802 (1996).

¹⁷ *Id.* at 469-70, 668 N.E.2d at 802.

¹⁸ *Id.* at 470, 668 N.E.2d at 802.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Williams v. Ely*, 423 Mass. 467, 470, 668 N.E.2d 799, 802 (1996).

²² *Id.* at 470, 668 N.E.2d at 802.

The Superior Court Judge found that in 1975 there was a risk of federal gift tax consequences for a person disclaiming a remainder interest in a trust.²³ The court stated that the law was unsettled as to whether the holder of a contingent remainder interest must disclaim his interest within a reasonable time of learning of its existence or within a reasonable time after the remainder interest vested in order to avoid adverse tax consequences.²⁴ The court, therefore, held that a competent estate planning attorney at that time would advise a client that the law was unsettled on the issue.²⁵

In 1961, the United States Tax Court in *Fuller v. Commissioner*²⁶ took the position that a party must make a disclaimer within a reasonable time of learning of the existence of an interest.²⁷ The tax court reaffirmed its decision in 1972 in *Keinath v. Commissioner*.²⁸ In 1973, however, the United States Court of Appeals for the Eighth Circuit reversed *Keinath* and held that a disclaimer made within a reasonable time after the interest vested produced no adverse federal gift tax consequences.²⁹ The Eighth Circuit's decision did not effect any other circuit, and, as of 1975-1976, the Internal Revenue Service had not indicated that it acquiesced in the decision.³⁰ It was under these circumstances that Gaston Snow advised the plaintiffs that they would suffer no federal gift tax liability if they disclaimed their interests.

The Superior Court in *Williams* found that the attorneys failed to warn their clients that the IRS might oppose the Eighth Circuit's holding in *Keinath*.³¹ If successful, this would create a conflict in the circuits which might prompt the United States Supreme Court to grant certiorari.³² If it did, the United States Supreme Court might overrule the Eighth Circuit's decision in *Keinath*.³³ The Superior Court held that "it was this risk of which Gaston Snow gave the plaintiffs no hint."³⁴ On February 23, 1982,

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ 37 T.C. 147 (1961).

²⁷ *Id.* at 152-55.

²⁸ 58 T.C. 352, 357 (1972).

²⁹ 480 F.2d 57, 63-66 (8th Cir. 1973) (reversing the Tax Court's 1972 decision).

³⁰ *Williams v. Ely*, 423 Mass. 467, 471, 668 N.E.2d 799, 803 (1996).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

the possibility became a reality when the Supreme Court of the United States, reviewing *Jewett v. Commissioner*,³⁵ upheld the decision of the United States Court of Appeals for the Ninth Circuit.³⁶ In its decision, the Court announced that the holder of a contingent interest must make a disclaimer within a reasonable time of learning of the interest in order to avoid gift tax liability, thereby overruling *Keinath*.³⁷

The *Williams* court found that an attorney client relationship existed between the firm and Ralph Williams' siblings even though the lawyers did not deal with them directly.³⁸ The court also found that the plaintiffs' earliest notice of the attorneys' negligence was on December 1984 when Gaston Snow advised Ralph Williams that he and his siblings had a federal gift tax liability due to the disclaimers.³⁹ In 1986, plaintiffs filed gift tax returns for the period in which they filed disclaimers and paid all gift tax liabilities, including interest.⁴⁰ The court found that the plaintiffs incurred these liabilities by following Gaston Snow's advice that their disclaimers would not create federal gift tax liability.⁴¹ Additionally, Gaston Snow's failure to advise them to file gift tax returns in 1975 or shortly thereafter caused the statute of limitations to begin running on any gift tax liability arguably flowing from the disclaimers.⁴² The court held that those partners who opted out of the bankruptcy reorganization and were partners at the time of the execution of a tolling agreement between the plaintiffs and the firm were bound by the agreement.⁴³ This action, therefore, was

³⁵ 455 U.S. 305 (1982), *aff g* 638 F.2d 93 (9th Cir. 1980).

³⁶ 638 F.2d 93, 95 (rejecting result in *Keinath*). *But see id.* at 96 (Harris, J., dissenting). Judge Harris argued that the court should refrain from overturning the *Keinath* decision because "numerous tax practitioners have undoubtedly relied on this opinion in advising as to the tax consequences of such acts as are involved in the instant case and justifiably so!" *Id.*

³⁷ *Jewett*, 455 U.S. at 318 (affirming Ninth Circuit decision by 6 to 3). *But see id.* at 324 (Blackmun, J., dissenting) (citing Dist. Judge Harris' dissent in lower court's decision). "I agree stability in tax law is desirable. Except for the Tax Court, the pronounced law appeared to have achieved a level of stability after *Keinath*." *Id.*

³⁸ *See Williams v. Ely*, 423 Mass. 467, 471, 668 N.E.2d 799, 803 (1996).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Williams v. Ely*, 423 Mass. 467, 471, 668 N.E.2d 799, 803 (1996).

within the three year statute of limitations for malpractice claims in Massachusetts.⁴⁴

III. STATE OF LAW IN MASSACHUSETTS

In a suit for legal malpractice the plaintiff must establish four elements to recover. These include: (1) the existence of an attorney-client relationship; (2) the attorney failed to exercise reasonable care and skill; (3) the attorney's negligence proximately caused plaintiff's injury; and (4) the plaintiff suffered actual damages.⁴⁵

A. *The Existence of an Attorney Client Relationship*

In general, an attorney owes no duty to anyone other than his client for legal malpractice.⁴⁶ A plaintiff must establish the existence of an attorney-client relationship as a threshold requirement.⁴⁷ The Massachusetts courts, however, have held that:

An attorney-client relationship need not rest on an express contract. An attorney-client relationship may be implied when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.⁴⁸

⁴⁴ *Id.* at 472, 668 N.E.2d at 804.

⁴⁵ See *Fishman v. Brooks*, 396 Mass. 643, 646-47, 487 N.E.2d 1377, 1379-80 (1986) (holding expert testimony as to reasonable settlement value admissible to prove negligence and loss). See also *Collucci v. Rosen*, 25 Mass. App. Ct. 107, 111-13, 515 N.E.2d 891, 894-95 (1987) (stating the elements of legal malpractice); *DiPiero v. Goodman*, 14 Mass. App. Ct. 929, 929-30, 436 N.E.2d 998, 999 (1982) (holding that plaintiff failed to establish breach of duty, loss, and proximate cause); *Glidden v. Terranova*, 12 Mass. App. Ct. 597, 598-99, 427 N.E.2d 1169, 1170 (1981) (holding existence of attorney client relationship, standard of care, and causation are questions for jury).

⁴⁶ See *DeVaux v. American Home Assurance Co.*, 387 Mass. 814, 817, 444 N.E.2d 355, 357 (1983).

⁴⁷ See *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Iowa 1977). See also *Fanaras Enterprises, Inc. v. Doane*, 423 Mass. 121, 124, 666 N.E.2d 1003, 1005 (1996) (holding that plaintiff has burden of proving attorney client relationship in legal malpractice action); *DaRoza v. Arter*, 416 Mass. 377, 381, 622 N.E.2d 604, 607 (1993) (holding injured employee failed to establish relationship with attorneys for employer's workers compensation carrier).

⁴⁸ *DeVaux*, 387 Mass at 817-18, 444 N.E.2d at 357 (quoting *Kurtenbach*, 260 N.W. 2d at 56). *Accord Fanaras*, 423 Mass. at 124-25, 666 N.E.2d at 1006; *DaRoza*, 416 Mass.

All three must be met to demonstrate the existence of an attorney-client relationship.⁴⁹

Although an attorney's liability for legal malpractice generally extends only to a client, she "is not absolutely immune from liability to non-clients."⁵⁰ Therefore, the third element may be established by demonstrating that an attorney owed a duty to a non-client based on a foreseeable reliance, apparent authority, or third-party beneficiary theory.⁵¹ To establish foreseeable reliance, the plaintiff must prove he reasonably relied on the defendant attorney's advice, that the attorney should have reasonably foreseen such reliance by the plaintiff, and the attorney did nothing to prevent

at 381, 622 N.E.2d at 607; *Robertson v. Gaston Snow*, 404 Mass. 515, 526, 536 N.E.2d 344, 351 n.8 (1989); *Page v. Frasier*, 388 Mass. 55, 62, 445 N.E.2d 148, 152 (1983).

⁴⁹ *DaRoza*, 416 Mass at 381, 622 N.E.2d at 607.

⁵⁰ *Page*, 388 Mass. at 65, 445 N.E.2d at 154. *But see* *One National Bank v. Antonellis*, 80 F.3d 606, 609 (1st Cir. 1996) (concurring but holding that assignee of secured mortgage could not sue mortgagee's attorney for negligent title certification); *Spinner v. Nutt*, 417 Mass. 549, 552, 631 N.E.2d 542, 544 (1994) (quoting *Page* but holding that trustee's attorney owed no duty to trust beneficiaries).

⁵¹ *See* *Craig v. Everett Brooks*, 351 Mass. 497, 501, 222 N.E.2d 752, 756 (1967) (introducing the concept of foreseeable reliance and liability to third parties in tort cases). *See also* *Spinner*, 417 Mass. at 552, 631 N.E.2d at 544 (quoting *Robertson*, 404 Mass at 524, 536 N.E.2d at 350). The *Spinner* court held "[a]n attorney owes a duty to non-clients who the attorney knows will reasonably rely on the services rendered." 417 Mass. at 552, 631 N.E.2d at 544; *Logotheti v. Gordon*, 414 Mass. 308, 311, 607 N.E.2d 1015, 1017 (1993) (holding attorneys owe a duty to intended beneficiaries).

Courts in other jurisdictions have held that in some circumstances at least an attorney owes to the intended beneficiaries of a competent testator a duty to exercise reasonable care and skill in the drafting of will provisions that are enforceable and in making sure that the will is properly executed and witnessed In those cases, there is no conflict between the duty the attorney owes to his client and the duty the attorney owes to intended beneficiaries.

414 Mass. at 311, 607 N.E.2d at 1017 (citing favorably *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685 (1961)); *DeVaux*, 387 Mass. at 819, 444 N.E.2d at 358 (holding whether plaintiff reasonably relied on the apparent authority of attorney's secretary is question for jury); *Kirkland Construction v. James*, 39 Mass. App. Ct. 559, 561, 658 N.E.2d 699, 701 (1995). "Under certain circumstances a lawyer owes a duty to a non-client who he or she knows will rely on the services rendered." 39 Mass. App. Ct. at 561, 658 N.E.2d at 701; *Chatterjee v. Glynn*, No. 931912, 1994 WL 879735, at *3 (Mass. Super. Jan. 28, 1994) (holding intended beneficiary of testator's will the very type of person protected by third party beneficiary status).

such reliance.⁵² A claim of actual reliance by the plaintiff is not sufficient. It must be shown that the attorney knew or should have reasonably foreseen that the non-client would rely on his legal services or advice.⁵³

Where a conflict of duties arises between an actual client and a foreseeable third party, the court will not impose a duty to the non-client.⁵⁴ A potential conflict is enough to preclude finding a duty owed to the non-client.⁵⁵ An attorney never owes a duty to his client's adversary.⁵⁶ To

⁵² See *Robertson*, 404 Mass. at 524, 536 N.E.2d at 349-50; see also *Lamare v. Basbanes*, 418 Mass. 274, 276, 636 N.E.2d 218, 219 (1994) (discussing an attorney's duty to non-clients). "Absent an attorney client relationship, the court will recognize a duty of reasonable care if an attorney knows or has reason to know a non-client is relying on the services rendered." 418 Mass. at 276, 636 N.E.2d at 219 (citing *Spinner* and *Robertson*); *Page*, 388 Mass. at 64, 445 N.E.2d at 153-54. "Recovery under the principles of *Craig* is limited to instances 'where the defendant knew that the plaintiff would rely on his services.'" 388 Mass. at 64, 445 N.E.2d at 153-54.

⁵³ See *DaRoza*, 416 Mass. 377, 384, 622 N.E.2d 604, 608 n.7 (1993) (holding a claim of reliance is insufficient to establish a duty). "Claimed reliance by the non-client is not dispositive. It must be shown that the attorney should reasonably foresee that the non-client will rely upon him for legal services." *Id.* See also *Spinner*, 417 Mass. at 555-56, 631 N.E.2d at 546-47 (holding trust beneficiaries are only incidental, not intended beneficiaries of relationship between defendant attorneys and trustees). The *Spinner* court concluded that, "an incidental benefit does not suffice to impose a duty upon the attorney." 417 Mass. at 555-56, 631 N.E.2d at 546-47 (quoting *Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1268-69, 266 Cal. Rptr. 483 (1990)). See also *Best v. Rome*, 858 F. Supp. 271, 276 (D. Mass. 1994) (deciding that Union's attorney not liable to individual member on third party beneficiary theory); *Sheinkopf v. Stone*, 741 F. Supp. 323, 324 (D. Mass. 1990). The *Sheinkopf* court stated that there was no attorney client relationship where plaintiff claimed he relied on defendant attorney because plaintiff knew he was an attorney and did not seek advice of his own attorney. 741 F. Supp. at 324. There was no communication to the attorney by word or deed of plaintiff's reliance on attorney's advice and, therefore, there was no foreseeable reliance. *Id.*

⁵⁴ See, e.g., *Lamare*, 418 Mass. at 276, 636 N.E.2d at 219 (holding husband's attorney owed no duty to wife and child in divorce and sexual abuse proceedings); *Logotheti*, 414 Mass. at 312, 607 N.E.2d at 1018 (refusing to impose on testator's attorney a conflicting duty to heirs who benefit by intestacy); *Robertson v. Gaston Snow*, 404 Mass. 515, 525, 536 N.E.2d 344, 350 (1989) (holding no attorney client relationship existed between law firm representing corporation and former corporate officer).

⁵⁵ See *Spinner v. Nutt*, 417 Mass. 549, 554, 631 N.E.2d 542, 546 (1994). "Our decisions make it clear that it is the potential for conflict that prevents the imposition of a duty on the defendants." *Id.* (citing *DaRoza*, 416 Mass. at 383-84, 622 N.E.2d at 608); *One National Bank v. Antonellis*, 80 F.3d 606, 609 (1st Cir. 1996). "Massachusetts and federal

find such a duty would create an unacceptable conflict of interest, inimical to the adversarial system.⁵⁷

Furthermore, an attorney's liability extends only to advice given within the scope of his professional competence.⁵⁸ The plaintiff cannot base his claim on prior, subsequent, or even contemporaneous representation, but "must establish that the relationship existed with respect to the act or omission upon which the malpractice claim is based."⁵⁹ An attorney, therefore, may represent a client in numerous matters without creating an attorney-client relationship as to another.⁶⁰ The trier of fact must resolve whether or not an attorney-client relationship existed.⁶¹

B. Exercise of Reasonable Care and Skill

case law has consistently found that a potential conflict between an attorney's duty to his or her client and the alleged duty to the non-client is sufficient to defeat the non-client's malpractice claim." 80 F.3d at 609; *Robertson*, 404 Mass. at 524, 536 N.E.2d at 350; *Page v. Frasier*, 388 Mass 55, 63, 445 N.E.2d 148, 148 (1983).

⁵⁶ *Lamare*, 418 Mass. at 276, 636 N.E.2d at 219.

⁵⁷ *Beecy v. Pucciarelli*, 387 Mass. 589, 597, 441 N.E.2d 1035, 1040-41 (1982) (holding attorney not liable to his client's adversary for professional negligence).

⁵⁸ *Sheinkopf v. Stone*, 741 F. Supp. 323, 324 (D. Mass. 1990) (holding no attorney-client relationship where advice relied upon was outside the scope of attorney's competence). The plaintiff attempted to hold attorney and firm liable for poor financial advice. *Id.*

⁵⁹ *Page*, 388 Mass. at 62, 445 N.E.2d at 152 n.10. *Accord* *Fanaras Enterprises, Inc. v. Doane*, 423 Mass. 121, 125, 666 N.E.2d 1003, 1006 (1996) (holding no attorney client relationship with respect to business loans made by client to attorney). *But see* 423 Mass. at 126-27, 666 N.E.2d at 1007 (Fried, J., dissenting) (arguing jury might find attorney-client relationship where general retainer agreement existed).

⁶⁰ *Robertson v. Gaston Snow*, 404 Mass. 515, 522, 536 N.E.2d 344, 348-49 (1989). "[T]he fact that an attorney agreed to, or did, represent a client in a particular matter does not necessarily create an attorney-client relationship as to other matters or affairs of that client." *Id.* (citing *DeVaux v. American Home Assurance Co.*, 387 Mass. 814, 816, 444 N.E.2d. 355, 357 n.6).

⁶¹ *See DeVaux*, 387 Mass. 814, 818, 444 N.E.2d 355, 357 (1983) (holding trier of fact determines existence of attorney-client relationship). "Where reasonable persons could differ as to the existence of an attorney-client relationship, this issue must be resolved by the trier of fact." *Id.* (quoting *Kurtenbach v. TeKippe*, 260 N.W. 2d 53, 57); *see also Robertson*, 404 Mass at 522, 536 N.E.2d at 348 (following *Page* and *DeVaux*); *Page*, 388 Mass. at 61, 445 N.E.2d at 152 (holding plaintiff did not establish an express or implied attorney client relationship).

An attorney owes his client the general duty to exercise the degree of skill and care of the average qualified practitioner in the performance of his legal duties.⁶² This includes the full disclosure of all facts material to the client's interests so that he may make an informed decision between alternatives.⁶³ Where an attorney holds himself out as a specialist in a specific area of the law, he will be held to the higher standard of specialists in the area.⁶⁴ An attorney who is not a specialist and takes on a case that is beyond his skill and training may be liable for malpractice.⁶⁵ Although Massachusetts has not adopted a specific rule on the issue of locality, the courts have adopted a state jurisdictional standard as opposed to a local standard.⁶⁶ The question of whether Massachusetts will adopt a national standard remains unanswered.⁶⁷

The courts generally require expert testimony in order to establish the standard of care in a particular situation and the defendant attorney's breach of duty.⁶⁸ Expert testimony is not necessary, however, "where the

⁶² See *Fishman v. Brooks*, 396 Mass. 643, 646, 487 N.E.2d 1377, 1379 (1986). "An attorney who violates this duty is liable to his client for any reasonably foreseeable loss caused by his negligence." *Id.*; see also *McLellan v. Fuller*, 226 Mass. 374, 377-78, 115 N.E. 481, 481-82 (1917) (holding that cause of action exists); *Glidden v. Terranova*, 12 Mass. App. Ct. 597, 598, 427 N.E.2d 1169, 1170 (1981) (reversing directed verdict stating whether attorney violated standard of care and caused injury were jury questions).

⁶³ See *Hendrickson v. Sears*, 365 Mass. 83, 90, 310 N.E.2d 131, 135 (1974).

⁶⁴ See David A. Barry, *Legal Malpractice In Massachusetts: Recent Developments*, 78 MASS. L. REV. 74, 77 (1993).

⁶⁵ *Id.* See also *Fishman*, 396 Mass. at 646, 487 N.E.2d at 1379. An attorney who had not tried a case in fourteen years was found negligent for advising his client to settle a personal injury claim for well below what a competent attorney would have advised. 396 Mass. at 646, 487 N.E.2d at 1379. Accord *Colucci v. Rosen*, 25 Mass. App. Ct. 107, 112, 515 N.E.2d 891, 894 (1987). The *Colucci* court stated that lack of experience in a specialized area of law may furnish a basis for malpractice liability when the attorney undertakes a matter beyond his skill level. 25 Mass. App. Ct. at 112, 515 N.E.2d at 894. The court held that the plaintiff needed to provide expert testimony demonstrating that obtaining a temporary restraining order against striking employees was a specialized area of law and that an inexperienced attorney was negligent in taking such a case. *Id.* The court stated that although this was the attorneys first case of this type, he was not negligent *per se*. *Id.*

⁶⁶ See Barry, *supra* note 63, at 77.

⁶⁷ *Id.* at 78.

⁶⁸ See *Glidden v. Terranova*, 12 Mass. App. Ct. 597, 599-99, 427 N.E.2d 1169, 1170 (1981). See also *Pogonis v. Saab*, 396 Mass. 1005, 1005, 486 N.E.2d 28, 28 (1985) (affirming attorney's motion for directed verdict holding plaintiff's case was fatally deficient

claimed legal malpractice is so gross or obvious that laymen can rely on their common knowledge or experience to recognize or infer negligence from the facts.”⁶⁹ Massachusetts courts have held that a violation of an ethical or disciplinary rule does not constitute *per se* negligence, but if the plaintiff can demonstrate that he is a member of the class which the rule seeks to protect, a violation of the rule may be some evidence of the attorney’s negligence.⁷⁰ In addition, “an expert on the duty of care of an attorney properly could base his opinion on an attorney’s failure to conform to a disciplinary rule.”⁷¹ Expert testimony relating to ethical issues is inadmissible.⁷² A jury is capable of deciding ethical issues for itself.⁷³

C. Attorney’s Negligence Proximate Cause of Plaintiff’s Injury

In a legal malpractice action, a plaintiff must demonstrate that he has lost a valuable right or would have obtained a better result in the underlying matter if the attorney exercised reasonable care.⁷⁴ This requires a trial

due to lack of expert testimony); *Harris v. Magri*, 39 Mass. App. Ct. 349, 353, 656 N.E.2d 585, 587 (1995) (reversing decision because plaintiff failed to present expert testimony establishing attorney’s failure to exercise reasonable care and skill); *Collucci*, 25 Mass. App. Ct. at 111-12, 515 N.E.2d at 894-95 (reversing jury verdict holding that plaintiff failed to present expert testimony establishing attorney’s negligence); *Fall River Sav. Bank v. Callahan*, 18 Mass. App. Ct. 76, 82, 463 N.E.2d 555, 560 (1984) (concurring with *Glidden*, but holding that judge sitting without jury may supplement expert testimony with other materials).

⁶⁹ *Glidden*, 12 Mass. App. Ct. at 598, 427 N.E.2d at 1170. *Accord Pogonis*, 396 Mass. at 1005, 486 N.E.2d at 28; *Fall River Sav. Bank*, 18 Mass. App. Ct. at 82, 463 N.E.2d at 560; *Wagenmann*, 829 F.2d at 218-20.

⁷⁰ *Fishman v. Brooks*, 396 Mass. 643, 649, 487 N.E.2d 1377, 1381 (1986). *See also* *Fanaras Enterprises, Inc. v. Doane*, 423 Mass. 121, 125, 666 N.E.2d 1003, 1006 (1996) (holding no ethical violation where plaintiff unable to prove professional relationship as to matter in question); *Sullivan v. Birmingham*, 11 Mass. App. Ct. 359, 369, 416 N.E.2d 528, 534 (1981). “The canons of Ethics and Disciplinary Rules provide standards of professional conduct of attorneys and not grounds for civil liability.” 11 Mass. App. Ct. at 369, 416 N.E.2d at 534.

⁷¹ *Fishman*, 396 Mass. at 650, 487 N.E.2d at 1381.

⁷² *Id.* at 650, 487 N.E.2d at 1382.

⁷³ *Id.* (citing *Perry v. Medeiros*, 369 Mass. 836, 842, 343 N.E.2d 859 (1976)).

⁷⁴ *Fishman*, 396 Mass. at 647, 487 N.E.2d at 1380. *See also* *Poly v. Moylan*, 423 Mass. 141, 145, 667 N.E.2d 250, 254, (1996) (holding plaintiff failed to provide evidence that failure to regain custody of children was result of attorney negligence); *Girardi v. Gabriel*, 38 Mass. App. Ct. 553, 560, 649 N.E.2d 805, 809 (1995). “The mere possibility that the defendant’s negligence caused harm is not sufficient to take issue to the jury.” 38

within a trial.⁷⁵ The trier of fact in a legal malpractice action must hear all that occurred at the original trial without expert testimony.⁷⁶ The trier of fact will determine whether the attorney's negligence caused the plaintiff's injury.⁷⁷

D. Plaintiff Suffered Actual Damages as a Result of Attorney's Negligence

It is not enough that the attorney is proven negligent in his duty to the plaintiff, the negligence must result in some injury to the plaintiff.⁷⁸ The attorney's negligence must have made some difference to the client.⁷⁹ An attorney who violates his duty to his client is liable for any reasonably foreseeable loss caused by his negligence.⁸⁰ Normally, damages are strictly limited to the loss of property or other pecuniary interests. Damages are calculated as the difference between the judgment obtained against the defendant in the underlying action and the amount the plaintiff would have received but for the negligence of the attorney. In *Wagenmann v. Adams*,⁸¹ the United States Court of Appeals for the First Circuit allowed the plaintiff to recover emotional damages where the plaintiff was

Mass. App. Ct. at 560, 649 N.E.2d at 809; *Colucci v. Rosen*, 25 Mass. App. Ct. 107, 113, 515 N.E.2d 891, 895 (1987). "It need not be a perfect claim but it must have a probability of success." 25 Mass. App. Ct. at 113, 515 N.E.2d at 895.

⁷⁵ *Fishman*, 396 Mass. at 647, 487 N.E.2d at 1380.

⁷⁶ *Id.*

⁷⁷ *Id. Accord Girardi*, 38 Mass. App. Ct. at 558, 649 N.E.2d at 808. "Generally the issue of proximate cause is one of fact for the jury." 38 Mass. App. Ct. at 558, 649 N.E.2d at 808.

⁷⁸ *See Fall River Sav. Bank v. Callahan*, 18 Mass. App. Ct. 76, 81, 463 N.E.2d 555, 560 (1984) (holding actual loss is an element of the tort of legal malpractice).

⁷⁹ *Jemigan v. Giard*, 398 Mass. 721, 723, 500 N.E.2d 806, 807 (1986). "Former clients suffer a loss due to an attorney's negligence only if that negligence is shown to have made a difference to the client." *Id. See also Best v. Rome*, 858 F. Supp. 271, 277-78 (1994). The *Best* court found that even if the plaintiff had established an attorney client relationship with the union's attorney, he could not establish that the attorney was negligent or that the alleged negligent behavior affected the outcome of the arbitration proceedings. 858 F. Supp. at 278.

⁸⁰ *Fishman v. Brooks*, 396 Mass. 643, 646, 487 N.E.2d 1377, 1379 (1986). *See also McLellan v. Fuller*, 226 Mass. 374, 377, 115 N.E.2d 752, 481 (1917). "There is no doubt that for any misfeasance or unreasonable neglect of an attorney, whereby his client suffers a loss, an action may be supported and damages recovered to the amount of that loss." 226 Mass. at 377, 115 N.E.2d at 481.

⁸¹ 829 F.2d 196 (1st Cir. 1987).

institutionalized as a result of his attorney's negligence.⁸² In *Wehringer v. Powers and Hall*,⁸³ the District Court for the District of Massachusetts suggested that the Supreme Judicial Court would allow emotional damages in exceptional circumstances, but not necessarily limited to those cases where the attorney's negligence effects plaintiff's personal liberty.⁸⁴ The court stated that the exceptional circumstances must be a reasonably foreseeable consequence of the attorney's negligence.⁸⁵

Beyond the rare cases involving emotional damages, the plaintiff cannot recover more from the attorney in a negligence suit than the plaintiff could ultimately have recovered in the underlying cause of action.⁸⁶ For this reason it is argued that Massachusetts courts should deduct any reasonable legal fees, contingent or otherwise, from the damages awarded to a successful plaintiff in a legal malpractice case.⁸⁷ To do otherwise would give the plaintiff a windfall.⁸⁸ Additionally, it would be adverse to public policy to make legal malpractice suits more lucrative than the underlying action.⁸⁹ Finally, the plaintiff must not only establish the attorney's negligence, but also must show that any judgment against the original defendant would have been collectible.⁹⁰

⁸² See *id.* at 222 (holding emotional damages resulting from client's loss of liberty was reasonably foreseeable injury of attorney's malpractice).

⁸³ 874 F. Supp. 425 (D. Mass. 1995).

⁸⁴ *Id.* at 429.

This court believes that the California rule - permitting recovery for emotional distress damages arising from legal malpractice only in exceptional circumstances - would be followed by the courts of the commonwealth of Massachusetts because it is based on the same considerations of foreseeability and 'proximate cause' that inform Massachusetts law in the area of legal malpractice.

Id.

⁸⁵ *Id.* at 428-29. "Foreseeability is the touchstone of emotional distress analysis." *Id.* (quoting *Pleasant v. Celli*, 18 Cal. App. 4th 841, 22 Cal. Rptr. 2d 663 (1993)). In order to receive emotional damages the plaintiff would have to meet the Massachusetts standard for negligent infliction of emotional distress, namely, she must prove physical manifestations of the underlying stress. *Id.*

⁸⁶ Barry, *supra* note 63, at 80.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Jemigan v. Giard*, 398 Mass. 721, 723, 500 N.E.2d 806, 807 (1986). The Supreme Judicial Court affirmed the trial court judge's instruction to the jury that the plaintiff had to

E. Statute of Limitations Considered

“Massachusetts has established a three year period for ‘actions of contract or tort for malpractice, error or mistake against attorneys’”⁹¹ In Massachusetts, however, a client’s cause of action against an attorney for legal malpractice does not accrue until the attorney’s negligence is discovered or reasonably should have been discovered by the client.⁹² A cause of action accrues when there occurs “a necessary coalescence of discovery and appreciable harm.”⁹³ The Massachusetts courts hold that a client suffers appreciable harm immediately upon incurring additional legal expenses as a result of an attorney’s negligence.⁹⁴

The Massachusetts courts adopted the continuing representation doctrine which recognizes that a client cannot be expected to second-guess his attorney’s performance as long as the attorney-client relationship continues.⁹⁵ Thus, the statute of limitations does not begin to run on a legal malpractice claim until the attorney-client relationship has been terminated with respect to the specific undertaking that is the subject of the suit.⁹⁶ “The doctrine only protects innocent reliance, however; where a client

prove that he could have collected something on any judgment he might have obtained from the defendant in any underlying action. *Id.* See also *Poly v. Moylan*, 423 Mass. 141, 148, 667 N.E.2d 250, 255 (1996) (following *Jernigan*). Plaintiff failed to prove collectibility of damages against an ex-wife in a child custody dispute. 423 Mass. at 148, 667 N.E.2d at 255; *DiPiero v. Goodman*, 14 Mass. App. Ct. 929, 930, 436 N.E.2d 998, 1000 (1982) (holding defendant’s failure to perfect service against plaintiff’s ex-husband insufficient evidence that plaintiff would have recovered the child support ordered by court).

⁹¹ *Hodas v. Sherburne, Powers, and Needham*, 938 F. Supp. 58, 59 (D. Mass. 1996) (interpreting MASS. GEN. LAWS. ch. 260 § 4).

⁹² See *Hendrickson v. Sears*, 365 Mass. 83, 91, 310 N.E.2d 131, 136 (1974) (adopting discovery rule in legal malpractice cases). Accord *Riley v. Presnell*, 409 Mass. 239, 243, 565 N.E.2d 780, 784 (1991); *Franklin v. Albert*, 381 Mass. 611, 618-19, 411 N.E.2d 458, 459 (1980).

⁹³ See *Cantu v. St. Paul Companies*, 401 Mass. 53, 57-58, 514 N.E.2d 666, 668-69 (1987) (holding notice of harm, not knowledge of full extent of harm, is sufficient for cause of action to accrue).

⁹⁴ *Id.* *Barry*, *supra* 63 at 84-85.

⁹⁵ See *Murphy v. Smith*, 411 Mass. 133, 137-38, 579 N.E.2d 165, 167-68 (1991) (adopting continued representation doctrine); *Hodas*, 938 F. Supp. at 59 (denying defendant’s motion to dismiss where plaintiff’s complaint sufficiently pled continuing representation doctrine).

⁹⁶ See *Murphy*, 411 Mass. at 138, 579 N.E.2d at 168.

knows that something is wrong and goes ahead anyway, there can be no tolling."⁹⁷

IV. ANALYSIS OF THE LAW IN FOREIGN JURISDICTIONS

The Supreme Judicial Court's decision in *Williams* generally concurs with the laws of other jurisdictions on the issue of legal malpractice. The court, however, has taken a position contrary to most jurisdictions on the issue of an attorney's liability where an issue of law is unsettled. Most jurisdictions have adopted the error-in-judgment rule first announced in *McCullough v. Sullivan*.⁹⁸ The *McCullough* court held that a lawyer is not an insurer or guarantor of his opinion and he is not answerable for an error of judgment or for every mistake which might occur.⁹⁹ The court in *Hodges v. Carter*¹⁰⁰ elaborated on the general duty of care owed by an attorney to clients where the law is unsettled when it stated:

An attorney who acts in good faith and in honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers.¹⁰¹

⁹⁷ *Cantu*, 401 Mass. at 58, 514 N.E.2d at 669 (citing *Greene v. Greene*, 56 N.Y.2d 86, 93-94, 436 N.E.2d 496, 500, 451 N.Y.S.2d 46, 50 (1982)). See also *Hodas*, 938 F. Supp. at 59-60 (citing *Cantu*).

⁹⁸ 102 N.J.L. 381, 132 A. 102 (1926). Affirming trial court decision holding attorney liable for failure to exercise reasonable care and skill in drafting a chattel mortgage for plaintiff-client, that subsequently proved flawed and was invalid against general creditors of plaintiff's debtor. *Id.*

⁹⁹ *Id.* at 384, 132 A. at 103. The *McCullough* court held that an attorney: [C]ontracts to use the reasonable knowledge and skill in the transaction of business which lawyers of ordinary ability and skill possess and exercise. On the one hand, he is not to be held accountable for the consequences of every act which might be held to be an error by a court. On the other hand, he is not immune from responsibility if he fails to employ in the work he undertakes that reasonable knowledge and skill exercised by lawyers of ordinary ability and skill.

Id.

¹⁰⁰ 239 N.C. 517, 80 S.E.2d 144 (1954). Plaintiffs sought damages against attorney for failing to secure proper service against insurance companies even though attorney filed service with insurance commissioner. *Id.*

¹⁰¹ *Id.* at 520, 80 S.E.2d at 146. Court held that attorneys were not negligent in

This standard has been followed in virtually every jurisdiction.¹⁰²

An attorney will be held liable for any injury caused by his negligence where a competent attorney could reasonably ascertain the state of the law.¹⁰³ An attorney, however, is not liable "solely according to an omniscience of hindsight."¹⁰⁴ The question is whether the advice was so legally deficient when given that a court may find an attorney has failed to carry out his duties with the requisite skill and diligence commonly possessed and exercised by lawyers of ordinary skill in the performance of the tasks which they undertake.¹⁰⁵ The advice of an attorney should be judged on the surrounding circumstances at the time that the advice or opinion was given.

In *Smith v. Lewis*,¹⁰⁶ the court clarified the error-in-judgment rule by requiring the exercise of an informed judgment. The court provided:

"following a custom which had prevailed in this state for two decades or more" and which attorneys throughout the state had generally taken for granted. *Id.*

¹⁰² See *Halvorsen v. Ferguson*, 46 Wash. App. 708, 717, 735 P.2d 675, 681 (1986). Attorney is not liable where he did not "sufficiently emphasize" a legal principle on behalf of his client. *Id.* "This rule has found virtually universal acceptance where the error involves an uncertain, unsettled or debatable proposition of law." *Id.* See also *Mills v. Cooter*, 647 A.2d 1118, 1122 (D.C. 1994). Attorney not liable where he believed legal action was unwarranted and he made his opinion known to client well before Statute of Limitations expired. 647 A.2d at 1122. "An attorney is not liable for an error of judgment regarding an unsettled proposition of law." *Id.*; *Kaufman v. Cahen*, 507 So. 2d 1152, 1153 (Fla. Dist. Ct. App. 1987) (following *Collins*); *Collins v. Wanner*, 382 P.2d 105, 109 (Okla. 1963). The court stated "the rule has been followed in many jurisdictions that an attorney is not liable for reaching a conclusion as to a controversial point of law which by subsequent authoritative decision is proved to be erroneous." 382 P.2d at 109.

¹⁰³ See *George v. Caton*, 93 N.M. 370, 377, 600 P.2d 822, 829 (1979) (reversing summary judgment, court of appeals found attorney-client relationship based on attorney's statement, "I will handle it"). *Id.* "If the law on the subject is well and clearly defined and has existed and been published long enough to justify the belief that it was known to the profession, a lawyer who disregards the rule or is ignorant of it renders him liable for losses caused by such negligence or want of skill." *Id.*

¹⁰⁴ See *Meagher v. Kavli*, 256 Minn. 54, 57, 97 N.W.2d 370, 373 (1959) (affirming decision upholding judgment for attorneys seeking balance of fee due).

¹⁰⁵ *Lucas v. Hamm*, 56 Cal. 2d 583, 591, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961). The court found defendant attorney not liable for allegedly drafting a will whose trust provisions violated the rule of perpetuities because they agreed that most attorneys of ordinary skill have found the law confusing and fraught with traps for the unwary. *Id.*

¹⁰⁶ 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (holding attorney liable

[A]n attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess the knowledge of those elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.¹⁰⁷

For an attorney to avoid liability where the law is unsettled at the time his advice is given he must demonstrate that he conducted reasonable research into the state of the law at that time.¹⁰⁸ The two prong test is whether: 1) the state of the law was unsettled at the time the professional advice was rendered; and 2) whether the advice was based upon the execution of an informed judgment. The first question is answered by asking if the issue has been settled by the court of last resort in the state and, if not, if there is reasonable doubt entertained by well-informed lawyers as to the current state of the law.¹⁰⁹ If the law is unsettled, one must "examine the indicia of the law which were readily available to the defendant at the time he performed the legal services in question."¹¹⁰ The factors to be considered in determining if the attorney based his advice on an informed judgment include: What steps did he take to ascertain the state of the law at the time he rendered an opinion?;¹¹¹ Did he rely on a single, outdated precedent?;¹¹² Did he check the advance sheets?;¹¹³ Did he investigate what other lawyers in his locality were doing in the area of law?;¹¹⁴ If the attorney has conducted reasonable research into all the available and relevant sources and in good faith and honest belief acted in what he believes is the best interest of his client, than he cannot be held liable for "failing to

for failing to assert plaintiff's community interest in her husband's retirement benefits).

¹⁰⁷ *Id.* at 358, 530 P.2d at 595, 118 Cal. Rptr. at 627.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 356, 530 P.2d at 593, 118 Cal. Rptr. 625.

¹¹¹ *Smith v. Lewis*, 13 Cal. 3d 349, 356-61, 530 P.2d 589, 593-96, 118 Cal. Rptr. 621, 626-629 (1975).

¹¹² *See Aloy v. Mash*, 38 Cal. 3d 413, 419, 696 P.2d 656, 659-60, 212 Cal. Rptr. 162, 165 (1985) (holding attorney relying on single 1941 case had not conducted sufficient research to show informed judgment).

¹¹³ *See Procanik v. Cillo*, 206 N.J. Super. 270, 286, 502 A.2d 94, 102 (N.J. Super. Ct. Law Div. 1985). "Attorneys are absolutely responsible for case law decisions as well as all temporary supplemental official texts of the case law such as an advance sheet." *Id.*

¹¹⁴ *Smith*, 13 Cal. 3d at 356-61, 530 P.2d at 593-96, 118 Cal. Rptr. 621, 626-29.

anticipate the manner in which the uncertainty will be resolved. . . ."¹¹⁵ After conducting his research, the attorney may choose not to contest a highly debatable point for strategic reasons, but "there is nothing strategic or tactical about ignorance. . . ."¹¹⁶

In *Williams*, the Supreme Judicial Court affirmed the superior court's holding that the attorneys at Gaston Snow provided a reasonable view of the law at the time the opinion was given.¹¹⁷ The attorneys, however, were held liable for having failed to alert their clients that the law had not been conclusively resolved and of all possible outcomes that could arise.¹¹⁸ Therefore, the court concluded the attorneys denied their clients the ability to make an informed decision in relation to their alternatives.¹¹⁹ The possible outcomes neglected by the attorneys consisted of a long and tenuous list of contingent legal possibilities.¹²⁰ Namely, the attorneys did not warn their clients that: the IRS *might* not acquiesce in the Eighth Circuit's 1973 *Keinath* decision, and that they *might* fight the decision in another circuit; such a fight *might* lead to a conflict in the circuits; the United States Supreme Court *might* grant certiorari; and the law *might* be settled against the clients position.¹²¹

In *Davis v. Damrell*,¹²² the California Court of Appeals for the First District dealt with a similar fact pattern.¹²³ In this case, a wife sued her husband, a career military officer, for divorce.¹²⁴ In 1970, she asked her attorney, Damrell, if a community interest attached to her husband's federal military retirement pay.¹²⁵ He advised her that Federal military pension did not constitute divisible community property.¹²⁶ In 1973, the ex-husband retired and began to collect retirement benefits.¹²⁷ In 1974, the

¹¹⁵ *Id.* at 358-59, 530 P.2d at 595, 118 Cal. Rptr. at 627 (citing and following *Sprague v. Morgan*, 185 Cal. App. 2d 519, 523, 8 Cal. Rptr. 347, 350, (Cal. Dist. Ct. App. 1960)).

¹¹⁶ *Id.* at 359, 530 P.2d at 595, 118 Cal. Rptr. at 627 (citing *Pineda v. Craven*, 424 F.2d 369, 372 (9th Cir. 1970)).

¹¹⁷ *Williams v. Ely*, 423 Mass. 463, 476, 668 N.E.2d 799, 806 (1996).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 471, 668 N.E.2d at 803.

¹²¹ *Id.*

¹²² 119 Cal. App. 3d 883, 174 Cal. Rptr. 257 (1981).

¹²³ *Id.*

¹²⁴ *Id.* at 885, 174 Cal. Rptr. at 258.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Davis v. Damrell*, 119 Cal. App. 3d 883, 885, 174 Cal. Rptr. 257, 258 (1981).

California Supreme Court held that vested retirement benefits, including federal military pensions, constituted community property subject to division in divorce.¹²⁸ Following the *Smith* court's holding that an attorney must exercise an informed judgment in order to avoid a charge of professional negligence, the plaintiff in *Damrell* brought suit against attorney Damrell claiming "that [Damrell's] failure to advise her of the unsettled state of the relevant law deprived her of the opportunity to actively litigate and pursue such unsettled points of law and this amounted to professional negligence."¹²⁹

The *Damrell* court applied the two prong test of *Smith* to determine if the defendant had failed in his duty to his client.¹³⁰ The court determined that the law in 1970, when the opinion was rendered, was unsettled.¹³¹ Furthermore, the court concluded that an attorney's failure to anticipate the future resolution of an unsettled point of law, especially where there is a "180 degree shift in the law," cannot serve as the basis for legal malpractice where the attorney's advice was ultimately held erroneous but was based on an informed judgment.¹³² The court reasoned:

While in hindsight that professional advice ultimately proved erroneous, nonetheless it represented a reasoned exercise of an informed judgment grounded upon a professional evaluation of applicable legal principles. Under such uncontroverted circumstances, respondent's [Damrell's] error in judgment on a question of law is immune from a claim of professional negligence.¹³³

The court strongly denounced the appellant-client's contention that Mr. Damrell was under a duty to advise her of the unsettled state of the law

¹²⁸ *Id.* at 885-86, 174 Cal. Rptr. at 258.

¹²⁹ *Id.* at 886, 174 Cal. Rptr. at 258-59.

¹³⁰ *Id.* at 887, 174 Cal. Rptr. at 259.

¹³¹ *Id.* at 888, 174 Cal. Rptr. at 260.

¹³² *Davis v. Damrell*, 119 Cal. App. 3d 883, 888, 174 Cal. Rptr. 257, 260 (1981).

¹³³ *Id.* at 888-89, 174 Cal. Rptr. at 260. *See also* *Cianbro Corp. v. Jeffcoat and Martin*, 804 F. Supp. 784, 789 (D.S.C. 1992). "As a general proposition, '[a] legal malpractice action is unlikely to succeed when the attorney erred because an issue of law was unsettled or debatable. The perfect vision and wisdom of hindsight is an unreliable test for determining the past existence of legal malpractice'". *Cianbro Corp.*; 804 F. Supp. at 789. *Mills v. Cooter*, 647 A.2d 1118, 1122 (D.C. 1994) ("An informed judgment, even if subsequently proven to be erroneous, is not negligence").

at the time the advice was rendered.¹³⁴ The court stated that although an attorney owes a duty to provide sound advice to a client:

[S]uch obligation does not include a duty to advise on all possible alternatives no matter how remote or tenuous. To impose such an extraordinary duty would effectively undermine the attorney-client relationship and vitiating the salutary purpose of the error-in-judgment rule. As a matter of policy, an attorney should not be required to compromise or attenuate an otherwise sound exercise of informed judgment with added advice concerning the unsettled nature of relevant legal principles....To require the attorney to further advise a client of the uncertainty in the law would render the exercise of such professional judgment meaningless. . . . In short, the exercise of sound professional judgment rests upon consideration of legal perception and not prescience.¹³⁵

This reasoning directly conflicts with the holding in *Williams* that expands the duty to disclose material facts to include the duty to warn of all potential risks.¹³⁶

In *Procanick v. Cillo*,¹³⁷ the Superior Court of New Jersey ruled in favor of plaintiffs who brought suit against medical malpractice attorneys to whom plaintiffs' case was referred by their attorney.¹³⁸ The malpractice attorneys issued an opinion advising the plaintiffs that the settled law in the area of wrongful birth cases was not in their favor.¹³⁹ The malpractice attorneys, however, were found negligent where they withheld their personal opinion that the settled law was "ripe for reconsideration" and failed to inform plaintiffs that the Supreme Court of New Jersey reversed its position shortly after issuing their opinion.¹⁴⁰ The superior court held that the attorneys had a duty to give the clients all the relevant information in complete form.¹⁴¹ The court stated:

[T]his duty is not one to guaranty a change in the law, but rather to be aware that a realistic probability exists that the settled law is likely to be reconsidered. . . . It should be clear that this duty is not to be confused

¹³⁴ *Davis v. Damrell*, 119 Cal. App. 3d 883, 889, 174 Cal. Rptr. 257, 260 (1981).

¹³⁵ *Id.* at 889, 174 Cal. Rptr. at 261.

¹³⁶ 423 Mass. at 477, 668 N.E.2d at 806.

¹³⁷ 206 N.J. Super. 270, 502 A.2d 94 (N.J.L. 1985), *rev'd*, and *remanded* 226 N.J. Super. 132, 543 A.2d 985 (N.J. Super. Ct. App. Div. 1988).

¹³⁸ *Id.*

¹³⁹ *Id.* at 276 n.2, 502 A.2d at 97 n.2.

¹⁴⁰ *Id.* at 285, 502 A.2d at 102.

¹⁴¹ *Id.* at 287, 502 A.2d at 102.

with hindsight or prescience. This duty does not require clairvoyance or the ability to predict as a prophet that the change in the law, in fact, will occur.¹⁴²

Procanick is distinguishable from *Williams* in that the law in question in *Procanick* was ripe for reconsideration.¹⁴³ The change in the law had been heralded in law journals, case law, and advance sheets almost contemporaneous with the issuing of the opinion by the defendant attorneys.¹⁴⁴ By contrast, *Williams* involved advice given in 1975 and 1976 which was considered a reasonable interpretation of the law up until it was overturned by the Supreme Court of the United States in 1982.¹⁴⁵

In 1988, however, the Superior Court of New Jersey, Appellate Division, reversed and remanded the *Procanick* decision.¹⁴⁶ The court found that an attorney-client relationship did not exist, rather there was an affirmative refusal of the professional undertaking.¹⁴⁷ More importantly, the court held that even if there had been an attorney-client relationship, "it is not a professional dereliction for [an attorney] to withhold his gratuitous prediction of the prospect of success of an appeal which would be taken to obtain a change in the law."¹⁴⁸ If the law is settled, an attorney is expected to know it, but "if the law is unsettled, debatable or doubtful, he is not required to be correct, . . . but only to exercise an informed judgment based on a reasoned professional evaluation."¹⁴⁹ Where an attorney is not required to anticipate the view that the court may ultimately express with respect to unsettled law, neither can he be expected to anticipate changes in the settled law.¹⁵⁰ If a lawyer believes that a settled point of law might change, he can satisfy his duty by pointing this out and explaining the various developments in the law. An attorney, however, should not be required to accompany such a legal opinion with a prediction of the likeli-

¹⁴² *Procanick v. Cillo*, 206 N.J. Super. 270, 287, 502 A.2d 94, 103 (N.J.L. 1985), *rev'd*, and *remanded* 226 N.J. Super. 132, 543 A.2d 985 (N.J. Super. Ct. App. Div. 1988).

¹⁴³ *Id.* at 285, 502 A.2d at 101-02.

¹⁴⁴ *Id.* at 286, 502 A.2d at 102.

¹⁴⁵ *Williams v. Ely*, 423 Mass. 467, 476, 668 N.E.2d 799, 807 (1996).

¹⁴⁶ *Procanick v. Cillo*, 226 N.J. Super. 132, 543 A.2d 985 (N.J. Super. Ct. App. Div. 1988).

¹⁴⁷ *Id.* at 146, 543 A.2d at 992.

¹⁴⁸ *Id.* at 149, 543 A.2d at 994.

¹⁴⁹ *Id.* at 150, 543 A.2d at 994 (citing *Davis v. Damrell*, 119 Cal. App. 3d 883, 174 Cal. Rptr. 257, 259 (1981)).

¹⁵⁰ *Procanick v. Cillo*, 226 N.J. Super. 132, 150, 543 A.2d 985, 994 (1988).

hood that he can bring about that change in the law.¹⁵¹ The appellate court further stated that due to the fluid and flexible nature of the law, "that which seems indisputably correct today may be deemed clearly erroneous tomorrow. Conversely, that which now appears erroneous may in the future be revealed as correct."¹⁵² Since the *Williams*' court held that the advice given by Gaston Snow was reasonable at the time, one must conclude that the attorneys are being penalized for following an erroneous view which the ordinary lawyer would perceive as correct.¹⁵³

In *Cianbro v. Jeffcoat and Martin*,¹⁵⁴ the court found a duty existed to advise clients in some circumstances of uncertainty in the law.

Undoubtedly, if an attorney has a reason to believe, or should have reason to believe that there could be some adverse consequences from taking a particular course of action, the attorney is obligated to advise the client of the possible courses of action or, failing that, to act in the most conservative fashion so as to protect the client's interests.¹⁵⁵

This was not the case in *Williams*. Although the law in the area in question had not been conclusively resolved, the attorney gave reasonable advice based on an informed judgment at the time it was given. There were no indications in 1975 or 1976 that any of the possible legal risks that occurred were on the horizon. In fact, Gaston Snow was in the situation described by the *Cianbro* court which carves out an exception to this duty to warn of the unsettled nature of the law:

[I]f there is no reasonable ground for the attorney to believe that his advice is questionable, he certainly has no obligation to advise clients of every remote possibility that might exist or to act prematurely when there is no apparent reason to do so.¹⁵⁶

Finally, it appears that the *Williams*' court is saying that an attorney owes a duty to a client to inform him of changes in the law relating to past opinions. Arguably the attorney-client relationship between the Gaston Snow firm and the plaintiffs ended in 1976 when the advice was given and the firm filed the proper documents in the appropriate registries. The purpose of the relationship had been accomplished. Not until 1982 was the law settled adversely to the plaintiffs position. Thus, some troubling ques-

¹⁵¹ *Id.* at 150-51, 543 A.2d at 995.

¹⁵² *Id.* at 151, 543 A.2d at 995.

¹⁵³ *Id.*

¹⁵⁴ 804 F. Supp. 784 (D.S.C. 1992).

¹⁵⁵ *Id.* at 793.

¹⁵⁶ *Id.*

tions arise as a result of the *Williams* decision. How did the court find a duty on the part of the attorneys to notify the plaintiffs of this change in the law post termination? How did the court find liability for advice that represented a reasonable and valid view of the law for the six year period between its issuance and the ultimate settlement of the issue by the Supreme Court in 1982?

V. CONCLUSION

In *Williams v. Ely*, the court concluded that the advice the attorneys provided their clients was a reasonable view of the law at the time. If their opinion was reasonable, the court must concede that the attorneys had conducted reasonable research and that their opinion was based on an informed judgment. To hold attorneys liable for an unforeseen shift in the law negates the error-in-judgment rule. Gaston Snow provided the plaintiffs with a reasonable opinion of the law at the time and filed the appropriate documents by January 1976. It is difficult to accept that they are liable to clients whose relationship with the firm ended in 1976, for an opinion given in 1975, which was based on case law from 1973, particularly because the court admits the advice constituted a reasonable view of the law at the time and the law remained unsettled until 1982. Based solely on the language of *Hendrickson v. Sears*¹⁵⁷, which stated that an attorney has a duty to disclose all material facts to a client in order that he can make an informed decision, the Supreme Judicial Court has found a duty to warn clients of all potential risks involved where the law is unsettled.

In *Williams v. Ely* the Supreme Judicial Court has made a statement that is broad and ambiguous. Traditionally, attorneys were not liable for a mere error in judgment where the attorney based his opinion on an informed judgment. The decision in *Williams* now requires an attorney to warn a client of the unsettled nature of the law. The question remains open as to whether this requires a warning in every situation regardless of how slight or remotely possible a shift in the law may be. All law is unsettled if we extend the court's logic far enough. This ruling is contrary to the law in other jurisdictions as stated by *Davis v. Damrell*, *Procanick v. Cillo*, and *Cianbro v. Jeffcoat and Martin*, which hold that an attorney has no duty to warn a client of every remote potential change in the law. A duty to warn exists where there is reason to doubt the soundness of the opinion. The court's decision in this case presumes that there was a reason to doubt the soundness of Gaston Snow's opinion. To reach such a conclusion, however, requires the firm to partake in an exercise in probabilities. How probable is it that the Internal Revenue Service will fight this

¹⁵⁷ 365 Mass 83, 90, 310 N.E.2d 131, 136 (1974).

decision in another circuit? How probable is it that the Circuit Court of Appeals elsewhere will decide differently than *Keinath*? How likely is it that this issue will reach and be resolved by the United States Supreme Court? The holding in *Williams* requires attorneys to make predictions about the course of action of various parties and the ultimate resolution of an issue.

Finally, the decision in *Williams* puts Massachusetts attorneys in an untenable position. Advising a client that the law is unsettled will certainly lead the client to ask his attorney what they should do, and the attorney will then render an opinion. If he advises his client to follow either course, and that course proves wrong, the attorney may be liable. For these reasons, law firms and attorneys now issue opinions with disclaimers of liability attached. Disclaimers are a perfectly legitimate method for attorneys to protect themselves from liability. Finding a duty to warn a client of all possible risks where the law is unsettled will lead to an increase in the practice of disclaiming liability for opinions. Out of fear of being held liable for negligence based on hindsight in future unforeseen lawsuits, attorneys are now afraid to stand by their own professional judgment. What good is an opinion that is accompanied by a clause that essentially states that the attorney who rendered the opinion is unwilling to stand by his work? This will not benefit a profession that is already beleaguered by negative stereotypes.

In the future, the Supreme Judicial Court should consider the following in dealing with cases of legal malpractice where the law is unsettled. First, the court should apply the *Smith* two prong test to determine if the law is unsettled at the time the advice was given, and, if so, whether the attorney exercised reasonable skill and diligence in seeking to ascertain the state of the law at the time the opinion was given. The focal question should be whether the advice given is so legally deficient so as to violate the standard of care. Second, the court should determine if there are any reasonable grounds for an attorney, in the defendant's position, to believe that the advice given was questionable or subject to adverse consequences. If so, the court then needs to ask whether this amounts to a duty to warn the client of the adverse consequences of a particular alternative? By analyzing the facts using this framework the court will be able to protect clients who are the victims of unsound advice where the law is unsettled. Meanwhile, attorneys who exercise due care and employ reasonable research techniques in order to render sound opinions will stand by their opinions without the fear of liability for any remotely possible or unforeseen shifts in the law for which they did not warn their client.

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