

**HOFSTRA UNIVERSITY-SCHOOL OF LAW**  
**LAWYER MALPRACTICE (CRN 25104) SPRING 2012**  
**COURSE OUTLINE & READING ASSIGNMENTS**

(Updated Jan. 2012)

**Prof. Bennett Wasserman**

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Class Meets on Thursdays, starting January 12, 2012 between from 12:10 to 2:00 pm in KOPPL Room 0202

**All Required Reading Materials are hyperlinked below in this Course Outline & Reading Assignment List. Those that are not linked can be accessed on the internet or through Google Scholar. You may also use your own student Westlaw or Lexis accounts to access required materials. Materials that you cannot readily access will be placed in a Dropbox folder by Prof. Wasserman which will allow each student complete access to them.**

Additional Reading Materials:

Fortney & Johnson, Legal Malpractice Law: Problems and Prevention (Thomson/West, 2008) (Hereafter referred to as "FJ").

Restatement of the Law Governing Lawyers (ALI, 2000) (Hereafter "RLGL")

[Rules of Professional Conduct NY](#) (NY RPC)

[Rules of Professional Conduct NJ](#) (NJ RPC)

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**Class #1- INTRODUCTION TO THE LAW OF LAWYER MALPRACTICE**

**Required Readings:**

[Savings Bank v. Ward 100 U.S. 195 \(1880\)](#)

[Baxt v. Liloia, 155 N.J. 190 \(1998\)](#)

Additional Readings:

FJ: Chap. 1 (pp. 1-13); Chap 2 (pp.30-32)

**Topics for Class Discussion:**

Sources of Lawyer Liability Common Law

Rules of Professional Conduct: The Overlapping Worlds of Legal Ethics and Legal Malpractice

Rules of Professional Conduct as Proof of the Standard of Care

The Malpractice Cause of Action: The Basic Elements

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**Class #2- THE INDICIA OF THE LAWYER-CLIENT RELATIONSHIP**

**Required Readings:**

[In re Palmieri, 76 N.J. 51 \(1978\)](#)

[Procanik v. Cillo, 226 N.J. Super. 132 \(App. Div. 1988\)](#) cert. denied 113 N.J. 357 (1988)

[Togstad v. Vesely, Otto, Miller et al 291 N.W.2d 686 \(1980\).](#)

[Jordan v. Lipsig Sullivan et al 689 F. Supp. 192 \(SDNY 1988\)](#)

[Gilles v. Wiley, Malehorn & Sirota, 345 N.J. Super 119 \(App Div. 2001\)](#)

[Kriegsman v. Kriegsman, 150 N.J. Super \(App Div 1977\)](#)

[Estate of Albanese v. Lolio 393 N.J. Super 355 \(App Div 2007\)](#)

[Herbert v. Haytaian, 292 N.J. Super 426 \(App. Div. 1996\)](#)

[Lerner v. Laufer, 359 N.J. Super. 201 \(App. Div.\) cert. denied 177 N.J.223 \(2003\)](#)

[NY Letters of Engagement Rules](#)

**NJ RPC 1.5 (b):**

**When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.**

Additional Readings:

FJ: Ch. 3 (pp.35-50)

**Topics For Class Discussion:**

Forming the Relationship: What you need and what you don't need; The Scope of the Relationship (Limiting the lawyer's duty to the client); Ending the Relationship; The Enduring Relationship

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**Class #3- The Client's "Hybrid" Cause of Action against the Lawyer**

**Required Readings:**

**RLGL § 48, 49**

[Fiorentino v. Rapaport, 693 A. 2d 208 \(Pa. Super. 1997\)](#)

[Hutchinson v. Smith, 417 So. 2d 926 \(Miss. 1982\)](#)

[Hall v. Nichols, 400 S.E.2d 901 \(W.Va. 1990\)](#)

[Estate of Re v. Kornstein, Veisz & Wexlert, 958 F. Supp.907 \(SDNY 1997\)](#)

Additional Readings:

FJ: Ch. 2 (pp. 15-33)

**Topics for Class Discussion:**

Breach of Contract

Negligence,

Breach of Fiduciary Duty

Intentional Torts (fraud, conversion)

[Affidavit of Merit NJ: 2A:53A--§§26,27,29.](#)

Statutes of Limitations

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**Class #4- The Lawyer's Basic Duties to the Client and the Standard of Care**

**Required Readings:**

**RLGL §§ 15 (Prospective Clients), 16 (A Lawyers Duties to a Client--In General), 48 (Professional Negligence), 50 (Duty of Care to a Client), 51 (Duty of Care to Certain Non-Clients) , 52 (Standard of Care).  
RLGL § 20 (Duty to Inform and Consult with Client);**

**RPC 1.1 (Competence); 1.3 (Diligence); 1.4 (Duty to Communicate)**

**RPC 1.2 The Scope of the Relationship**

[Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 \(1954\).](#) (standard of care)

[Matter of Yetman, 113 N.J.556 \(1989\)](#) (competence)

[Brizak v. Needle, 239 N.J. Super. 415, 571 A.2d 975 \(App Div.1990\).](#) (duty to investigate)

[Ingemi v. Pelino & Lentz, 866 F. Supp. 156 \(DNJ, 1994\)](#) (role of local counsel)

Dixon-Ticonderoga Co. v. Estate of O'Connor 248 F.3d 151 (2001)

Additional Reading

FJ: Ch 3 (pp. 51-78)

**Topics For Class Discussion:**

The Duty of Competence The Duty of Diligence The Duty to Investigate The Duty to Communicate The Standard of Care  
For most of us; For specialists; For local counsel

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**Class#5- The Lawyer's Basic Duties to the Client--continued**

**Readings:**

2) RLGL § 49

3) TWEN:

a. Profit Sharing Trust v. Lampf Lipkind, 267 N.J. Super 174 (L.Div 1993).

b. NJ ACPE Op.684

c. Maritrans v. Pepper, Hamilton & Scheetz, 529 Pa. 241,602 A.2d 1277 (1992);

d. Matter of Silverman, 113 N.J. 193 (1988)

Additional Reading:

FJ: Ch. 4 (pp. 101-116) Ch. 11 (pp.421-424).

**Topics for Class Discussion:**

The Fiduciary Duty

Defining the Essence of the Fiduciary Duty-putting the interests of the client ahead of those of the lawyer. Conflicts of Interest Self-Dealing and Disloyalty

Abusing the position of trust (e.g., excessive billing) Misuse of Confidential Information

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**Class#6- The “Quasi” Client’s Causes of Action for Lawyer Malpractice.**
**Readings:**

- 2) RLGL §§15, 51
- 3) TWEN:
  - a. Martyn, The Accidental Client, 33 Hofstra L. Rev. 913 (2005)
  - b. The Balancing of Factors Test
  - i. Biakanja v. Irving, 49 Cal. 2d 647,320 P.2d 16 (1958) ii. Lucas v. Hamm, 56 Cal.2d 583, 364 P. 2d 685 (1962) iii. Heyer v. Flaig, 70 Cal.2d 223, 449 P.2d 161 (1969).
  - c. Third Party Beneficiary Status
  - d. The New York Rule: Prudential Ins. Co v. Dewey Ballantine, 80 N.Y.2d 377 (1992).
  - e. Aiding and Abetting Breach of Fiduciary Duty
  - i. Wasserman, “Where Were the Lawyers?” N.J. Law J. 1/23/07
  - f. Petrillo v. Bachenberg,139 N.J.472 (1995)

- Davin, LLC v. Daham 329 N.J. Super 54 (2000)
- g. Exceptions to privity: fraud, collusion
- h. Dodging the privity defense:
- i. Hedlund Mfg. Co. v. Weiser, Staper & Spivak, 517 Pa. 522 (1988) ii. Oppel v. Empire Mutual Ins. Co., 517 F. Supp. 1305 (SDNY 1981) iii. Alcmn Serv.Corp. v. bullock, 925 F. Supp. 252 (DNJ, 1996)

## Additional Reading:

FJ: Ch. 5 (133-179); Ch. 4 (pp.117-128)

**Topics for Class Discussion:**

- Privy and What’s Left of it
- The New York perspective
- Other States, a sampling
- The “prospective” client
- The “implied” client
- Duties to the adverse parties and their attorneys
- Negligence
- Negligent Misrepresentation
- Fraud
- Overcoming Privity’s obstacles:
- Assigning the Legal Malpractice Cause of Action Conspiracy; Aiding and Abetting Breach of Fiduciary Duty

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**Class#7- Continuation of Class #6**


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**Class#8- The Legal Malpractice Expert Witness: Why is this Witness Different from All Others?**
**Readings:**

- 2) TWEN:
  - a. Brewer, “Expert Witness Testimony in Legal Malpractice Cases”, 45 S.C. L. Rev. 727 (1994).
  - f. Carbis Sales v. Eisenberg, 397 N.J. Super 64 (App. Div. 2007)
  - g. Carbis Sales v. Eisenberg Expert report
  - h. Carbis Sales v. Eisenberg Expert trial testimony
  - i. Celucci v. Bronstein, 277 N.J. Super 506 (App. Div. 1994)
  - j. The Expert’s Report NY CPLR §3101(d); FRCP R. 26.
  - k. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)

I. Daubert v. Merrill Dow, et al. 509 U.S. 579 (1997)

Additional Reading:

FJ: Chap 3 (pp. 59-70)

**Topics for Class Discussion:**

The Expert's Qualifications  
 The Expert's Opinion and his Report  
 Daubert, Kumho Tire, etc.  
 New Jersey's "Net Opinion" Rule

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**Class#9- Proximate Cause in Underlying Litigation Cases**

**Readings:**

- 2) RLGL: § 53
- 3) TWEN:
  - a. Hoppe v. Ranzini, 158 N.J. Super. 158 (App. Div. 1978)
  - b. Conklin v. Hannoeh Weisman, 145 N.J. 395 (1996)
  - c. Albee Associates v. Orloff Lowenbach, et al. 317 N.J. Super 211 (App.Div.1999)
  - d. Lieberman v. Employers of Wausau, 84 N.J. 325 ((1980)
  - e. Vahila v. Hall 674 N.E.2d 1164 (Ohio 1997)
  - f. Kelly v. Berlin
  - g. Garcia v. Kozlov, 179 N.J. 343 (2004)
  - h. Bailey v. Tucker, 533 Pa. 237 (1993)

Additional Readings:

FJ: Chap 3 C (pp. 79-99);

**Topics for Class Discussion:**

Underlying Civil Cases  
 Case Within a Case  
 The "Old Fashion" Way The Streamlined Way  
 Underlying Criminal Cases: Constitutional Right to Effective Assistance of Counsel

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**Class#10-- Proximate Cause in Underlying Transactions**

**Readings:**

- a. 2175 Lemoine Ave. v. Finco, 272 N.J. Super. 478 (App. Div. 1994)
- b. Levine v. Lacher & Lovell-Taylor, 681 N.Y.S. 2d 503 (1st Dept. 1998).

**Topics For Class Discussion:**

Commercial Ventures; Real Estate

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**Class#11- Damages and other Remedies for Malpractice**

**Readings:**

- 2) TWEN:
  - a. Saffer v. Willoughby, 143 N.J.256 (1996)
  - b. Merenda v. Superior Court, 3 Cal App 4th 1 (1992)
  - c. Gautam v. De Luca, 215 N.J. Super. 388 (App Div., 1987)

- d. Kohn v. Schiappa, 281 N.J. Super 235 ( L. Div.,1995)
- e. Campagnola v. Mulholland, Minion & Rice 76 N.Y. 2d 38 (1990)
- f. Strauss v. Fost, 213 N.J. Super 239 (App Div
- g. Perl v. St. Paul Fire and Marine Ins. Co., 345 N.W.2d 209 (Minn 1984)
- h. Wagenmann v. Adams, 829 f. 2d 196 (1st Cir., 1987) i. Snyder v. Baumecker, 708 F. Supp. 1451 (DNJ, 1989).

Additional Reading

FJ: Chap. 6 (pp.181-203)

**Topics for Class Discussion:**

“Actual Damages”  
 Compensatory Damages  
 Consequential Damages  
 Punitive Damages  
 Emotional Distress  
 Loss of Liberty  
 Attorney’s Fees and Expenses to Correct the Malpractice  
 Fee Disgorgement

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**Class#12- Vicarious Liability and Affirmative Defenses**

**Readings:**

2) TWEN:

Additional Reading

FJ: Chaps. 8 (pp.255-287) then Ch. 7 (pp.205-252)

**Topics For Class Discussion:**

Vicarious Liability: The “art” of blaming others for your malpractice  
 Affirmative Defenses:  
 Statute of Limitations  
 Sharing the Risk: Indemnity and contribution  
 Judgmental Immunity  
 Prematurity  
 Settlement of the Underlying matter  
 Mitigation  
 “The client made me do it”

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**Class#13- Recurrent Traps and New Frontiers in Legal Malpractice**

**Readings:**

- 1) FJ: Chap. 9 (pp.289-349)
- 2) TWEN:
  - a. Wasserman, “Holding Lawyers Accountable for Bad Settlements”
  - b. Puder v. Buechel, 183 N.J. 428 (2005)
  - c. Muhammad v. Straussburger, 526 Pa. 541 (1991)
  - d. In re New York Diet Drug Litigation, 839 NYS2d 434 (Mar.27, 2007)
  - e. Legislative Efforts to Limit the Rights of Victims of Lawyer Malpractice.
  - i. Wasserman, The Professional Services Business Enhancement Act: Myths and Realities (Jan. 2009).

**Topics for Class Discussion:**

Bad Settlements  
Aggregate Settlements  
Insurance Defense- The "triadic" relationship  
The Tension between the Court and the Legislature controlling the practice of law.

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**Class#14- Preventing Malpractice and Protecting Yourself and Your Clients from it.**

**Readings:**

- 1) FJ: Chaps. 10 (pp. 369-401) and 11 (pp.403-420)
- 2) TWEN:
  - a. Russo, The Consequences of Arbitrating a Legal Malpractice Claim, 35 Hofstra L. Rev. 327 (2006)

**Topics For Class Discussion:**

Principles of Risk Management; Professional Liability Insurance Alternate Dispute Resolution (Arbitration and Mediation)